Appeal No. UKEAT/0116/17/LA
UKEAT/0137/17/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11-14 December 2017
Judgment handed down on 29 January 2018

Before

SIR ALAN WILKIE

(SITTING ALONE)

UKEAT/0116/17/LA

MS R SARGEANT AND OTHERS — APPELLANTS

LONDON FIRE AND EMERGENCY PLANNING AUTHORITY AND OTHERS — RESPONDENTS

UKEAT/0137/17/LA

LONDON FIRE AND EMERGENCY PLANNING AUTHORITY AND OTHERS — APPELLANTS

(1) MS R SARGEANT AND OTHERS
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(3) THE WELSH MINISTERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Ms R Sargeant and Others	MR ANDREW SHORT (One of Her Majesty's Counsel) and MS LYDIA SEYMOUR (of Counsel) Instructed by: Walkers Solicitors Satins Hill Oast Spongs Lane Sissinghurst Kent TN17 2AH
For London Fire and Emergency Planning Authority and Others	MR ADRIAN LYNCH (One of Her Majesty's Counsel) Instructed by: Bevan Brittan LLP Kings Orchard 1 Queen Street Bristol BS2 0HQ
For Secretary of State for the Home Department and The Welsh Ministers	MR JOHN CAVANAGH (One of Her Majesty's Counsel) and MR RAYMOND HILL (of Counsel) and MS KATHERINE APPS (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS

SUMMARY

AGE DISCRIMINATION

1. The Employment Tribunal did not err in law in concluding that the 5th and 6th Respondents were pursuing legitimate aims in devising and implementing the transitional arrangements in respect of the new pension scheme even though they had a discriminatory impact on grounds of age.

2. The Respondents, by so doing, could potentially justify that discriminatory effect provided, applying the appropriate level of scrutiny, the Employment Tribunal concluded that the means adopted were proportionate.

3. The Employment Tribunal erred in law in applying, on the issue of proportionality, only the level of scrutiny described in the decisions of the ECJ and the CJEU and by declining to apply the level of scrutiny described in the domestic case law. The Employment Tribunal inappropriately only applied a "margin of discretion" approach when considering whether the actions of the Fifth and Sixth Respondents were proportionate.

4. The appeal succeeds on the limited basis described in 3 above.

SIR ALAN WILKIE

Chapter 1. Introduction

1. These are appeals against decisions of the Employment Tribunal entered on the Register on 14th February 2017:

> **"(i) The treatment of the Claimants by the transitional provisions included in the Firefighters [sic] Pension Scheme 2015 is a proportionate means of achieving a legitimate aim and, accordingly, the claims of direct age discrimination fail.**
>
> **(ii) The claims for equal pay fail.**
>
> **(iii) The claims of indirect discrimination on the grounds of sex and/or race fail.**
>
> **(iv) The piggyback claims for equal pay fail."**

2. There is also an appeal against a decision of the Employment Tribunal on a Preliminary issue entered on the Register on 22nd June 2016 which amongst other things decided:

> **"(i) Paragraph 1(1) of Schedule 22 to the Equality Act 2010 does not bar the Claimants from bringing their claims of less favourable treatment on the grounds of age which will proceed to a hearing."**

The parties are agreed that this appeal should not be heard pending the outcome of the appeals against the decisions of 14 February 2017.

3. The claims which the Tribunal dismissed on 14th February 2017 concerned the transitional provisions contained within the Firefighters' Pension Scheme 2015 (NFPA) and the Firefighters' Pension Scheme (Wales) 2015. These appeals have, for reasons of convenience, been listed and heard consecutively with appeals in respect of similar claims arising from the transitional provisions in respect of the new Judicial Pension Scheme contained in the **Judicial Pensions Regulations 2015** (NJPS). This is because there is a common background and a number of common issues which should be considered and decided by the same composition of the EAT.

4. The appeal in respect of the Schedule 22 issue, the subject of the Preliminary decision, does not arise for determination in the Judicial Pension Scheme litigation.

5. The Claimants in the Firefighters' litigation are five in number and are lead cases in litigation in which the number of claims total more than five thousand in England and Wales. There are three English lead cases, Sargeant, Bebbington and Bygrave and two Welsh lead cases, Dodds and McEvoy. The first four Respondents are the relevant employing Fire and Rescue Authorities (FRAs). The Fifth and Sixth Respondents are the relevant Government departments which are now responsible under the **Public Services Pensions Act 2013** for establishing Schemes for the payment of pensions to Firefighters in England and Wales. These cases are test cases in England and Wales.

Chapter 2. The Background

6. In March 2011 the Independent Public Services Pension Commission (IPSPC) published a review of Public Sector Pensions, the Hutton Report. It recommended wholesale public sector pension reform in order to place those pensions on a more sustainable footing. The Government accepted the recommendations of the Report and enacted pension reforms through the **Public Service Pensions Act 2013**.

7. At paragraph 7.34, the Report stated as follows:

> **"The Commission's expectation is that existing members who are currently in their 50s should, by and large, experience fairly limited change to the benefit which they would otherwise have expected to accrue by the time they reach their current scheme NPA. This would particularly be the case if the final salary link is protected for past service, as the Commission recommends. This limitation of impact will also extend to people below age 50, proportionate to the length of time before they reach their NPA. Therefore, special protections for members over a certain age should not be necessary. Age discrimination legislation also means that it is not possible in practice to provide protection from change for members who are already above a certain age."**

8. Paragraph 1.132 of the Budget Report of the Government dated 23rd March 2011 read as follows:

> **"The Government accept Lord Hutton's recommendations as a basis for consultation of public sector workers, trade unions and others, recognising that the position of the uniformed services will require particularly careful consideration. The Government will set out proposals in the autumn that are affordable, sustainable and fair to both the public sector workforce and the taxpayer."**

9. The Government published a Green Paper on 2nd November 2011. It contained a foreword by the Chief Secretary to the Treasury in which he said:

> **"I believe it is right that we protect those public service workers who, as of 1st April 2012, have ten years or less to their pension age. It is my objective that these people see no change in when they can retire, or any decrease in the amount of pension they receive at their normal pension age …"**

10. The Chief Secretary to the Treasury also made a statement in Parliament on the same day, 2nd November 2011, recorded in Hansard as follows:

> **"In addition, I have listened to the argument that those closest to retirement should not have to face any change at all. That is the approach that has been taken over the years in relation to increases to the state pension age, and I think it is fair to apply that here too. I can also announce that Scheme negotiations will be given the flexibility, outside the costs ceiling, to deliver."**

11. On the same day the Chief Secretary to the Treasury wrote to the TUC General Secretary in the following terms:

> **"9. … I have accepted your argument that there should be transitional protection. It is my objective to ensure that those closest to retirement should not have any detriment either to when they can retire nor any decrease in the amount of pension they receive at their current Normal Pension Age. Over and above the costs ceiling, the Government's objective is to provide this protection to those who on 1 April 2012 are within ten years of Normal Pension Age. Schemes and unions should discuss the fairest way of achieving this objective, and for providing some additional protection for those who are just over ten years from their Normal Current Pension Age. I would be willing to consider tapering of transitional protection over a further three to four years. Full account must be taken of equalities impacts and legislation, while ensuring that costs to the taxpayer in each and every year should not exceed the OBR forecasts for public service pension costs – i.e. those forecasts made before the further reform set out in this letter….**
>
> **11. … The Government's offer is conditional on reaching agreement. If agreement has not been reached, we may need to revisit our current proposals."**

Chapter 3. The Changes in Pension Provision Including Transitional Provisions

12. The Firefighters' Pension Scheme (FPS) is set out in the Firefighters' Pension Scheme Order 1992. That Order provided for a Scheme containing the following essential elements:

> **"(a) Pension benefits were calculated on the basis of final salary.**
>
> **(b) It provided for an annual pension of one sixtieth of the Firefighter's final pensionable pay accrued during the first twenty years of service and thereafter two sixtieths up to a maximum of forty years accrual giving an effective accrual rate for most members of the Scheme of one forty fifth of final pensionable pay for each year of active membership.**
>
> **(c) It provided for a lump sum to be payable which was commutable at retirement based on rates applicable according to the member's age.**
>
> **(d) Normal pension age: the date upon which a person could retire and take their accrued pension with no penalties for early retirement; was fifty five, with an ability to retire from age fifty with no penalties provided the member had accrued twenty five years of service. A deferred pension age, at which a member who had opted out of active membership or left service before retirement could take an immediate and unreduced pension, was sixty."**

13. The FPS closed to new members on 1st April 2006. The Firefighters' Pension Scheme 2006 was less favourable and more in line with the Hutton Recommendations. The Claimants all commenced membership of the FPS prior to 1st April 2006 and remained in membership of that scheme on 1st April 2012.

14. The new Firefighters' Pension Scheme 2015 (NFPS) is established by the **Firefighters' Pension Scheme (England) Regulations 2014**. It came into force on 1st April 2015. It is less generous than the FPS. In particular:

(a) Pension benefits are calculated on the basis of career average earnings rather than final salary.

(b) There is an annual accrual rate of 1/59.7 as opposed to 1/45.

(c) The normal pension age is sixty as opposed to fifty five.

(d) The deferred pension age is sixty five or the higher state pension age.

15. The **2015 Scheme Regulations** contain provisions by which certain members who were active members of the FPS on 31st March 2015 are excluded from the NFPS but continue to be active members of the FPS as amended by the Transitional and Consequential Provisions Regulations of 2014 which provide for members to be treated differently depending on the date upon which they will reach their normal pension age. The effect of those provisions is to create three different groups defined by the age of the individual member. The members of each group are treated differently in respect of pension arrangements from 1st April 2015 as follows:

(a) Group 1 comprises active members of the FPS who were born on or before 1st April 1967. These members are entitled to full protection and remain entitled to continuing active membership of the FPS without the limit of time;

(b) Group 2 comprises active members of the FPS who were born after 1st April 1967 but before 2nd April 1971. These members are entitled to tapered protection by which they are entitled to remain active members of the FPS for an additional 53 days for each month by which their age on 1st April 2012 was over forty one;

(c) Group 3 are active members of the FPS who were born after 1st April 1971. These members receive no transitional protection but are transferred to the NFPS in respect of all pensionable service from 1st April 2015 unless they decide to opt out of pensionable service altogether.

16. Thus, Firefighters who are fully protected are treated more advantageously than those who are partially protected pursuant to the tapering provisions and those who are wholly unprotected. Those who are partially protected are more advantageously treated than those who are wholly unprotected but are treated disadvantageously in comparison to those who are fully protected. Those who are wholly unprotected are treated disadvantageously to those who are

fully protected and those who are partially protected under the taper. In each case the determining factor, whether a person is advantageously or disadvantageously treated, is their date of birth i.e. their age.

Chapter 4. The Relevant Provisions of the *Equality Act 2010* and European Union Legislation

Direct Age Discrimination

17. Article 2 of the Equality Directive 2000/78 provides:

> **"1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.**
>
> **2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated, in a comparable situation, on any of the grounds referred to in Article 1 …"**

The grounds in Article 1 include age.

18. Article 6 provides:

> **"1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."**

19. Section 13 of the **Equality Act 2010** provides:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**
>
> **(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."**

Chapter 5. The Relevant Pension Legislation

20. Section 10 of the **Public Service Pensions Act 2013** provides:

> **"(1) The normal pension age of a person under a scheme under section 1 must be -**

(a) the same as the person's state pension age, or

(b) 65, if that is higher.

(2) Subsection (1) does not apply in relation to -

(a) fire and rescue workers who are firefighters …

The normal pension age of such persons under a scheme under section 1 must be 60."

21. Section 18 allows for protective measures to be put in place for some members of pre-existing Schemes and provides:

> **"(1) No benefits are to be provided under an existing scheme to or in respect of a person in relation to the person's service after the closing date.**
>
> **…**
>
> **4. The closing date is -**
>
> **…**
>
> **(b) 31 March 2015 …**
>
> **This is subject to subsection (7).**
>
> **5. Scheme regulations may provide for exceptions to subsection (1) in the case of -**
>
> **(a) persons who are members of an existing scheme, or who were eligible to be members of such a scheme, immediately before 1 April 2012.**
>
> **…**
>
> **6. Exceptions under subsection (5) … may, in particular, be framed by reference to the satisfaction of a specified condition (for example, the attainment of normal pension age under the existing scheme or another specified age) before a specified date.**
>
> **7. Where an exception to subsection (1) is framed by reference to the satisfaction of a specified condition before a specified date, scheme regulations may also provide for a different closing date for persons in whose case the condition -**
>
> **(a) is not satisfied before the specified date, but**
>
> **(b) is satisfied no more than 4 years after that date.**
>
> **8. Provision made under subsection (5) … or (7) may in particular be made by amending the relevant existing scheme."**

22. These provisions in the primary legislation, and in particular section 18, are the means by which a discretion is given for the Scheme regulations to provide for protection, whether full or tapering, by reference of the person's age. In the case of the Firefighters, the protection was provided for by the Regulations, the effect of which I have described. The provision of transitional protection is inconsistent with the recommendation of the Hutton Report, but is

consistent with the statements of the Chief Secretary to the Treasury dated 2nd November 2011. Each of the Claimants is an unprotected Firefighter who ceased to accrue benefits in the FPS on 1st April 2015 because they were aged forty four or below on that date and below forty one on 1st April 2012. Their comparators are Firefighters who were aged forty eight or more on 1st April 2015 and forty five or more on 1st April 2012 and so were entitled to full protection and continued to accrue benefits in the FPS. The comparators also include Firefighters who were aged forty four or more, but below forty eight, on 1st April 2015, who were entitled to tapered protection by which they were able to continue to accrue benefits in the FPS for a limited period.

23. It is common ground that the Claimants have been treated less favourably on grounds of age as a result of their exclusion from the FPS, wholly or in part. Their treatment comprises unlawful age discrimination, unless the Respondents could show that their treatment of the Firefighter Claimants fell within section 13(2) of the **Equality Act 2010**, as informed by Article 6(1) of the Equality Directive 2000/78.

Chapter 6. The Claimants' Claim

24. The Claimants' claim for age discrimination before the ET was on the basis that the effect of the change in the pension arrangements, reflected in the NFPS, coupled with their exclusion, on grounds of age, from the protection given by the transitional provisions meant that they were less favourably treated because of their age than those who fell within the fully protected or the partially protected group and that such less favourable treatment did not fall within the defence provided by section 13(2) of the **2010 Act**.

Chapter 7. The Respondents' Case

25. The main burden of defending these claims was borne by the Fifth and Sixth Respondents. The implementation of the pension reforms across the public sector was the result of decisions made by the Government and Parliament to give effect to social policy objectives, including, they contended, political, economic, social, demographic, efficiency, and budgetary considerations.

26. The Respondents acknowledged that, as a result of the reforms, the terms on which members of public service pension schemes now accrue benefits are, in most cases, less advantageous than previously. The Respondents pointed out that the Claimants do not challenge the public sector pension reforms themselves, but challenge their exclusion from the protection given by transitional provisions under which certain existing members of pension schemes, on grounds of age, were permitted to remain members of the FPS after the introduction of the new schemes (either for the remainder of their careers or for a specified period), whereas other existing members of the FPS ceased immediately to be members and were permitted to transfer to the NFPS.

27. The Respondents, before the ET, argued that the transitional provisions involved recognition by the Government that scheme members closest to normal pension age have less time to make the necessary lifestyle and financial adjustments, that it was appropriate to provide protection from the effect of the reforms for those scheme members. Accordingly they argued that they fell within the defence provided by section 13(2).

Chapter 8. The Employment Tribunal's Decision dated 14th February 2017

28. The ET's decision was that the treatment of the Claimants by the transitional provisions was a proportionate means of achieving a legitimate aim. The claims of direct age discrimination failed as did the claims for equal pay and for indirect discrimination on the grounds of sex and race. I summarise below the reasons given for the decision.

Issues

29. The Employment Judge set out the agreed issues. Under the heading "Objective Justification" it states "the aim relied upon by the Respondents is to protect those closest to pension age and to retirement from the effects of pension reform".

The Material Facts

30. The ET noted that there were no significant disputes of fact and a large amount of common ground.

31. The ET set out the background, including the Hutton Report recommending wholesale public sector pension reform to place them on a more sustainable footing. The recommendations, accepted in large measure by the Government, resulted in the **Public Service Pensions Act 2013**.

32. The ET set out paragraph 7.34 from Hutton, indicating that special protection for members over a certain age should not be necessary and the foreword to the Green Paper by the Chief Secretary to the Treasury on 2nd November 2011:

> **"I believe it is right that we protect those Public Service Workers who as of 1st April 2012 have ten years or less to their pension age, it is my objective that these people see no change in when they can retire nor any decrease in the amount of pension they receive at their normal pension age."**

33. She referred to a letter from CST to the TUC General Secretary dated 2nd November 2011 which said:

> **"9. I have accepted your argument that there should be transitional protection. It is my objective to ensure that those closest to retirement should not have any detriment either to when they can retire nor any decrease in the amount of pension they receive at their current normal pension age. Over and above the costs ceiling the Government's objective is to provide this protection to those who on 1st April 2012 are within ten years of normal pension age. Schemes and Unions should discuss the fairest way of achieving this objective and for providing some additional protection for those who are just over ten years from their current normal pension age. I would be willing to consider tapering of transitional protection over a further three to four years. Full account must be taken of equalities, impacts and legislation while ensuring that costs to the tax payer in each and every year should not exceed the OBR forecast for public service pension costs …"**

34. The ET summarised the FPS and summarised discussions from 2011 with the TUC and the four largest public service pension schemes: the NHS, local Government, Teachers and Civil Service, which made up 82% of the total membership of public service pension schemes.

35. The ET refers to a submission by a Treasury Official to the CST dated 13th October 2011 which stated:

> **"… Getting further transitional protection for current members is hugely important to Unions who will want to be able to give a message to more concerned groups of active members that these Reforms will not affect them."**

That submission identified five types of transitional protection, namely: wholesale delay (costing four billion pounds per year of delay); staggered introduction for existing members; age protection (the option chosen); length of service protection; and a minimum notice period for changes to pension age.

36. The ET referred to other evidence emphasising the Government's focus on discussion with the unions and the local Government Association, including discussions with the FBU which had a particular concern that Firefighters, recruited on the basis they could take their

pension between age 50 and 55 might not be able to work to the new pension age of 60 because of the need to maintain fitness for their work.

37. There was a Heads of Agreement dated 9th February 2012 concerning the Firefighters' Pension Scheme which was further amended as detailed by the ET. One of the commitments in those Heads of Agreement was a review of the normal pension age for Firefighters which reported on 12th January 2013. It concerned cardio-respiratory fitness of Firefighters with reference to raising the normal pension age from 55 to 60. That report had, amongst other things, concluded that there would be a significant number of Firefighters who expect to retire at age 55 and would have difficulty maintaining fitness beyond that age. If fitness levels were maintained Firefighters would be able to continue undertaking Firefighting roles until age 60.

38. On 18th January 2013 the Fire Minister, in a letter to the Treasury, recorded that the Report suggested that one in four Firefighters may not be able to undertake Firefighting at ideal fitness levels until age 60 and he would like to respond positively. He put forward two potential options: actuarially reduced pension for retirees from age 55 and extending transitional protections. The Treasury did not intend to re-open the transitional protections but, on 19th June 2013 the Government offered the FBU to adopt an actuarially neutral pension for retirees from age 55. The FBU did not accept this and there was a trade dispute and industrial action.

A Brief Summary of Submissions

39. The ET briefly summarised the submissions of the parties. The Claimants contended that the Respondents had failed to prove that the less favourable treatment was justified. The Respondents contended that the transitional provisions embodied social policy aims approved

and implemented by the Government and Parliament, so there should be a less intrusive level of review by the Tribunal. They also submitted that the social policy considerations of a Member State can take into account budgetary considerations.

The ET's Conclusions

40. The Employment Tribunal reminded itself that the proceedings were solely about the transitional protection. There was no challenge to the terms of the NFPS. The Employment Judge also reminded herself that the Hutton Report had recommended there should be no transitional provisions and that in the case of Firefighters' retirement age was of particular importance.

41. There was an issue of fact as to why the transitional protection was adopted. The Claimants said it was to secure a deal with the big four Trade Unions. The Respondents said the CST was persuaded that those nearest to retirement needed protection. The Employment Judge stated that she intended to resolve this issue on the basis of the contemporaneous documentary evidence.

42. The Employment Judge referred to the decision in McCloud, which the Respondents sought to distinguish in a number of ways, not least that the difference in treatment between Judges in their protected and unprotected groups was more acute than for other public sector workers because of the impact of tax changes to pension schemes. The Employment Judge indicated that she disregarded the McCloud decision in reaching her conclusions on the present case.

Legitimate Aim

43. The first issue was whether the Respondents had identified a legitimate aim. At the heart of the dispute was the degree of scrutiny to be applied to the question of justification. The Claimants referred to **Hardy and Hansons Plc v Lax** [2005] ICR 1565 CA. Pill LJ had said:

> **"32. … That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the Appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, … is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the Appellants' submission … that … the Employment Tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."**

44. The Respondents contended that the Claimants' challenge was to a measure that was a social policy choice by a Member State which was different from the issues which arose in **Hardy and Hansons** which concerned a decision of a particular employer about operational needs rather than a social policy choice. The Respondents contended that there was a plethora of consistent European Court of Justice, Supreme Court and House of Lords case law which pointed in the opposite direction to that exemplified by **Hardy**.

45. The Employment Judge recorded that the Respondents had amplified the aims in the following ways:

> **"1. To protect those closest to pension age from the effects of pension reform since they would have least time to rearrange their affairs before retirement by making lifestyle changes or alternative financial provision (or by finding alternative employment);**
>
> **2. To take account of the greater legitimate expectation that those closer to retirement would have that their pension entitlements would not change significantly when they were close to retirement;**
>
> **3. To have a tapering arrangement so as to prevent a cliff edge between fully and unprotected groups;**
>
> **4. … To ensure that a clear and simple message could be communicated and that there was consistency across the public sector."**

46. The Employment Judge summarised five propositions made by the Claimants:

> **"1. The aim must have a social policy objective rather than cost reduction;**
>
> **2. Saving costs cannot comprise a legitimate aim whether as a Member State or employer and it is for the National Court to determine whether cost was the aim of the measure;**
>
> **3. The social policy objective must correspond to a real social need;**
>
> **4. Although Member States have a broad discretion in deciding what aims to adopt, article 6 imposes the burden of establishing legitimacy of the aim to a high standard of proof;**
>
> **5. Legitimacy of aim cannot be established by generalisations.**
>
> **For each of these propositions authority was cited."**

47. The Employment Judge then set out the documentary evidence on identifying the aims. She concluded that it was the CST who took the decision to provide protection across the public sector for those within ten years of normal pension age with a taper of three to four more years. This originated from concessions within the Treasury concerning changes to the state pension age where a ten year notice period was applied after extensive consultation.

48. The Claimants contended that the legitimate aim must explain why the older group was being protected. Authorities were cited supporting, it was said, that the courts had examined why a particular age group was being favoured over another. They contended that preferential treatment on grounds of age could only be in pursuit of a legitimate aim where those of a particular age were at a particular disadvantage or had a particular need that was related to age. The Claimants contended that the Respondent was required to show that those nearer retirement and normal pension age were in greater need of protection and it was insufficient to say that they had less time to adjust. The Claimants contended that, as it was common ground that the closer to retirement the less change the person would face and less adjustment required, in truth the protected group was treated more favourably simply because its members were older.

49. The Employment Judge did not accept that submission. She said:

> **"… The protected group were treated more favourably because of proximity to retirement. Whilst retirement is age related and proximity to retirement is connected with age there may be good reasons for treating different age groups differently. …" (Paragraph 70)**

50. She referred to the case of **Seldon v Clarkson Wright & Jakes** [2012] ICR 716, about a compulsory retirement age, where those below that age were treated more favourably than those at that age but the objective justification defence succeeded. She referred to section 18(6) of the **PSPA 2013** which gave, as the sole example of a possible condition, the attainment of normal pension age under the existing pension scheme or another specified age. She said:

> **"… It is clear … that the transitional provisions that were envisaged by primary legislation were age related transitional provisions which protected those closest to Normal Pension Age. The evidence is that the decisions were taken with great care and after negotiations with the representatives of the Unions. …" (Paragraph 71)**

51. The Employment Judge considered the case law. She stated that broadly it emphasised that it is for Member States and their authorities to find the right balance provided that they did not go beyond what was appropriate and necessary to achieve the legitimate aim. She cited a series of authorities on the basis of which she concluded that the decisions which are under consideration in this case are for the elected Government. They were social policy decisions which may well have a political element. She reminded herself that it was for the Member State to balance the different interests and that she must not substitute her own view for that of the Government. The Member States enjoyed a broad discretion on the choice of both aims and means (she referenced **Seymour-Smith (No 2)** [2000] 1 WLR 435. Lord Nicholls said:

> **"… if their aim is legitimate Governments have a discretion when choosing the method to achieve their aim. National courts acting with hindsight are not to impose an impracticable burden on Governments which are proceeding in good faith. Generalised assumptions, lacking any factual foundation, are not good enough but Governments are to be afforded a broad measure of discretion. The onus is on the Member State to show (1) that the allegedly discriminatory rule reflects a legitimate aim of its social policy; (2) that this aim is unrelated to any discrimination based on sex and (3) that the Member State could reasonably consider that the means chosen were suitable for achieving that aim."**

52. She also took into account the speech of Baroness Hale in **Seldon**:

> **"28. … article 6 contemplates that the justifications for direct age discrimination should be the broad social and economic policy objectives of the state … and not the individual business needs of particular employers …**
>
> **33. … The means employed had still to be both appropriate and necessary, although member states … enjoyed a broad discretion in the choice both of the aims and of the means to pursue them …**
>
> **50. … (2) If it is sought to justify direct age discrimination under article 6 … the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness" …"**

53. The Employment Judge referred again to **Hardy** which expressly rejected the importation of the margin of discretion into the ET's decision. **Hardy** was distinguishable. It did not concern a social policy measure adopted by a Member State. It concerned an operational decision by a private sector employer. She pointed out that, since **Hardy**, the Supreme Court in **Seldon** had applied the CJEU's approach to objective justification in social policy cases, whereas the stricter test described in **Hardy**, relates to operational and business choices of a private sector employer.

54. At paragraph 83, the Employment Judge stated she was satisfied that the correct test was that set out in **Seldon** in social policy cases following the CJEU's approach. The decision was taken not by the employer but the Home Office on behalf of the Government which was introducing a measure having made a social policy decision to protect those within ten years of retirement. The Government has a wide discretion in social policy matters. The standard of scrutiny involved a wide margin of discretion. The Employment Judge was satisfied that was the correct standard and that the stricter test applied to operational matters of a private sector employer was not the correct test.

55. The Claimants also contended that saving costs cannot comprise a legitimate aim and that was for the Tribunal to determine whether that was the aim. The Respondents contended that, whilst budgetary considerations can be included, it accepted that discriminatory treatment solely and purely explained by a desire to save costs would not be lawful.

56. The Employment Judge conducted a detailed consideration of possible alternative courses of action the Government could have taken and whether those would have been directed at the legitimate aim identified. She also considered the impact of **Unison** [2006] IRLR 926, **Lockwood** [2014] ICR 1257 (after **Seldon**) and the CJEU decision in **Hungary** (Case C-286/12). She also referred to **Lumsdon v Legal Services Board** [2016] AC 697, in particular paragraph 56:

> **"… the justification … tends to be examined in detail although much may depend on the nature of the justification and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification on the other hand may well be expected to be supported by evidence."**

57. The Employment Judge commented that the authorities suggest that the need for precise and concrete factors depends on the nature of the justification. Political considerations may have played a part in the Government's decision to protect those closer to retirement. For those reasons she rejected the criticism that the decision was not based on precise or concrete factors. She also referred to arguments based on the Williams Report.

58. She concluded, in paragraphs 104 and 105, that the correct test for determining whether the Respondents had established legitimate aims was that established by the ECJ and the Supreme Court in **Seldon** which gave a wide margin of discretion. She was satisfied that the Respondents had demonstrated that the aims were: to protect those closest to pension age from the effects of the pension reform; to take account of the greater legitimate expectation that those

closer to retirement would have that their pension entitlements would not change significantly when they were close to retirement; to have a tapering arrangement; and to achieve consistency across the public sector. She concluded that the Respondents had demonstrated those legitimate aims.

Proportionality

59. The Employment Judge referred to the three-stage test adopted by the Privy Council in **De Freitas** [1999] 1 AC 69:

> **"Whether:**
>
> **(1) The legislative objective is sufficiently important to justify limiting a fundamental right;**
>
> **(2) The measures designed to meet the legislative objective are rationally connected to it and;**
>
> **(3) The means used to impair the right or freedom are no more than is necessary to accomplish the objective."**

She was also referred to authorities which assist with the three limbs.

The first stage involved balancing the need to achieve the aim against the impact of the means used to achieve it. In **Seldon** at paragraph 50(6):

> **"The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measures chosen (*Fuchs*)."**

60. In relation to the second limb in **Age Concern** at paragraph 51, the ECJ stated:

> **"… the Member States enjoy broad discretion … However, that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age. Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim."**

61. Concerning the third aspect - reasonable necessity - reference was made to authority: **Dansk Jurist** [2014] ICR 1 (C-546/11), where the test was whether the aim could be achieved by less restrictive, but equally appropriate measures; the **Hungary** case where it was held that evidence is required to establish that more lenient provisions would not have made it possible to achieve the objective; and **Rosenbladt** (C-45/09) where the provisions must not go beyond what is necessary for achieving the objective and unduly prejudice the interests of the persons concerned.

62. The Claimants argued that there was no real analysis of the need or impact of the transitional protections and no attempt to balance the need against the impact on the disadvantaged class.

63. The Employment Judge, in respect of the first stage, said her approach was whether the need to protect those aged 48 or more on 1st April 2015 from the financial consequences of pension reform was sufficiently important to justify their receiving pension benefits that are very much more valuable than those received by younger Firefighters for the same work. Having found it was a legitimate aim to protect those closest to retirement, she said that it followed that the place where the line was drawn was a matter of social policy choice. The line was drawn in a manner which was consistent with the rest of the public sector. That was a social policy choice applied across the public sector. The Claimants contended that the impact on the unprotected group was catastrophic and unfair, but, she said, the impact on the Claimants of being unprotected went to the reforms themselves, which were not at issue - only the transitional provisions were in issue.

64. The Employment Judge referred to the judgment of Baroness Hale in **Seldon** in which she said:

> **"64. The answer given in the Employment Appeal Tribunal … with which the Court of Appeal agreed … was:**
>
> > **'Typically legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances is itself an important element in the justification. It is what gives predictability and consistency which is itself an important virtue.'**
>
> **Thus the appeal tribunal would not rule out the possibility that there may be cases where the particular application of the rule has to be justified but they suspected that these would be extremely rare.**
>
> **65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. In the particular context of inter-generational fairness, it must be relevant that, at an earlier stage in his life, a partner or employee may well have benefited from a rule which obliged his seniors to retire at a particular age. … "**

65. The Employment Judge came to her conclusions in the following terms:

> **"115. It is clear to me on the case law that there has to be a line drawn at some point. That is a social policy choice and inevitably some individuals will be disadvantaged. The FBU put forward the arguments in negotiation that the starting point for the transitional provisions should have been when a firefighter would have qualified for a full unreduced pension. Had this been agreed, the transitional provisions would still have protected those closest to retirement with a different cut-off date. …**
>
> **116. It was reasonably necessary for the Government to draw the line at some point. I am satisfied that the Respondents have demonstrated a legitimate aim and having considered the three stage test, I am also satisfied that the aim was proportionate.**
>
> **117. In these circumstances, it is my judgment that the treatment of the Claimants by the transitional provisions included in the Firefighters [sic] Pension Scheme 2015 are a proportionate means of achieving a legitimate aim and the claims of direct age discrimination fail."**

Grounds, Submissions and Conclusions

66. The Appellants submitted detailed grounds of appeal. They are helpfully summarised under headings which encompass a number of individual grounds. They are as follows:

1. The Judge erred in applying the article 6(1) test derived from the CJEU line of authorities, both to the issues of legitimate aim and proportionality, whereas she should have applied an objective test mirroring the approach in **Hardy and Hansons Plc v Lax**. In particular she approached her task by reference

to the Respondents' margin of discretion rather than undertaking the assessment herself.

2. In any event she failed to apply any or any proper scrutiny when considering the legitimacy of the asserted aims. She failed to appreciate that the evidence relied on amounted to no more than generalisations, and she failed to apply a high standard of proof by reference to precise and concrete factors.

3. She failed to apply any or any proper scrutiny to the Respondents' assertions on proportionality. She erroneously relied on the opinion of the Advocate General in **Age Concern** rather than the decision of the Court itself. A number of detailed complaints are made in respect of this such that, looking at the decision as a whole, the Employment Judge misdirected herself or misunderstood, or misapplied the facts.

4. It is said that, by her self direction in paragraph 129 of her decision she erred in law on the issues of equal pay, sex and race discrimination and further erred in the light of the Supreme Court decision in **Naeem v Secretary of State for Justice**.

5. It is said that the Employment Judge misunderstood the facts by wrongly assuming that positions adopted by the Appellants' Trade Union in negotiation amounted to their acceptance of the principle of the pension reforms.

67. The main issue of law is the respective contentions by the Appellants and Respondents in relation to the approach the Employment Judge should have taken in scrutinising the Respondents' claim to satisfy the requirements of legitimate aims, and proportionate means, as well as the standard and nature of evidence required to support such contentions. In particular

it involves considering the lines of authority emanating, respectively, from the ECJ/CJEU and the domestic courts on these issues. I have considered these issues in length in my judgment in the linked case of **McCloud and Others** and I do not propose to repeat my reasoning and conclusions here.

68. Suffice it to say, I concluded that, whilst an Employment Tribunal is obliged, when considering both legitimate aim and proportionate means to recognise the margin of discretion which the CJEU line of authority accords Governments, when taking and implementing decisions about social policy, the Supreme Court in **Seldon** sought to reconcile the two lines of authority by enabling an Employment Tribunal, in an appropriate case, to consider for itself whether the aim is legitimate in the particular circumstances of the employment (**Seldon** paragraph 61) and to scrutinise the means used to achieve the aim in the context of the particular business to see whether they meet the objective, and whether there are other less discriminatory measures which would do so (**Seldon** paragraph 62). The reasoning in **Lockwood** involved the Court of Appeal following the guidance in **Seldon** by applying the approach described in **Hardy and Hansons** and **MacCulloch** (see **Lockwood v DWP** [2014] ICR 1257).

69. The ET, in a comprehensive and careful judgment, identified the material facts. Reading these as a whole, in my judgment they constitute a full and accurate assessment of, and understanding of, the background and the facts involved in the decisions taken by the Respondents in respect of the transitional provisions. In particular the Employment Tribunal displayed an understanding of the fact that the Government, in seeking to implement the far reaching public sector pension reforms recommended by the Hutton Report, was undertaking a major exercise in changing social policy. It directly involved the most senior members of the

Government and it engaged the interests of large sectors of the employed population represented by their individual unions and the TUC. Discussions within Government and with the TUC, from the earliest stage, reflected the fact that the emergence of the policy of providing protection for public service workers who, as of 1st April 2012 had ten years or less to their pension age was perceived as the "right" and "fair" thing to do. They reflected the fact that implementing such a change in social policy affecting so many public service employees was an exercise in persuasion and accommodation, and that "getting further transitional protection for current members is hugely important to unions, who will want to be able to give a message to more concerned groups of active members that these reforms will not affect them". The Employment Judge well understood that the FBU did not, at any stage, agree the transitional protection provisions. There was a trade dispute and industrial action.

70. On the issue of legitimate aim, the Employment Tribunal dealt fully and accurately with the issues, the respective contentions of the parties and the relevant UK and CJEU case law. In particular the Employment Judge paid particular attention to the Supreme Court decision in **Seldon** and, in particular, the judgment of Baroness Hale. In so doing, it is unfortunate that she did not remind herself of what Baroness Hale had said at paragraphs 59 to 62 of her judgment. At paragraph 83 of the ET decision the Employment Judge said:

> **"Having reviewed the authorities, I am satisfied that the correct test to be applied is the test set out in *Seldon* in social policy cases following the CJEU's approach. … This is a situation where a Member State was introducing a measure as a result of having made a social policy decision to protect those within 10 years of retirement. The Government has a wide discretion in social policy matters. The standard of scrutiny involves granting a wide margin of discretion to the Member State. I am satisfied that that is the correct standard in the present case and the stricter test which applies to operational matters of a private sector employer is not the correct test."**

71. Having decided to take that approach the Employment Judge considered whether the Respondents had established legitimate aims. In so doing she reflected the submissions made by each side, in particular the Respondents' contention that the legitimate aim was to protect

those closest to retirement who had a legitimate expectation that things would not change in a significant way when they were only a few years away from retirement, as compared with those who were earlier in their career. She reminded herself of the Appellants' contention that the Government's social policy choice was not based on precise or concrete factors. She also reminded herself of paragraph 56 of the Supreme Court decision in **Lumsdon and Others v Legal Services Board** [2016] AC 697:

> **"The justification for the restriction tends to be examined in detail, although much may depend on the nature of the justification, and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification, on the other hand, may well be expected to be supported by evidence."**

72. She reminded herself at paragraph 97 that:

> **"The authorities suggest that the need for precise and concrete factors depends upon the nature of the justification. The Government relies on the fact that those in the protected group were closer to retirement. Political considerations may have played a part in the Government's decision. For those reasons I reject the criticism that the Government's decision was not based on precise or concrete factors …"**

73. She also had regard to the role which consistency played in support of what the Respondents said was their legitimate aim. At paragraph 100 she noted that the protection had been adopted across the public sector. In so doing she plainly had in mind, because she cited it a little later in the decision, what Baroness Hale in **Seldon** had said at paragraphs 64 and 65:

> **"64. The answer given in the Employment Appeal Tribunal … with which the Court of Appeal agreed … was:**
>
> > **'Typically legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances is itself an important element in the justification. It is what gives predictability and consistency which is itself an important virtue.'**
>
> **Thus the appeal tribunal would not rule out the possibility that there may be cases where the particular application of the rule has to be justified but they suspected that these would be extremely rare.**
>
> **65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. In the particular context of inter-generational fairness, it must be relevant that, at an earlier stage in his life, a partner or employee may well have benefited from a rule which obliged his seniors to retire at a particular age. … "**

74. At paragraph 104 the Employment Judge stated her conclusion on the issue of legitimate aims in the following terms:

> **"104. Having undertaken the analysis set out above, I am satisfied that the correct test for me to apply in determining the legitimate aims is to be determined by the approach to scrutiny laid down by the ECJ and the Supreme Court in *Seldon*. There is a wide margin of discretion for the Member State. On the evidence before me I am satisfied that the Respondents have demonstrated that the aims were to protect those closest to pension age from the effects of pension reform; to take account of the greater legitimate expectation that those closer to retirement would have that their pension entitlements would not change significantly when they were close to retirement; to have a tapering arrangement so as to prevent a cliff edge between fully protected and unprotected groups; and that there was consistency across the public sector.**
>
> **105. It is my decision that the Respondents have demonstrated these aims."**

75. In my judgment, the Employment Judge was correct in following **Seldon** in that part of her decision. It involved considering whether there were legitimate aims by reference to, and giving effect to, the state's margin of discretion in pursuing and implementing social policy. The Employment Judge, in her analysis of the evidence, the facts and the arguments, was entitled to conclude that the Respondents had established legitimate aims. In my judgment looking at this part of the judgment as a whole, the Employment Judge understood the facts, considered and applied the correct legal principles and came to a conclusion to which she was entitled to come. I reject the contention that, looking at this part of the judgment as a whole, she failed to exercise sufficient scrutiny. She had well in mind the fact that it was a high test, but there was the margin of discretion and, in her careful exposition of the facts, the law and her conclusions, she did not, in my judgment, err in coming to the conclusion that she did.

76. She went on to consider the proportionality of the means.

77. She identified at paragraph 111 that there were three stages to the proportionality test: the first being whether the need to protect those aged 48 or more on 1st April 2015 from the financial consequences of pension reform is sufficiently important to justify their receiving

pension benefits that are very much more valuable than those received by younger Firefighters for the same work having regard to the fact that it was a legitimate aim to protect those closest to retirement. She noted at paragraph 112 that the Claimants argued that the impact on the unprotected group was catastrophic and unfair, although she said that "these go to the pension reforms themselves. The reforms are not what is at issue in this case. The issue solely relates to the transitional provisions". She reminded herself of the guidance given in **Seldon** relating to consistency and that the application of a general rule consistently was itself an important element in the justification.

78. At paragraph 114 she described the severe impacts of the differential between those granted protection and those not granted protection by reference to the case of one of the Claimants Mr Bebbington. She referred herself to the second and third limbs of the test.

79. Her conclusion on this aspect of the matter is set out at paragraphs 115 to 117. It was on the basis that:

> **"… there has to be a line drawn at some point. That is a social policy choice and inevitably some individuals will be disadvantaged …**
>
> **116. It was reasonably necessary for the Government to draw the line at some point. I am satisfied that the Respondents have demonstrated a legitimate aim and having considered the three stage test, I am also satisfied that that aim was proportionate."**

80. In my judgment, in considering whether the means adopted by the Government were proportionate in order to achieve the legitimate aims, the Employment Judge was entitled to have regard to the fact that the Government was seeking to implement a social policy and that questions of consistency of application were significant. In so doing she was following what she took to be the approach identified in **Seldon** and to that extent she cannot be faulted.

81. She did, however, have to grapple with the issue posed by the Claimants, namely that, comparing the protected group with the unprotected group, the differential between the two was said to be catastrophic and unfair for the unprotected group. This contention was made in the context of the Claimants' submission of law that, when considering the issue as applied to them, the ET ought, additionally, to make up its own mind on the question of proportionality, applying the established domestic law principles described in **Hardy and Hansons**, **MacCulloch** and **Lockwood**.

82. The Employment Judge did not do so. Her conclusion was that it was sufficient for her to consider the issue of proportionality by reference solely to the approach identified by the ECJ/CJEU line of authorities and, as she understood it, approved by the Supreme Court in **Seldon**. It also appears that she did not fully appreciate that, although the differential of which the complainants complained amounted to their being subject to the changes in the pension schemes by reason of the Government's implementation of the pension reforms, which were not in issue, their complaint was of differential treatment by not being granted the full protection against such changes granted to those who were older than they were but denied to them by reason of their age. It followed that, in practice, their complaint was that they were subject to the changes in the pension scheme whereas they should have been protected from those changes and that this failure was unlawful age discrimination.

83. In my judgment, in this limited respect, the Employment Judge erred in law. She failed to appreciate that in **Seldon**, whilst the Supreme Court had given effect to the approach of the ECJ/CJEU in applying article 6(1), both in respect of legitimate aim and means (see paragraph 55 of Baroness Hale) the Supreme Court had gone on, in paragraph 59 and following, to require that the means be carefully scrutinised in the context of the particular business concerned, in

order to see whether they met the objective and whether there were not other, less discriminatory, measures which would do so. In particular, she failed to recognise that, on the issue of proportionate means of achieving a legitimate aim, the Court of Appeal in **Lockwood** had said that the judgment in **MacCulloch** had provided comprehensive guidance on the application of the test and the rigour with which tribunals must apply it (at paragraph 46). In my judgment, the Employment Judge erred in law in failing to consider whether, in the context of the Firefighters' Pension Schemes, the application of the transitional provisions and the differential treatment on the grounds of age was a proportionate means for achieving what she had concluded, were, and was entitled to conclude were, legitimate aims of social policy.

Conclusion on These Issues

84. In my judgment, the Employment Judge's decision on the issue of legitimate aims was correct, did not contain any error of law so the appeals on those grounds fail. She did, however, err in law in her consideration of the question of whether the means were proportionate for achieving the legitimate aims and, accordingly, the Appellants' appeal must be upheld in that respect.

85. In my judgment this is not a case where it would be open or appropriate for the Employment Appeal Tribunal to come to a conclusion on the question whether the transitional provisions were, or were not, a proportionate means for achieving the legitimate aims of the Respondents. The matter will have to be determined by a tribunal. I will receive argument on whether, given the limited basis upon which this appeal has succeeded, it is more appropriate to remit the case for decision: on the question of proportionate means, applying the correct test; to the same tribunal, or to a differently constituted tribunal.

Equal Pay and Indirect Discrimination Claims

86. On the main appeal I have concluded, for the reasons set out above, that the appeal succeeds and, subject to argument, that the appropriate course is to remit the case to the same or a differently constituted tribunal for a further/fresh hearing.

87. I now consider these separate claims in this litigation.

Equal Pay

88. Section 67 of the **Equality Act 2010** provides:

> **"(1) If an occupational pension scheme does not include a sex equality rule, it is to be treated as including one.**
>
> **(2) A sex equality rule is a provision that has the following effect -**
>
> > **(a) if a relevant term is less favourable to A than it is to B, the term is modified so as not to be less favourable;**
> >
> > **…**
>
> **(3) A term is relevant if it is -**
>
> > **(a) a term on which persons become members of the scheme, or**
> >
> > **(b) a term on which members of the scheme are treated**
> >
> > **…"**

89. Section 69 concerns the defence of material factor. It provides, insofar as is relevant:

> **"(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.**
>
> **(5) 'Relevant matter' has the meaning given in section 67.**
>
> **(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's."**

90. Section 67 (8) provides that:

> **"A relevant matter is -**
>
> > **(a) a relevant term …"**

91. The Employment Judge set out her conclusions at paragraphs 122 to 134. In these paragraphs she dealt with a number of different types of claim including the equal pay claim and a piggy-back claim associated with the equal pay claim. She was referred to, and considered, a number of authorities, many of which concerned indirect sex and race discrimination, with which I deal below. However, although these paragraphs can be somewhat confusing to the reader, the Employment Judge kept separate her conclusions on equal pay and on the indirect discrimination claims.

92. At paragraph 129 she made a finding of fact that the material factor in respect of the difference between the female Claimant, Ms Sargeant, and her chosen male comparators was age and not sex. On that basis she concluded that the claim of equal pay fails.

93. Paragraph 129 is less than clear - the Employment Judge seemed to think that, because the material factor was age and not sex, "no material factor defence was necessary". Upon a proper analysis, her finding of fact meant that the material factor defence under section 69(4) arose. Notwithstanding that element of confusion, in my judgment, the Employment Judge did not err in law in concluding, on the basis of that finding of fact, that the material factor defence had been made out. The equal pay claim arose under section 67 which imposes a sex equality rule. The statutory defence to such a claim is found in section 69(4). By contrast, a claim under section 66, based on a sex equality clause, is subject to a different, and more complicated, statutory defence pursuant to the provisions of section 69(1), (2) and (3) involving, as one element, the issue of justification. That issue does not arise for decision under section 69(4).

94. It follows that the appeal against the equal pay claim fails. So too does the associated piggy-back claim.

Claims for Indirect Sex and Race Discrimination

95. These claims were brought under section 19 of the **Equality Act 2010**. The relevant provisions are as follows:

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -**
>
> > **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> >
> > **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> >
> > **(c) it puts, or would put, B at that disadvantage, and**
> >
> > **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**
>
> **(3) The relevant protected characteristics are -**
>
> > **…**
> >
> > **race;**
> >
> > **…**
> >
> > **sex"**

Section 23 provides:

> **"(1) On a comparison of cases for the purposes of section … 19 there must be no material difference between the circumstances relating to each case."**

96. The Employment Judge, at paragraph 129, had found as a fact that the material factor was age and not sex. Having drawn that conclusion, she further concluded, in paragraph 130, that the claim of equal pay fails.

97. The Employment Judge went on, in paragraph 131, to consider the claims of indirect sex and race discrimination. She said that if she were wrong in concluding "that the material factor is not race or sex but age", then the issue for the tribunal would be one of objective justification. She referred to the test of objective justification in claims of indirect discrimination by

reference to **Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704. She went on to say:

> **"I am satisfied that, in the light of my decision in relation to age discrimination, the Respondents have demonstrated objective justification in the claims of sex and race discrimination."**

98. There is a difficulty with this part of the judgment. The Employment Judge's decision in relation to age discrimination was based on "the margin of discretion" approach described in the ECJ/CJEU cases. The Employment Judge explicitly rejected the argument that her decision should be taken on the basis of the ET coming to its own decision without any margin of discretion, as exemplified by the case of **Homer**, following a line of domestic authority.

99. I have found that, in relation to the age discrimination claim, the Employment Judge erred in law in failing herself and without reference to any margin of discretion, to consider, in the specific context of the Firefighters' pension schemes, the impact of the social policy reflected in the transitional provisions - in particular the age based disparity of treatment by excluding the Claimants from the protection of the transitional provisions. If the Appellants are correct that, in the light of the current authorities, the only route to a defence to this claim is by means of section 19(2)(d) (the justification defence) then, by parity of reasoning, this issue too must be remitted to a tribunal for a decision on the justification defence.

100. I have to consider whether the Employment Tribunal's finding of fact, that the material factor is age and not sex, has sufficient traction to preclude the need for consideration of the justification defence in relation to the indirect discrimination claims.

101. The decision of the ET on this issue was reached following consideration of a number of cases, including two decisions of the Court of Appeal **Essop v Home Office** [2015] ICR 1063

and **Naeem v Secretary of State for Justice** [2016] ICR 289. Those cases have now been decided by the Supreme Court. The Appellants contend that, in the light of the Supreme Court decision, the Employment Judge erred in concluding that, because the material factor is age and not sex or race, the issue of justification under section 19(2)(d) does not arise.

102. **Essop and Naeem** [2017] ICR 640 were heard together. In **Essop**, the Claimants, BME Civil Servants and Civil Servants of different ethnicities who were over the age of 35, brought claims of indirect discrimination on the grounds that they were less likely than non BME, or younger, candidates to pass the core skills assessment test necessary for promotion. The BME pass rate was 40.3% of that of the white candidates and the pass rate of candidates aged 35 or older was 37.4% of that of candidates below that age. In each case there was a 0.1% likelihood that this could happen by chance but no one was able to put forward a reason why the proportion of BME, or older, candidates failing was significantly higher than the proportion of white, or younger, candidates failing.

103. In **Naeem** an imam employed by the Prison Service claimed indirect discrimination on the ground that, as a Muslim chaplain, he was disadvantaged by the pay system, where employees progressed up pay bands partly in accordance with length of service. The evidence was that Muslim chaplains were first employed in 2002. Longer serving Christian chaplains, who were able to join the service before 2002, were more likely to be higher up the pay scale.

104. Baroness Hale gave the judgment with which the other members of the Supreme Court agreed. At paragraph 25 she described an important contrast between direct and indirect discrimination:

> **"Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the**

> **individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment … but aims to achieve a level playing field where people sharing a particular protected characteristic are not subject to requirements which many of them cannot meet but which cannot be shown to be justified."**

105. At paragraph 28 she described a salient feature of indirect discrimination to be:

> **"It is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence … Statistical evidence is designed to shown correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link."**

106. At paragraph 30 Baroness Hale commented that:

> **"All the above salient features of the definition of indirect discrimination support the claimants' case that there is no need to prove the reason why the PCP in question puts or would put the affected group at a particular disadvantage."**

107. Baroness Hale then identified two main arguments of the Respondent. The second was that undeserving Claimants who have failed (in the **Essop** case) for reasons nothing to do with the disparate impact may coat tail upon the claims of the deserving ones. The Respondent's argument was that it must be open for the Respondent to show that the particular Claimant was not put at a disadvantage by the requirement by showing that there was no causal link between the PCP, the disadvantage suffered by the individual and the fact of his protected characteristic. For example, the Claimant failed because he did not prepare for the exam or such like reasons.

108. Baroness Hale stated that the answer to this conundrum was that a candidate, who failed for such reasons, was not in the same position as a candidate who diligently prepared, turned up at the right place at the right time and finished the tasks he was set. In such a situation "there would be a material difference between the circumstances relating to each case contrary to section 23(1)" so that the comparison would be invalid and the claim would fail.

109. Baroness Hale's decision is set out in paragraph 33 in the following terms:

> **"… In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual."**

110. The Respondents contend that, on the basis of Baroness Hale's judgment, there is imported a requirement that the protected characteristic, for example gender or race, explains the causal link between the PCP and the particular disadvantage. In the case of the Firefighters, it is common ground that the PCP is the requirement that Firefighters be of a certain age and the particular disadvantage is being excluded from the protected group. It is also common ground that there is a causal link between the two - the Claimants are at a particular disadvantage - excluded from the protected group - by reason of the PCP - that they must be of a certain age. Nonetheless, argue the Respondents, it must be open to them to show that causal link has nothing to do with the protected characteristic, whether gender or race, and, if they can, then the issue of objective justification does not arise.

111. The Respondents seek to derive support for this proposition by reference to the argument presented by the Respondent in **Essop**, that it must be open to the Respondent to show that the particular Claimant was not put at a disadvantage by the requirement, in which case there would be no causal link between the PCP and the disadvantage suffered by the individual. Baroness Hale indicates, at paragraph 33, that the way in which that issue is dealt with in the statute is that, if there is a material difference between the circumstances relating to the cases being compared, then, pursuant to section 23(1), the comparison relied on would be invalid and, accordingly, the claim would fail without the need to invoke the justification defence under section 19(2)(d).

112. Applying the approach of **Essop** and **Naeem** in the Supreme Court, there is a causal link in the case of Ms Sargeant (BME woman) between the PCP (requiring her to be of a certain age) and the particular disadvantage (not being entitled to be a member of the protected group). On the face of it, that is sufficient to ensure that the Respondents' defence can only be that of justification under section 19(2)(d).

113. If it were the case of a given individual that she was at a particular disadvantage when compared with men/non BME Firefighters to whom the PCP also applies, but there was a material difference in the circumstances of her case, then it would be open to a Respondent to establish a defence by virtue of section 23(1). In that way, as Baroness Hale explained, provision is made in the statutory scheme for the type of case described in **Essop**.

114. There is no evidence or suggestion in this case that Ms Sargeant's case is different in any material respect from the circumstances of any other person in the unprotected group who share either of her protective characteristics.

115. Accordingly, in the light of **Essop** and **Naeem** in the Supreme Court, the conclusion of the Employment Judge, at paragraph 129s and 131, that this case does not call for justification under section 19(2)(d) is wrong in law.

116. It therefore follows that the appeal in respect of the Employment Tribunal's findings on indirect race and sex discrimination must succeed. I have also concluded in the main section of this decision that the Employment Judge erred in law in deciding that the Respondents had demonstrated objective justification in respect of these claims. The appropriate course is to

remit the claims of indirect race and sex discrimination to the same/different tribunal for fresh/further consideration.