[2023] EWHC 527 (Admin)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/4288/2021
CO/4351/2021

10 March 2023

Before :

MR JUSTICE CHOUDHURY

- - - - - - - - - - - - - - - - - - - -

Between:

THE KING
on the application of
(1) FIRE BRIGADES UNION
(2) JOSHUA DUNN
(3) CHLOE REID

Claimants

-and-

(1) HIS MAJESTY'S TREASURY
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendants

THE KING
on the application of
THE BRITISH MEDICAL ASSOCATION

Claimant

-and-

(1) HIS MAJESTY'S TREASURY
(2) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendants

Andrew Short KC and Claire van Overdijk (instructed by Walker Solicitors) for the Claimants in CO/4288/2021
Fenella Morris KC and Jennifer Thelen (instructed by Capital Law Limited) for the Claimant in CO/4351/2021
Nigel Giffin KC, Richard O'Brien, Imogen Proud and Oliver Jackson (instructed by **Government Legal Department**) for the Defendants

Hearing dates: 31 January, 1, 2 and 3 February 2023

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JUDGMENT

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MR JUSTICE CHOUDHURY:

Introduction

1. The Fire Brigades Union Claimants ("**the FBU**")[1] and the British Medical Association ("**the BMA**") (together, "**the Claimants**"), as identified in paragraph 3 of this judgment, seek judicial review of the decision of HM Treasury ("**HMT**" or "**the Defendant**") to make statutory directions contained in the *Public Service Pensions (Valuation and Employer Costs Cap) (Amendment) Directions 2021* ("**the 2021 Directions**") pursuant to a powers in connection with a Cost Control Mechanism ("**CCM**") contained in the *Public Service Pensions Act 2013* ("**the 2013 Act**"). The CCM is a mechanism intended to control changes in costs of public pension schemes and operates by modifying members' benefits (and/or contributions to such schemes) should the measured cost of future pension provision deviate from a set target. The Claimants contend that the modification of the CCM in the relevant schemes by the 2021 Directions so as to include within the CCM the costs of implementing what has been called "**the McCloud Remedy**" following the decision in *Lord Chancellor v McCloud & Ors, Sargeant and Ors v Secretary of State for the Home Department and Ors* [2019] ICR 1489 ("***McCloud/Sargeant***") is unlawful in that, amongst other things, it is: (i) based on a misconstruction of the 2013 Act; (ii) in breach of legitimate expectation; and (iii) indirectly discriminatory. It is claimed that, as a result, scheme members have been denied increases in benefits and/or reductions in contributions that would otherwise have been implemented. Although the two claims raise different grounds (overlapping to some extent), they were ordered by Heather Williams J to be heard together.

2. The FBU is represented by Mr Short KC with Ms van Overdijk. The BMA is represented by Ms Morris KC with Ms Thelen. The Defendant is

[1] See list of abbreviations used at Annex 1.

represented in both claims by Mr Giffin KC with Ms Proud, Mr O'Brien and Mr Jackson. I am grateful to all Counsel for their helpful and comprehensive written and oral submissions.

Parties

3. The FBU is a trade union recognised for collective bargaining in the fire and rescue service throughout the United Kingdom. It has approximately 33,000 members. The Second and Third FBU Claimants, Joshua Dunn and Chloe Reid, are members of the Firefighters' Pension Scheme 2015 ("**the 2015 FFP Scheme**") created by the *Firefighters' Pension Scheme (England) Regulations 2014* as amended in particular by the *Firefighters' Pension Scheme (Amendment) Governance Regulations 2015* (together "**the 2015 Scheme Regulations**"). Mr Dunn was born in 1990 and is of white British ethnic origin. Ms Reid was born in 1988 and is of black Caribbean ethnic origin. They both claim to be directly affected by the CCM.

4. The BMA is a trade union and professional body for doctors and medical students in the UK. It has more than 160,000 members, the vast majority of whom are members of the NHS Pension Scheme ("**the NHS Scheme**") created by the National Health Service Pension Scheme Regulations ("**the 2015 NHS Scheme Regulations**").

5. The First Defendant in each claim, HMT, is responsible for making directions that specify how the pension schemes created under the 2013 Act (including the FFP Scheme and the NHS Scheme) must be actuarially valued, and for making directions that specify how the CCM operates. The Second Defendant in the FBU Claim, the Secretary of State for the Home Department, is the responsible authority for the FFP Scheme; and the Secretary of State for Health and Social Care is the responsible authority for the NHS Scheme; although no independent, separate unlawful act is alleged against either of them.

6. The outcome of these proceedings will affect the operation of the CCM as it applies to other public service pension schemes. The organisations representing the members of those other schemes are interested parties in

these claims as are the Ministers responsible for such schemes. These interested parties are named in Schedule 1 to the Claim Form and are not set out here.

Background

7. The background to the 2013 Act, the CCM and the 2021 Directions goes back to 2011 and the recommendations made in the report by the Independent Public Service Pensions Commission chaired by Lord Hutton ("**the Hutton Report**"). Both sides have sought to summarise that background for the Court: the Claimants in a "Joint Narrative and Chronology"; and the Defendants in their skeleton argument and in a statement from Mr Henry Elks, Deputy Director for Workforce, Pay and Pensions at HMT. Whilst both sides have sought, naturally, to give a favourable view of events, the following summary, derived from both of the parties' summaries, strives to be more neutral.

8. The relevant pension schemes are statutory schemes which provide pension benefits to workers across the public service on a "defined benefit" basis. The number of members across all such schemes runs into the millions, including several million active members (i.e. employees who are still engaged in pensionable employment, accruing benefit entitlements, and in respect of whom employer and employee contributions are being paid).

9. Most of these schemes, including those at issue in these claims, are "unfunded" or "pay as you go" schemes. Rather than contributions being paid into a fund which is invested, the authorities responsible for the schemes, and ultimately the Exchequer, meet any excess of costs over member and employer contributions in a given year (or receive any excess of contributions over costs). In broad terms, employer contributions meet around 70% of the cost required to cover both the cost of accruing benefits, and the cost of changes in the cost of accrued benefits. The rate of employee contributions (as a percentage of their pay) is fixed at any given time. What employers need to contribute is assessed on the basis of periodic actuarial valuations.

10. The cost of funding such pension provision is huge. Total employer

contributions, even in a single year, run into the tens of billions of pounds. The Hutton Report concluded that comprehensive reform of pension schemes was necessary to achieve:

> "…reforms that can balance the legitimate concerns of taxpayers about the present and future cost of pension commitments in the public sector as well as the wider need to ensure decent levels of retirement income for millions of people who have devoted their working lives in the service of the public."

11. The Hutton Report identified, amongst other matters, the need for a mechanism to manage the pressures on public service pension schemes and recommended that:

> "…ministers should set a clear cost ceiling for these new schemes going forward – I suggest the percentage of pensionable pay paid by the taxpayer – with automatic stabilisers built into their design to keep future costs under more effective control. These stabilisers will mean that scheme members might need to increase their contributions, or take a smaller pension, the choice should be the subject of discussion with staff but an automatic default must be agreed. This will allow a new framework of public service pensions to be established which will be much more resilient and better able to absorb the kind of shocks that have profoundly affected the viability of defined benefit schemes over the last few decades. It will also provide confidence to taxpayers that there will be firm limits set on how much they can be expected to contribute to public service pensions." (Hutton Report – Foreword)

12. A form of a cost control mechanism, with a fixed cost ceiling, was proposed to "*share cost and risk fairly*": Hutton Report – Ex.12. As to the costs and risks that should and should not be shared between employers and members, the Hutton Report stated:

> "2.24 Salary risk and longevity risk before retirement are areas where increases in the cost of pension provision benefit members at an individual level, whether that is through higher pension income or pension income paid for a longer period. As such it is the Commission's conclusion that it is reasonable for employers to share these risks with the members.
>
> 2.25 Conversely, increases in pension costs because of uncertain asset returns or high interest rates or inflation are generally areas where members individually have little control and do not benefit. Large employers, such as Government, have a better ability to bear these risks. For this reason, the Commission believes that these risks should

not be passed to the member."

13. The Hutton Report further recommended that the Government should establish a mechanism, namely a "cost ceiling", to manage future spending in the event that costs within new schemes increased due to factors not taken account of in the scheme design:

> "Ex.28 This measure [i.e. linking Normal Pension Age to State Pension Age – see Ex. 27] and the other design features proposed by the Commission should achieve much of the Commission's aim regarding sharing risks and costs fairly between employees and the Government. However, an additional safety valve, a cost ceiling based on the proportion of their total pensionable pay bill, is needed in case costs within the new schemes increase due to factors not taken account of in the scheme design. This will ensure that public service pensions remain affordable and sustainable.
>
> Ex.29 What is included within this cost ceiling is a matter for the Government to determine in consultation with employees and their representatives. However, if the ceiling is exceeded measures will need to be taken to bring costs back down below it. There should be a default stabilising mechanism that could take the form of an increase in employee contributions or a decrease in accrual rates which would automatically reduce costs if negotiations between employers and scheme members were unsuccessful."

The Hutton Report considered the effects of introducing reformed schemes on members near to retirement, stating that:

> "7.34 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. <u>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</u>." (Emphasis added)

14. The then Government accepted the recommendations in the Hutton Report as a basis for consultation with the public sector trade unions. Ultimately, the Government agreed to introduce a "cost floor" to match the cost ceiling.

15. On 30 June 2011, a submission from HMT and the Chief Secretary to HMT ("**CST**") was provided to the Chancellor on the creation of a cost ceiling mechanism. The submission recommended that a "fixed cost ceiling based on employer contribution rates should be used to cap taxpayer contributions". The submission proposed categorising costs as either "member" costs or "financial" costs. Member costs were "changes in actual or assumed longevity, earnings, careers or the age and sex mix of the membership". Financial costs were "changes in actual or assumed inflation and the discount rate". The submission noted that "there may be significant costs attached to any transitional arrangements that are put in place" and that "transitional costs may be temporary and as such difficult to include in any ongoing cost cap". No specific recommendation was made in this submission about transitional costs.

16. On 2 November 2011, HMT published a policy paper entitled "Public Service Pensions: Good Pensions that Last". This paper set out the Government's preferred design for the new schemes, which was intended to be the basis for further, scheme-specific discussions. That scheme design included a cost control mechanism, at that stage referred to as the "employer contribution cap". It also stated that protections would be provided to those within ten years of their retirement age as of 1 April 2012, but noted that scheme specific discussions needed to take place to determine the fairest way to achieve it, taking full account of equalities impacts and legislation.

17. On 14 December 2011, the CST (then Danny Alexander) wrote to the Trade Union Congress (the "**TUC**") General Secretary regarding public service pension reform. The letter explained that the Government proposed to introduce an employer cost cap, which "would provide backstop protection for the taxpayer, protecting them from highly exceptional and unanticipated events which very significantly increase scheme costs." The letter explained that "I intend that only changes to scheme costs due to 'member costs', such as a dramatic change in longevity and as defined by previous cap and share arrangements, would be controlled by the cap. Financial cost pressures, including changes to the discount rate, would be met by employers."

18. Scheme-specific designs were subsequently negotiated. On 20 December 2011, Heads of Agreements were published for the NHS, local government, civil service and teachers' schemes. On 9 February 2012, the Heads of Agreement for the FFP Scheme were published.

19. On 18 September 2012, the TUC General Secretary, Brendan Barber, wrote to the CST, acknowledging that the stated expectation of Government was that the CCM would only be triggered in exceptional circumstances, as part of a guarantee given that the "schemes should not face further significant reform within the next 25 years." Concerns were also raised about the inclusion within the CCM of costs arising from pre-2015 pensioner and deferred members.

20. In September 2012, the Public Service Pensions Bill ("**the Bill**") was introduced.

21. In November 2012, HMT published two policy documents dealing with the proposed cost cap.

    a. The first, entitled "Establishing an employer cost cap in public service pension schemes" (the **"First November 2012 policy**"), stated that in response to the recommendation in the Hutton Report:

    > "The Government intends to take forward this recommendation by putting in place an employer cost cap in the new public service schemes. This will provide backstop protection to the taxpayer, to ensure that risks associated with pension provision are shared between employers and scheme members. The Public Service Pensions Bill provides the necessary legislative framework for this cap to operate.
    >
    > …
    >
    > The cost cap will control all of the cost risks associated with the new pensions schemes, and the risks associated with active members who have service in the existing, pre-reform schemes (including those with transitional protection). Changes in costs which arise from technical or financial changes will not affect the cost cap. Only those which directly relate to members – such as changing expectations about life expectancy, salary growth, or career paths – will be included in the cap mechanism."

b. The second policy document, entitled "Actuarial valuations of public service pension schemes" (the "**Second November 2012 policy**"), contained further detail about the CCM including as to the distinction between "member" costs and "employer" (previously "financial") costs. It provided:

> "1.6 For the unfunded schemes, the initial level of the employer cost cap will be set with reference to the 2012 scheme valuations, with subsequent valuations being used to measure future costs against this cap. If valuations show that there have been unexpected changes in costs, action will be taken to mitigate these. This may be via an adjustment to the benefits accruing in respect of future service, an adjustment to member contributions, or via some other means.
>
> 1.7 Given the potential impact on members, it is crucial that the approach taken to scheme valuations is transparent and consistent between schemes. Directions will provide details that will allow for this – such as establishing the outputs of the valuation process and when the valuations are to be carried out."
>
> …
>
> 1.9 The Bill specifies that the Treasury will consult the Government Actuary before making these directions to ensure that they meet actuarial standards. The Treasury will also involve other stakeholders, such as public service employers, scheme actuaries and trade unions, when considering the approach to valuations. This will ensure that directions reflect individual scheme circumstances and economic and demographic changes.
>
> …
>
> 1.16 Many of the assumptions that must be made to carry out a valuation relate to the profile of scheme members – for example the expectation about their life expectancy, growth in salaries, or career paths. These will be defined as "member costs". Other decisions and assumptions that must be made to carry out a valuation are financial or technical in nature – for example the discount rate that is used to assess the present costs of future benefits, or the actuarial methodology to be used. These will be defined as "employer costs."
>
> 1.17 The Government has stated that adjustments will only be made via the cost cap mechanism if there have been changes in the "member costs". Changes in costs that arise solely from changes in "employer costs" will not be controlled by the employer cost cap and will not trigger changes in member contributions or benefits. Public service employers, and ultimately the Exchequer, will bear the risk of changes in these costs.

…

1.19 The employer cost cap will control the past and future cost risks associated with:

- active members of the new schemes, including any service they have in the existing schemes;

- deferred and pensioner members of the new schemes; and

- transitionally protected members of the old schemes."

Public Service Pensions Act 2013

22. The Bill became the 2013 Act, which received royal assent in April 2013. The 2013 Act provided for the establishment of reformed pension schemes, the closure of legacy schemes (but with accrued rights protected), and for the introduction of the CCM.

23. The Employer Cost Cap is dealt with in s.12 of the 2013 Act. Section 12(5) requires HMT to make regulations making provision requiring the cost of a scheme (and any connected scheme – i.e. any legacy scheme) to remain within specified margins on either side of the employer cost cap and for the procedure to be followed to bring the cost back to the target cost if those margins are exceeded. The relevant provisions of the 2013 Act are considered in more detail below.

The CCM

24. The CCM was designed to work as follows:

    a. Scheme regulations for each scheme would set a percentage rate of pensionable earnings, against which changes in the cost of the scheme (established by periodic actuarial valuations carried out, pursuant to HMT directions, under a common framework for all schemes) would be measured. HMT regulations would set the permissible margins either side of this percentage rate, and if the margins were exceeded (a "floor breach" if the cost was lower, and a "ceiling breach" if it was higher), steps would be taken to bring the cost back to the target cost as specified in HMT regulations, in particular through changes either to benefits or to member contributions.

b. The 2015 Scheme Regulations set an "employer cost cap" to be expressed as a percentage of pensionable earnings of members of the scheme.

c. The relevant regulations, the *Public Service Pensions (Employer Cost Cap) Regulations 2014* (the **"2014 Regulations**") set the relevant cost control range at 2%: if costs assessed at a scheme valuation are found to exceed a 2% margin above or below the employer cost cap, costs in the scheme must be rectified by being brought back to the target cost: Reg 3 of the 2014 Regulations.

d. For example, the relevant scheme regulations set the employer cost cap for the 2015 NHS Scheme at 11.6% of members' pensionable earnings (Reg.8) and for the FFP Scheme at 16.8% (Reg 150A(1)).

e. If, following valuation, the costs of the scheme fall outside the acceptable 2% margins, the Secretary of State must be notified, who must in turn request that the Scheme Advisory Board (the "**SAB**") consider the matter and give advice to the Secretary of State as to the means by which the target cost is to be achieved. The Secretary of State must consider the advice and seek to reach agreement with the SAB as to how the target cost would be achieved. Where no agreement is reached, the Secretary of State must change the rate at which pension benefits accrue in order to achieve the target cost.

2014 Directions

25. In 2013, HMT consulted on the first directions (under s.11 of the 2013 Act) with the Government Actuary's Department (the "**GAD**"), the TUC and other employee representatives.

26. On 11 March 2014, HMT made the 2014 Directions. The "essential function" of the 2014 Directions is said (by Mr Elks on behalf of the Defendant) to be "to specify which inputs are to be used in the valuation of the public service schemes, and the actuarial methodology which is to be used to combine these inputs so as to determine the cost of the scheme".

27. Also in March 2014, HMT published the "*Public Service Pensions: Actuarial valuations and the employer cost cap mechanism*" (the "**2014 Guidance**"). The 2014 Guidance:

a. Provided that future service costs would be calculated ignoring the effect of accruals that members may have in the existing schemes and the cost of providing transitional protection to those members entitled to it. Instead, the cost of their accrual would be calculated on the assumption that they were accruing benefits in the reformed scheme. This assumption was made in order to avoid distorting the cap by the transitional effect. (See paragraphs 2.19 and 4.67 of the 2014 Guidance.)

b. Explained the distinction between "member costs" and "employer costs" thus:

> "2.31 Many of the assumptions that must be made to carry out a valuation relate to the profile of scheme members – for example the expectations about their life expectancy, growth in salaries, or career paths. For the purpose of the operation of the cost cap, these will be defined as "member costs". Other decisions and assumptions that must be made to carry out a valuation are financial or technical in nature – these will be defined as "employer costs".
>
> 2.32 The government has stated that the cost cap mechanism will only capture changes in costs arising from changes in the "member costs". Changes in costs that arise solely from changes in "employer costs" will not be captured by the employer cost cap and will not trigger changes in member contributions or future benefit accruals. Public service employers, and ultimately the Exchequer, will bear the risks of changes in "employer costs".

c. Recognised that there may be future unexpected costs which may need to be factored into the CCM:

> "2.36 The government will set the cap to take account of expected changes in future scheme costs. However, there may be future changes in scheme costs which the government may not wish to affect members via the cost cap mechanism, even though they are unexpected. For example, improvements in scheme data may lead to changes in the costs of the schemes as measured by the valuations. Similarly, there may be one-off shifts in the costs of the schemes.
>
> 2.37 There may also be some potential changes in scheme costs which

cannot be easily quantified at the preliminary valuation. For example, increases in the State Pension age may lead to an increase in the average age of the public service workforces. All things being equal, this would lead to a rise in scheme costs. However, there is no way of accurately forecasting the potential impact of such changes at this stage.

2.38 Any decisions about whether such changes should feed through to the employer cost cap mechanism, and therefore to scheme members, will need to be taken on a case-by-case basis. If, at a future valuation, it can be demonstrated that the cost cap mechanism has been affected by such a change, the government will need to decide how this should be taken into account in that mechanism. In making such a decision, the government will need to balance the interests of scheme members against the need to protect the taxpayer and ensure that the costs to employers remain sustainable. If any adjustments are made, these may be via an adjustment to the level of the cap, to the valuation process, or by some other means.

2.39 In addition, some of the valuation assumptions which are specified in the Directions are likely to become out of date as new data becomes available ... These elements of the Directions will need to be updated to ensure that the most appropriate assumptions are used at future valuations, and to take account of any new evidence which may impact on the costs of the schemes as measured by the valuations. Similarly, as the programme of reform of public body pension schemes progresses it may also be necessary to amend the Directions to cover any specific circumstances relating to the valuations of those schemes.

2.40 For these reasons, the Treasury will keep the Directions under review after they have been made. This will ensure that they continue to reflect Treasury policy, and also ensure that they take into account any future developments that are relevant to public service pension scheme cost measurement and control, such as the release of new data or changes in assumptions. It is anticipated that such reviews will take place before each round of scheme valuations.

2.41 The government will discuss any potential changes of this nature with stakeholders, and consult the Government Actuary, before any final decisions are made." (Emphasis added)

d. Recognised that changes to scheme regulations to adjust benefits accruing in respect of future service, and/or adjustments to member contributions, may have an impact on particular groups, and stated that "Any potential impacts will be considered at a scheme level when decisions are taken on those outcomes": 1.14 of the 2014 Guidance.

Implementation

28. On 1 April 2015, the reformed public service pension schemes came into force along with the main relevant provisions of the 2013 Act, including the CCM. Central to the operation of the CCM was a process of scheme valuation, which was also required for the setting of employer contribution rates for the following 4-year period.

29. The 2014 Directions stipulated an initial "preliminary" valuation of each scheme, on the basis of which the employer cost cap would be calculated. This was to be followed by a "first" scheme valuation with an effective ("as at") date of 31 March 2016, with further subsequent valuations on a quadrennial basis thereafter. The 2014 Directions dealt with required inputs and assumptions, methodology for determining scheme cost, and process and contemplated that the 2012 and 2016 (and subsequent) valuations would be used for both of the purposes identified above, i.e. both for the CCM purpose of determining the employer cost cap or comparing it with scheme costs, and for the purpose of determining employer contribution rates.

30. The preliminary valuations for the various schemes were carried out in 2014 and 2015 on the basis of an "as at" date of 31 March 2012, so that the scheme regulations establishing the reformed schemes could specify an employer cost cap percentage rate as required.

31. Work on the 2016 valuations (the so-called "first" valuations for CCM purposes) began in 2016. By October 2017, it was clear that there were expected to be floor breaches across the public sector pension schemes, primarily because of public sector wage restraint, life expectancy having improved less quickly than was expected, and more people having commuted more pension than had been anticipated. GAD informed HMT of this and set out minor adjustments to be made to finalise the valuations. GAD also questioned, with HMT, whether, given the floor breaches at the first evaluation, the CCM was operating as intended.

32. In response to the query whether the CCM was operating as intended, on 5

December 2017 a submission to the CST (then Liz Truss) recommended consulting on excluding past service costs on the basis that "the mechanism, as currently designed, risks creating intergenerational unfairness and undesirable volatility in pension scheme benefits for active members". A further submission recommending consulting on changes to the CCM was made on 19 December 2017. Ultimately, a 24 January 2018 submission confirmed that the CST did not want to proceed with fundamental changes to the CCM.

McCloud/Sargeant

33. It is relevant to mention the *McCloud/Sargeant* litigation at this point, which had by then commenced. Notwithstanding the concerns expressed in the Hutton Report as to the age discrimination consequences of providing protection for those on legacy schemes close to retirement, the 2013 Act provided for transitional protection when the legacy schemes closed on 1 April 2015. Specifically, the transitional protection was that members who, on 1 April 2012, had less than a specified period of time left before their normal pension age would be able to continue in active membership of the legacy scheme. But some individuals who were further away from retirement and thus typically younger (which in some cases also made them part of a cohort with a different gender or ethnic composition), challenged the transitional protection arrangements as being unlawfully discriminatory. The first tribunal decisions in early 2017 went different ways, but the claimants, to a large extent, succeeded in the EAT in January 2018, and then succeeded more completely in the Court of Appeal in December 2018. Fundamentally, the courts held that the aim of providing protection (or greater protection) for those closer to retirement was not, on the evidence, a legitimate one.

34. On 26 February 2018, another submission was prepared, recommending suspension of the 2016 valuations until the outcome of the *McCloud* litigation was known due to the uncertainty it was said to create. However, that recommendation was rejected, and on 18 April 2018, the Chancellor wrote to the Prime Minister, recommending that the CCM be implemented, as it stood,

thus giving effect to the floor breaches, whilst in parallel considering reform to the CCM. The reason for this was as follows:

> "[A]ny move to revisit the cost cap design now – when initial results show members are due significant improvements to the generosity of their pensions under the framework – would be controversial and could present industrial relations and Parliamentary risks, together with a likelihood of legal challenge. Equally, any attempt to postpone the process, which could arguably be justified by uncertainty arising from pre-existing legal cases, could present similar risks. ... Having considered the issues in the round, I am reluctantly of the view that we should let the mechanism run in its current form and implement these valuation results from April 2019, whilst in parallel exploring options for long term reform."

35. In June 2018, a further submission to the CST was provided, which included a proposal "to allow the current cost control mechanism to run, and for departments to take steps to remedy cost cap breaches via improvements to pension benefits." On 6 September 2018, a Written Ministerial Statement ("**WMS**") confirmed that the initial results showed a floor breach of the CCM. On the same day, draft *Public Service Pensions (Valuations and Employer Cost Cap) (Amendment) Directions 2018* (the "**2018 Directions**") were published, setting out how schemes should complete the CCM element of the 2016 valuations.

36. Over the next few weeks, provisional floor breaches were confirmed in respect of most schemes including the NHS and FFP Schemes. For example, on 13 September 2018, the GAD wrote to the Department for Health and Social Care (the "**DHSC**") providing the provisional results for the NHS Scheme as at 31 March 2016, based on the draft directions. The GAD explained that, as things currently stood, the cost cap cost would be 3.2% lower than the employer cost cap set out at the 2012 valuation and therefore would exceed the 2% CCM margin. For the FBU, the gap was 5.2% of pensionable payroll. Recommendations were made by the relevant SABs during consultation as to the steps to be taken to remedy the floor breaches.

37. On 20 December 2018, the Court of Appeal held in *McCloud/Sargeant* that the age-based restriction of transitional protections gave rise to unlawful age discrimination in both cases.

38. On 11 January 2019, a submission was prepared for the Chancellor and the CST recommending suspension of the valuations of public service pension schemes due to the ongoing uncertainty arising out of the *McCloud/Sargeant* litigation. This submission stated:

> "…[y]ou have previously given a steer that the costs of complying with the Court ruling should be borne by employees rather than taxpayers, ie through less generous pension arrangements in the future. There are a number of ways in which this could be achieved, ranging from just reinstating a slightly amended form of the 2015 schemes through to more fundamental changes. We will set out the options in detail in further advice. It is likely to be possible to implement your objective under the existing legislative framework without the need for further primary legislation."

CCM Pause

39. On 30 January 2019, Government made a WMS announcing that it was pausing the CCM (but not the employer contribution rate elements) of the 2016 valuations process. *The Public Service (Valuations and Employer Cost Cap) (Amendment and Savings) Directions 2019* (the "**2019 Pause Directions**") were made. The effect of the 2019 Pause Directions was that the valuation process continued for one of the two purposes already mentioned (the setting of employer contributions), but was paused for the other purpose (the CCM purpose of comparing costs with the employer cost cap). The Government at that stage considered that it was not possible to make any sensible assessment of the cost of remedying the discrimination in *McCloud/Sargeant* (the "**McCloud remedy costs**" or the "**MRC**"), and decided that the CCM process could not be operated with sufficient certainty. The making of the 2019 Pause Directions enabled valuation reports to be signed off shortly afterwards.

Remedying McCloud

40. On 6 March 2019, the HMT Pension Board considered how to address *McCloud/Sargeant*. The Board Paper said that the costs of *McCloud/Sargeant* could be passed to members via the CCM. It was also represented that this would have the benefit of removing floor breaches, without the Government having to modify the CCM to achieve that effect.

41. On 1 April 2019, the HMT Pension Board met again to discuss *McCloud/Sargeant*. Two policy options were set out for addressing the *McCloud* remedy, one of which was to include the MRC in the CCM.

42. On 27 June 2019, the Supreme Court refused permission to appeal against the Court of Appeal's decision.

43. Slides prepared for a 10 September 2019 meeting of the HMT Pensions Board set out four options to address the MRC: (1) implement cost cap with improvements in addition to remedy; (2) amend the CCM to include remedy; (3) reset target costs; and (4) reduce generosity by reducing accrual rates. Option (3) was recommended, with option (2) as a fall back if ministers considered that option (3) was undeliverable.

44. On 17 April 2019, a submission to the CST (then Steve Barclay) was prepared which specifically considered "who should bear the £4bn costs of remedy: taxpayer or scheme members (via CCM)." The recommendation was that scheme members should bear the remedy costs. The submission stated:

> "3. There is a strong case that scheme members should bear the costs of McCloud remedy, rather than employers. When the mechanism was designed, we agreed it would only consider "member costs", such as life expectancy assumptions. Whilst the past service costs of transitionally protected members were included, future service costs of transitional protection were not, based on the assumption that these members would rapidly diminish in proportion. The McCloud judgment disproves that.
>
> 4. The Government, in its policy statement in 2014, noted the possibility of unforeseen future changes in costs, and set out that decisions about whether such changes should feed through the mechanism would be taken on a case-by- case basis, balancing the interests of members against the need to protect the taxpayer and ensuring that the costs to employers remain sustainable. McCloud remedy <u>clearly fits into the category of member costs</u>, and so balancing the interests of members and other taxpayers, we recommend that members bear the costs of McCloud". (Emphasis added)

45. On 23 April 2020, the CST agreed with the recommendation and reached what has been described by the Defendant as an "in principle" decision to include the MR as a member cost. However, the CST also "thought there was

an international fairness aspect that needs consideration."

Challenge to the Pause – First JR proceedings

46. On 20 April 2020 the FBU brought a claim for judicial review challenging the Government for failing to lift the pause on the operation of the CCM and failing to implement the benefit improvements that should have been made following the 2016 valuations (the "**First JR**"). The BMA filed Summary Grounds as an interested party in those proceedings. Following the announcement in July 2020 (explained below) that the pause would be lifted, the proceedings were stayed by consent until "such time that the First Defendant publishes new directions setting out how the judgment in *McCloud / Sargeant* will be reflected in the costs control element of the valuation process." Once the 2021 Directions were made on 7 October 2021, the FBU had 28 days in which to file and serve amendments to its statement of facts and grounds. The FBU confirmed it did not wish to make any amendments, and would be issuing new proceedings. In her order dated 4 July 2022 granting permission in these claims, Heather Williams J continued the stay on the earlier proceedings.

Lifting the Pause

47. On 16 July 2020, HMT announced that it would lift the pause on the CCM element of the 2016 public service pension valuation. The relevant WMS stated:

> "When the mechanism was established, it was agreed that it would consider 'member costs', i.e. costs that affect the value of schemes to members. As the proposals in the consultation today will increase the value of schemes to members, this falls into the 'member cost category."

48. On the same day, HMT launched a consultation on the McCloud remedy. Two proposals were outlined – 'immediate choice' or 'deferred choice underpin'– for addressing the unlawful discrimination arising from the transitional protections. Both would have enabled affected members, whether they originally received transitional protection or not, to decide whether to take legacy or reformed scheme benefits for the period 1 April 2015 to 31 March

2022.

49. Under the 'immediate choice' approach, members would make their decision about which benefits to receive in the year or two after 2022 (which might be many years before their retirement). Under the 'deferred choice underpin', a member would not have to make this decision until the point at which they retired or took their pension benefits. Until that deferred choice was made, all relevant members would be deemed to have accrued benefits in the legacy scheme, rather than the reformed scheme, for the remedy period.

50. An Equality Impact Assessment was published, dealing with the McCloud remedy and the choice between immediate choice and deferred choice underpin, but not specifically the impact of including the costs of those proposals in the CCM.

51. On 27 July 2020 a submission to the CST recommended that changes should be made to the 2014 Directions to capture the majority of remedy costs, including: costs for all years of the remedy period; paying for those costs over a four-year spreading period, and revisiting valuation assumptions only where behavioural change resulting from remedy was anticipated. The submission stated:

> "The proposed re-stated cost-cap mechanism simply adds the new remedy costs to the previous provisional cost cap results. This means there are some technical inconsistencies between how these figures are calculated. For example, as previously mentioned, using a 4-year spreading period is a different approach to the spreading period for the previous provisional valuation results. This is however justified as previously explained. This could be argued to undermine the narrative that McCloud remedy is something that should be captured anyway, rather than needing to be imposed on top. We are able to justify this, though, as the McCloud judgment was unforeseen, and the design could have never considered it. By its nature though, it falls into the category of "member cost" and it is reasonable to therefore take it into consideration in this way."

52. That submission was agreed by the CST.

Consultation on McCloud Remedy

53. As stated above, the Government embarked on a consultation on 16 July

2020 on the form of the McCloud remedy. That consultation did not formally include the treatment of those costs as part of the CCM. Nonetheless, this continued to be raised by the unions as a "key concern" and featured in discussions.

54. The BMA stated:

> "We have stressed that this cost is a direct result of the unlawful age discrimination imposed by the government and was not the fault of the scheme members. It is essential therefore that the costs of this remedy are borne directly by government and that employee contribution rates, accrual rates and overall pension benefits are not adversely impacted by your proposed remedy."

55. Consultees also noted that a "one-size fits all" approach to equalities assessment was flawed. For example, the GMB explained:

> "For example, the NHS workforce is predominantly female (77%) whereas the Consultant demographic is older, whiter and male. The BAME community make up almost 21% of the NHS workforce.
>
> In the Civil Service women are just over 50% of the workforce and just 12.7% of the Civil Service workforce are from BAME communities.
>
> Given the distinct make up of just these two areas of public service the government should set out detailed sector specific approaches to addressing the equalities impact of its choice proposal."

56. That consultation closed on 11 October 2020.

57. On 19 November 2020, a submission was made to the CST which recommended that any ceiling breaches arising from the 2016 valuations should be waived, but that any floor breaches should be rectified. The CST agreed to these recommendations on 3 December 2020.

58. On 4 February 2021, the Government announced that the McCloud remedy would be deferred choice underpin. This meant that "all individuals who were members of, or were eligible to be members of, a legacy scheme immediately prior to 1 April 2012, and have a period of service after 31 March 2015 during which they were members of a legacy or reformed scheme, will be given such a choice where those periods of service are

continuous (including those with a qualifying break in service of less than 5 years).” That month, the response to the consultation was also published. The Government announced that these changes would be implemented through primary legislation.

59. On 4 October 2021, the response to the consultation on the CCM was published. The consultation response announced, amongst other matters, that a wider margin against target (+/- 3%) for the CCM would be introduced.

Equalities Assessment

60. On 5 October 2021, an equalities impact assessment entitled “PSED Assessment for the amending directions to unpause the cost control mechanism and reflect the increased value of public service pensions as a result of the *McCloud* and *Sargeant* judgments in the completion of the cost control element of the 2016 valuations” (the “**PSED analysis**”), was completed. It considered the impact of including the MRC in the CCM. The PSED analysis was not scheme-specific.

61. The PSED analysis recognised that “member’s (sic) benefits will either be unchanged or lower than their benefits would have been had the 2016 cost control valuations been completed without allowing for McCloud remedy and any subsequent rectification been carried out on that basis.” It recorded that the members who will be adversely affected, through lower benefits, include those who are not eligible for the McCloud remedy. These were likely to be younger members and more likely to be female and/or have other protected characteristics.

62. The PSED analysis concluded that this approach was “fair and proportionate” because:

> “○ the Government is required to provide McCloud Remedy
>
> ○ it is necessary to ensure the subsequent uplift in the value of members’ benefits is subject to cost control to protect taxpayers; and
>
> ○ all cost-sharing mechanisms will entail the possibility that members’ benefits may be affected by costs associated with other cohorts.”

63. Also on 5 October 2021, HMT wrote to the Government Actuary to ask for his professional opinion on the proposed 2021 Directions, as required by s.11(4) of the 2013 Act. Paragraph 4 of the HMT letter provides:

> "In deciding how to allow for Remedy in the cost control element of the 2016 valuations, the Government has the following policy intentions:
>
> a. to reflect the entire impact of Remedy on the cost cap cost of a scheme at this set of valuations, because the Remedy period ends by the end of the implementation period for this set of valuations.
>
> b. that Remedy should be subject to cost control through the operation of the CCM. The required changes to the cost control element of the 2016 valuation process should not unduly reduce intergenerational fairness.
>
> c. to revisit assumptions made in completing the employer contribution rate element of the 2016 valuations only to the extent required to properly reflect the Remedy, with no changes being made to the calculation of other elements of the cost of a scheme as assessed for cost control purposes.
>
> d. to aim for a "best estimate" calculation of Remedy costs, in line with the 'no bias' objective referred to in paragraph [10(b)] of this letter."

64. In a 6 October 2021 report entitled the "Actuarial Analysis of Equality Impacts" (the "**Actuarial Equalities Report**"), the GAD considered the effect that including the MRC in the CCM would have on members' benefits.

2021 Directions

65. The 2021 Directions were made on 7 October 2021. It is these that are the subject of challenge. The 2021 Directions, which amend the 2014 Directions, have the effect of:

    a. lifting the pause on the CCM, allowing schemes to complete the 2016 valuations; and

    b. setting out a method of valuation which includes the MRC in the CCM. Specifically, the 2021 Directions provide that, in completing the 2016 valuations, schemes should use the same costs as those that were calculated prior to the *McCloud/Sargeant* litigation and the pause of the

2016 cost control valuations, plus the expected cost of the McCloud remedy.

66. These amendments meant that there were no longer any floor breaches and that the accrual rate of benefits from 1 April 2019 onwards was not (in the absence of a reduction in member contributions) increased.

67. On 29 October 2021, the FBU sent a pre-action letter, setting out this challenge. The BMA's pre-action protocol letter followed on 12 November 2021. These claims were issued on 15 December 2021 (FBU) and 21 December 2021 (BMA).

Legislative Framework

68. Section 1 of the 2013 Act provides that:

> "Regulations may establish schemes for the payment of pensions and other benefits to or in respect of persons specified in subsection (2)"

69. The persons so specified include health service and fire and rescue workers for England, Wales and Scotland.

70. Section 11 of the 2013 Act deals with Valuations. So far as relevant, it provides:

> "11 Valuations
>
> (1) Scheme regulations for a scheme under section 1 which is a defined benefits scheme must provide for actuarial valuations to be made of—
>
> > (a) the scheme, and
> >
> > (b) any statutory pension scheme that is connected with it.
>
> …
>
> (2) Such a valuation is to be carried out in accordance with Treasury directions.
>
> (3) Treasury directions under subsection (2) may in particular specify—
>
> > (a) how and when a valuation is to be carried out;

(b) the time in relation to which a valuation is to be carried out;

(c) the data, methodology and assumptions to be used in a valuation;

(d) the matters to be covered by a valuation;

(e) where a scheme under section 1 and another statutory pension scheme are connected, whether the schemes are to be valued separately or together (and if together, how);

(f) the period within which any changes to the employer contribution rate under a scheme under section 1 must take effect following a valuation.

(4) Treasury directions under subsection (2), and variations and revocations of such directions, may only be made after the Treasury has consulted the Government Actuary.

…"

71. A "scheme under section 1" within the meaning of subsection (1) is a new or reformed scheme, whereas "any statutory pension scheme that is connected with it" is a reference to the legacy schemes.

72. Section 12 of the 2013 Act contains the principal powers and duties in respect of the Employer Cost Cap. So far as relevant, it provided (in the version in force until 10 March 2022):

"12 Employer cost cap

(1) Scheme regulations for a scheme under section 1 which is a defined benefits scheme must set a rate, expressed as a percentage of pensionable earnings of members of the scheme, to be used for the purpose of measuring changes in the cost of the scheme.

(2) In this section, the rate set under subsection (1) is called the *"employer cost cap"* .

(3) The employer cost cap is to be set in accordance with Treasury directions.

(4) Treasury directions may in particular specify—

(a) how the first valuation under section 11 of a scheme under section 1 is to be taken into account in setting the cap;

(b) the costs, or changes in costs, that are to be taken into account on subsequent valuations of a scheme under section 1

for the purposes of measuring changes in the cost of the scheme against the cap;

(c) the extent to which costs or changes in the costs of any statutory pension scheme which is connected with a scheme under section 1 are to be taken into account for the purposes of this section.

(5) Treasury regulations must make—

(a) provision requiring the cost of a scheme (and any connected scheme) to remain within specified margins either side of the employer cost cap, and

(b) for cases where the cost of a scheme would otherwise go beyond either of those margins, provision specifying a target cost within the margins.

(6) For cases where the cost of the scheme would otherwise go beyond the margins, scheme regulations may provide for—

(a) a procedure for the responsible authority, the scheme manager (if different), employers and members (or representatives of employers and members) to reach agreement on the steps required to achieve the target cost for the scheme, and

(b) the steps to be taken for that purpose if agreement is not reached under that procedure.

(7) The steps referred to in subsection (6) may include the increase or decrease of members' benefits or contributions.

…

73. Section 12 thus requires there to be regulations setting a rate (the employer cost cap) for the purposes of measuring changes in the cost of the scheme (subsection (1)), the "scheme" here being one under s.1, i.e. a new or reformed scheme as opposed to a legacy scheme. The employer cost cap is to be set in accordance with directions which may specify the "costs or changes in costs" that are to be taken into account on subsequent valuations of a new or reformed scheme for such purposes, and the "extent to which costs or changes in the costs" of any legacy scheme are to be taken into account for those purposes. Subsection (5) requires that the regulations make provision for the costs of a new or reformed scheme and any legacy scheme to remain within specified margins.

74. The 2014 Regulations were made pursuant to the power under s.12(5) of the 2013 Act. By Reg 2, 2014 Regulations, a "relevant scheme" means a "defined benefits scheme (and any connected scheme) to which section 12 of the [2013 Act] applies". Reg 3 provided (at the time) that the cost of the relevant scheme was to remain within a margin of ±2% of the employer cost cap. Reg 4 provides that for cases where the cost of a relevant scheme exceeds or falls below the ±2% margin the target cost (see s.12(5)(b) of the 2013 Act) will be the same as the employer cost cap of the scheme.

75. The employer cost cap for the 2015 NHS Scheme Regulations was 16.8% (Reg 150A) whereas the employer cost cap under the NHS Regulations 2015 was 11.6% (Reg 8). Thus (at that time) the cost ceiling for each scheme was 18.8% and 13.6% respectively, and the cost floor was 14.8% and 9.6% respectively.

76. Reg 150A of the 2015 Scheme Regulations further provides:

> "(1) The employer cost cap for this scheme is 16.8% of pensionable earnings of members of this scheme.
>
> (2) Where the cost of this scheme, calculated following a valuation in accordance with Treasury directions under section 11 of the 2013 Act is more than the margins specified in regulations made under section 12(5) of the 2013 Act 2 ("the Cost Cap Regulations") above or below the employer cost cap, the Secretary of State must follow the procedure specified in paragraph (3) for reaching agreement with scheme managers, employers and members (or representatives of employers and members) as to the steps required to achieve the target cost specified in the Cost Cap Regulations.
>
> (3) The procedure specified for the purposes of section 12(6)(a) of the 2013 Act is consultation for such period as the Secretary of State considers appropriate with the Firefighters' Pension Scheme Advisory Board with a view to reaching an agreement endorsed by all members of that Board.
>
> (4) If, following such consultation, agreement is not reached within 3 months of the date on which the consultation period ends, the Secretary of State must take steps to adjust the rate at which benefits accrue under regulation 34 (amount of pension for a scheme year) so that the target cost for this scheme is achieved. (Emphasis added)

77. Reg 150A(2) therefore mandates a period of consultation with the Firefighters' SAB as to the steps to be taken to achieve the target cost in the

event of a floor or ceiling breach.

The 2014 Directions as amended on 24 November 2018

78. By Direction 3(1), a reference in Part 2 of the 2014 Directions to a "scheme" is to a scheme "made under section 1 of the 2013 Act and any connected scheme, valued together as if they were a single scheme".

79. Direction 6(1) provides that the first valuation of a scheme (i.e. the first valuation after the preliminary valuation as at 31 March 2012) must have an "effective date", and that for the schemes in question that date was "31 March 2016".

80. Direction 7 provides that the implementation date must be a date no more than three years and one day after the effective date, and by Direction 8, the implementation period is 4 years from the implementation date.

81. Direction 13 requires the scheme actuary to calculate contribution rates and the cost cap past service cost (see Direction 41) on the assumption that the contribution rates will be payable for 15 years from the dates indicated in the 2014 Directions.

82. Directions 14 to 18 set out various assumptions to be made by the scheme actuary and Direction 21 stipulates what the valuation report must include. Direction 22 provides that such report must also contain, amongst other matters, a statement of the employer contribution rate.

83. Directions 30 to 43 deal with the cost cap cost of the scheme, and contain, amongst other matters, formulae for the calculation of the cost cap liabilities, cost cap future service and past service costs, and the cost cap cost of the scheme. By Direction 42 the cost cap cost of the scheme must be calculated as:

> ((A+B) - C) - D
>
> where—
>
> A is the cost cap future service cost, calculated in accordance with direction 40;

B is the cost cap past service cost calculated in accordance with direction 41;

C is the cost cap contribution yield calculated in accordance with direction 31;

D is the cost cap difference calculated in accordance with direction 42A.

84. The cost cap future service cost is calculated on the basis that all benefits are accrued under the new scheme (Direction 40).

85. Direction 43 (Cost Cap Analysis) provides:

"The valuation report must state, to the nearest 0.1% of pensionable payroll—

(a) the difference between the employer cost cap and the cost cap cost of the scheme; and

(b) an analysis of the difference between the employer cost cap and the cost cap cost of the scheme, identifying and quantifying any noticeable differences caused by—

i. a change in the average age of members;

ii. a change in the average normal pension age of members (whether resulting from a change in state pension age or otherwise);

iii. a change in the expected member contribution yield; and

iv. scheme experience or a change in assumptions relating to—

aa. new entrant profiles

bb. mortality rates;

cc. rates of age retirement;

dd. rates of early and late retirements;

ee. rates and severity of ill health retirements;

ff. resignations and opt outs;

gg. rates of rejoining service;

hh. general earnings growth until 31st March 2019;

ii. promotional earnings increases;

jj. members dependants;

kk. take up of commutation options; and

ll. any other relevant reason."

86. Part 3 of the 2014 Directions deals with the Employer Cost Cap in more detail. Direction 53 provides:

> "The valuation report for the preliminary valuation produced in accordance with direction 50(g) must state to the nearest 0.1% of pensionable payroll, the proposed employer cost cap, being—
>
> A-B
>
> where—
>
> A is the contribution rate required to cover the expected cost of benefits accrued by members of the relevant old scheme during the implementation period; and
>
> B is the contribution yield expected from normal member contributions to the relevant old scheme during the implementation period."

87. Direction 53(6) provides:

> "For the purpose of calculating A in paragraph (1), the expected cost of benefits accrued by members of the relevant old scheme during the implementation period should be determined as if no members of the relevant old scheme have any entitlement to exceptions made under section 18(5) to (7) of the 2013 Act."

88. The effect of that provision is that in calculating the ECC, all members are assumed to be accruing benefits in accordance with the new scheme.

The 2019 Pause Directions

89. The 2019 Pause Directions amended the 2014 Directions to implement the pause. The effect of this was that the requirement to calculate the Cost Cap Cost was deleted and replaced with a requirement to calculate the 'Corrected Employer Contribution Cost'. The Corrected Employer Contribution Cost was calculated on the assumption that benefits have been adjusted to bring the Cost Cap Cost back to the target cost. Due to the way

in which it was calculated, the Corrected Employer Contribution Cost was in fact the same as what the Cost Cap Cost would have been if the requirement to calculate it had not been deleted. The FFP Scheme valuation relied upon for the Corrected Employer Contribution Cost purposes showed that there had been a floor breach in that the relevant costs were 11.6% of pensionable payroll, 5.2% below the target cost of 16.8%. But for the Pause, this would have necessitated an increase in the annual accrual rate from 1/59.7 to 1/51.2 (or the equivalent reduction in member contributions). Employers were required to pay contributions at the rate of the Corrected Employer Contribution Cost, even though no benefit adjustments were in fact made because of the Pause.

The 2021 Directions

90. The 2021 Directions included a new separate 'Cost Cap Valuation Report', showing the condition of the Cost Cap Fund as at 31 March 2016 but with an allowance made to include an additional liability, namely the MRC (referred to as the "transitional protection remedy cost"). That led to a statement of a newly defined Cost Cap Cost of the scheme.

91. The effect of the 2021 Directions, in summary is that:

   a. The valuation signed off in 2019 remains unchanged (Directions 19-47 of the 2021 Directions). The employers' actual contribution rate (the Corrected Employer Contribution Cost) will remain unchanged with effect from 1 April 2019, until the beginning of the next "implementation period" in 2024, and still includes an allowance for the cost of improving benefits as a consequence of the breach of the CCM floor, even though the intention is now that no benefit improvements will be made (because the floor is no longer breached once the MRC are included).

   b. The cost cap future service cost still proceeds on the assumption that no members are entitled to exceptions made under ss.18(5)-(7) of the 2013 Act, i.e. on the assumption that no members are entitled to transitional protection. Therefore, all members of all three schemes are assumed to

be accruing benefits under the 2015 Scheme structure (Direction 40).

c. New Directions 48-56 require the calculation of the 'Transitional Protection Remedy Cost'. The Transitional Protection Remedy is defined such that all members in the McCloud Remedy cohort are assumed to have accrued benefits under the legacy schemes between 1 April 2015 and 31 March 2022 (the 'Remedy Period'), with an assumed right to elect to have this service treated as 2015 Scheme service, should they so choose, when their benefits "crystallise" (Direction 49(2)(a)).

92. The requirement to calculate the Cost Cap Cost of the scheme is thus reinstated. It becomes the Cost Cap Cost as calculated in 2019 (when it was renamed the Corrected Employer Contribution Cost) plus the Transitional Protection Remedy Cost (Direction 57).

93. The 2019 Cost Cap Cost assumes that no-one is accruing benefits in the legacy schemes; but when calculating and adding the Transitional Protection Remedy Cost, it is assumed that some of them will in fact have done so when their benefits "crystallise". It is assumed that when their benefits "crystallise", members will choose whichever bundle of benefits is most advantageous to them. In practice, as the Claimants submit (and the Defendants do not dissent) almost all FPS members will elect for FPS benefits because, save in exceptional circumstances, the benefits provided by the FPS are superior to the benefits of the 2015 Scheme. Almost all NFPS members will elect for 2015 Scheme benefits because in almost all circumstances the latter is a better scheme than the NFPS.

94. As a result of the inclusion of the Transitional Protection Remedy Cost, the breach of the Cost Cap floor is negated, and the anticipated improvements to benefits (or reductions in contributions) disappear. What had been a 5.2% breach of the floor in the FFP Scheme became a 14.6% breach of the ceiling, although, as set out above, the ceiling breach has been waived and no benefits or contributions consequences flow from that breach (other than, of course, the Claimants' claim that they have lost out on the benefits that would have accrued had the floor breach not been so negated).

Grounds of Challenge

FBU Claim

95. The FBU Claimants rely on four grounds:

a. **FBU Ground 1**: The retrospective extinction, by the 2021 Directions, of the earlier judicial review proceedings, brought by the First and Second Claimants, is a violation of their right to a fair trial, contrary to common law and Article 6 of the European Convention on Human Rights (the "**ECHR**");

b. **FBU Ground 2**: Government policy has created a legitimate expectation that the accrual rate of benefits would increase (or that member contributions would be reduced) in the event that the cost of providing benefits under the new schemes was below the relevant statutory margin in accordance with the CCM. The Defendant has failed, without proper justification, to meet that legitimate expectation;

c. **FBU Ground 3**: The 2021 Directions unlawfully frustrate the policy and objects of the relevant legislation, namely the 2013 Act and the 2015 Scheme Regulations, contrary to "*Padfield*" principles (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997);

d. **FBU Ground 4**: The regime introduced by the 2021 Directions is indirectly discriminatory on the grounds of age, race and sex.

BMA Claim

96. The BMA also relies on four grounds of challenge. These are as follows:

a. **BMA Ground 1**: The 2021 Directions are founded upon a misinterpretation and/or misapplication of the word "*cost(s)*" in the 2013 Act so as to include the MRC within them, upon the wrongly asserted basis that the remedy costs are *"member costs"* within the meaning of the policy, guidance and negotiation documents underpinning the statutory scheme;

b. **BMA Ground 2**: HMT's decision to include the MRC within the costs to be taken into account when carrying out a valuation pursuant to the 2021 Directions was taken without consultation on the issue, or "involvement", with stakeholders contrary to their legitimate expectation arising from the policy and guidance documents, and/or the requirements of fairness;

c. **BMA Ground 3**: HMT failed to satisfy its obligations under the Public Sector Equality Duty (the "**PSED**") in s.149 of the *Equality Act 2010* ("**the 2010 Act**") before making the 2021 Directions; it failed to investigate and assess the impact, and in particular the extent of the impact, on scheme members, or groups of members, with protected characteristics within each scheme;

d. **BMA Ground 4**: HMT failed to discharge the "*Tameside*" duty of reasonable inquiry (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B) and/or take into account relevant information before making the 2021 Directions.

97. Mr Giffin addressed these grounds in a different order. He commenced by dealing with the challenges going to the construction of the 2013 Act; dealt next with the challenges to the decision-making process; and concluded with the challenges to the effect that the 2021 Directions are claimed to have had on the Claimants. I agree with Mr Giffin that this is a more logical order in which to address the various grounds rather than to approach them in strict claim and numerical order; it also has the benefit of grouping together the challenges in the two claims which are related and which to some extent overlap. Accordingly, I shall deal with the grounds in the following order:

a. BMA Ground 1 – Construction and the meaning of the word "costs"

b. FBU Ground 2 – Breach of legitimate expectation

c. FBU Ground 3 – Breach of *Padfield* principle

d. FBU Ground 1 – Breach of Art 6, fair trial rights

e. FBU Ground 4 - Discrimination

f. BMA Ground 2 – Failure to consult

g. BMA Ground 3 – Breach of the PSED

h. BMA Ground 4 – Breach of *Tameside* duty

BMA Ground 1

Outline of Claimants' submissions

98. Ms Morris' argument under this ground is in two parts. In the first part (to which I shall refer as "**BMA Ground 1A"**), she submits that in seeking to include the MRC in the CCM, the Defendant has misinterpreted or misapplied the term "cost(s)" within the meaning of s.12 of the 2013 Act. The term "cost(s)" is not defined in the 2013 Act. It is submitted that, having due regard to the context and purpose of the legislation, it is clear that there was intended to be a distinction between "member costs" and "employer costs" with only the former to be included in the costs to be taken into account for the statutory purpose of measuring changes in the cost of the scheme. "Member costs" have been stated to include matters such as life expectancy, career, salary, age and gender, such things being related to the "profile" of members; and to exclude transitional costs given the distorting effect these can have on assessment of the future service costs of a scheme. The 2014 Directions closely followed this distinction and reiterated that only changes in "member costs" would be taken into account in the operation of the CCM. Ms Morris submits that the inclusion in the CCM of the MRC, described in the impugned 2021 Directions as the "transitional protection remedy cost", marked a radical departure from the approach taken hitherto, and that it was a step taken without legal or actuarial advice as to whether such cost could properly be included within a CCM that had to comply with the terms of s.12 of the 2013 Act.

99. Mr Short also made submissions on construction, albeit in the context of FBU Ground 3. It is relevant to refer to that submission here. He submits that the purpose of the CCM, and HMT's power to make directions, is "to control

the long-term cost of the new scheme" rather than to allow any pension related costs to limit accrual or increase member contribution rates. On a proper construction of s.12(1) of the 2013 Act, which refers to "Scheme regulations for a scheme under section 1", the purpose of the legislation is not to measure the overall cost of a scheme, but, rather, to "measur[e] changes in the cost of the scheme" where "the scheme" is clearly a reference to the new scheme. It is for that reason, he submits, that costs relating to the legacy schemes featured in the CCM only to a very limited extent, and insofar as they did feature, they consistently excluded transitional protection costs. The CCM was not intended to control the value of new benefits not known about at the time and was certainly not intended for use by the Government to pass on to members the cost of its own discrimination.

100. Ms Morris also relied in the alternative ("**BMA Ground 1B**") on the argument that to include the MRC in the CCM amounted to a breach of legitimate expectation as to how such costs would be treated. She submits that the policy documents and records of negotiations made clear and unequivocal statements to a specific and well-defined class of persons that the costs of transitional protection were not member costs and were excluded from the CCM. HMT's suggestion that the MRC were "in the nature of member costs … or … more closely analogous" is not tenable as they were unconnected with member profile and bore little or no resemblance to matters such as life expectancy, salaries or career paths. Furthermore, it cannot be said that the MRC arose from an unforeseeable event, given that the Government had been warned (see 7.26 of Hutton Report) that age-dependent transitional protection of the sort that gave rise to the findings in *McCloud/Sargeant* was likely to be discriminatory on the grounds of age.

Outline of Defendant's submissions

101. Mr Giffin submits that Ms Morris' construction argument in BMA Ground 1A is hopelessly flawed in that there can be no sensible basis for the suggestion that the MRC are not "cost(s)" of the relevant scheme. The term "cost(s)" is a broad one that is apt in the circumstances to encompass the cost of paying a benefit to members. The meaning of that term is a matter of

interpretation by the Court and cannot depend on having "due regard" to how others might have interpreted it in the course of issuing policy statements or during negotiations. Furthermore, there is no ambiguity about the word "cost" that would entitle one to look at a purported "definition" of it that might appear in some pre-enactment material. In any event, there is nothing in any of the pre-enactment material which purports to set out a clear definition of the word "costs". The references to "member costs", such as they are, do no more than indicate the kinds of matters that would be regarded as such without any attempt at laying down a comprehensive definition.

102. As to Mr Short's arguments, Mr Giffin submits that even if Mr Short were correct about the focus of section 12 being on changes in the costs of the scheme, changes resulting from the MRC are such a change. It is apparent from the Hutton Report that the purpose of the cost ceiling and the CCM was "to ensure that public service pensions remain affordable and sustainable". Mr Giffin submits that it is not accurate to say that, in this context, the costs of legacy schemes play only a limited role. Section 12(4)(c) expressly entitles HMT directions to specify "the extent to which costs or changes" in a "connected" scheme (i.e. legacy scheme) are to be taken into account for the purposes of the section. The attempt by the Claimants to draw a clear dividing line between costs which are and are not to be taken into account is not supported by the terms of the 2013 Act. In particular, in circumstances where the purpose of the legislation is to ensure that costs are sustainable and that risks are shared fairly between members and the taxpayer, there is no warrant for the suggestion that certain costs (e.g. transitional protections costs or the MRC) are definitively outside its scope.

103. As to the arguments on legitimate expectation under BMA Ground 1B, Ms Morris's contentions fail at the first hurdle in that there is nothing here which amounts to a "promise" which is "clear, unambiguous and devoid of relevant qualification": *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 A.C. 1, at [37]. Mr Giffin submits that there is nothing in the documentation which amounts to a promise to exclude costs falling outside a closely defined category, let alone a clear, unambiguous and unqualified one. There is no

comprehensive definition of 'member costs' and nor was there any unambiguous statement that costs in the nature of the MRC would not be regarded as member costs for this purpose. Mr Giffin further submits that the statements relied upon by the Claimants were not directed at particular individuals or limited groups but were statements made generally. If they were to be treated as promises, they would apply to potentially millions of pension scheme members (not just the Claimant unions' members), a fact which militates against the conclusion that there is any sort of enforceable expectation: see *R (Police Superintendents' Association) v HM Treasury* [2021] EWHC 3389 (Admin) per Heather Williams J at [178-185].

BMA Ground 1A – Discussion.

104. Section 12(1) and (2) of the 2013 Act provide that scheme regulations "for a scheme under section 1" must set an employer cost cap to be used for the purpose of measuring changes in the cost of the scheme. The employer cost cap is to be set in accordance with HMT Directions: s.12(3).

105. Section 12(4) on the other hand confers a discretion as to what HMT directions may specify in relation to specified matters. The first of these is as to how the first valuation of the scheme is to be taken into account in setting the cap (s.12(4)(a)). More relevantly for present purposes, s.12(4)(b) states that the directions may specify the "costs, or changes in costs, that are to be taken into account on subsequent valuations of a scheme under section 1 for the purposes of measuring changes in the costs of the scheme against the cap". Similarly, by sub-subsection (c), the directions may specify "the extent to which costs or changes in costs of [any legacy scheme] are to be taken into account for the purposes of this section".

106. These provisions therefore confer a broad discretion as to the "costs or changes in costs" that may be taken into account for both new and legacy schemes for the purposes of measuring changes in costs.

107. The term "costs" is not defined. The question is whether (as the Claimants submit) it excludes certain types of cost, in particular transitional protection costs and costs in the nature of the MRC, or whether (as the Defendants

submit) such costs are not excluded. As a matter of ordinary language, which is the natural starting point in ascertaining the proper meaning of the section, the term "cost(s)" is a broad one, apt to encompass any financial resource required to enable the scheme to meet the obligation of paying out pension benefits due to members of that scheme. The MRC are, on the face of it, one such cost: the litigation has resulted in certain additional benefits having to be paid to some members in the affected schemes in order to remedy the discrimination that was found to exist.

108. It is not, as I understand it, disputed that, in principle, the MRC do amount to costs of the scheme. Counsel for the Claimants (Mr Short in particular), rely, however, on a series of construction points in support of their contention that costs of this nature are excluded from the CCM.

109. The first is that the purpose of s.12, as made clear by the words at the end of s.12(1), is to "measure <u>changes in the cost</u> of the scheme". Similarly, reliance is placed on the wording of s.12(4)(b) and (c) which refer to "costs, or <u>changes in costs</u>". I do not regard the use of the phrase "changes in costs" as limiting the categories of costs that can be taken into account: any CCM operating on the basis of deviations from a target cost between one valuation and the next is likely to involve "changes in costs". In my judgment, the reference to "costs, or changes in costs" simply makes clear that the directions may require costs to be taken into account as well as changes in costs. Had there been defined categories of costs limiting what could be taken into account, then any "changes in costs" would have to be referable to those categories. However, the 2013 Act is not so limited: costs, including where appropriate those arising from past service in legacy schemes, may be taken into account insofar as they result in a change in the costs of the new scheme.

110. Mr Short's submission that the overall purpose of s.12 is that of measuring changes in costs of the new scheme is undoubtedly correct. However, it is difficult to see how that necessarily leads to the conclusion that costs in the nature of the MRC are to be excluded. The increase in costs resulting from having to meet the MRC means that there is a "change in costs" since the previous valuation. Current estimates are that the MRC involve an additional

cost of some £4bn a year (or up to £19bn over the total spreading period). That is an additional cost which, on the face of it, gives rise to a substantial change in the costs of the scheme.

111. Mr Short submits, however, that the fact that the references in s.12(1) and s.12(4)(b) to "the scheme" are to the new scheme as opposed to any legacy scheme means that costs of the latter have a limited role. However, although the references identified are to the new scheme, there are ample instances of reference being made to the costs of legacy schemes (or "connected" schemes as the legislation puts it) that tend to support the view that such costs may also be taken into account for the purposes of the section. Thus, we see that at s.11(1) of the 2013 Act, provision is made for regulations to provide for actuarial valuations to be made of "(a) the scheme, and (b) any [legacy scheme]". Such valuations are to be carried out in accordance with directions (s.11(2)), which may specify, amongst other matters (including how and when a valuation is to be carried out and the methodology and assumptions to be used), "whether [a scheme and relevant legacy scheme] are to be valued separately or together (and if together, how)": s.11(3). Mr Short contended in reply that this is not significant because one would need to consider both new and legacy schemes to determine the employer contribution rate, that being one of the purposes of conducting a valuation. However, it is striking that s.11(3) contains no limitation on its face as to the purposes for which such valuations of both new and legacy schemes are to be conducted.

112. Even when one turns to s.12 of the 2013 Act, one finds express references to legacy schemes in subsections (4)(c) and (5), the former stating expressly that regulations may provide for "the extent to which costs or changes in the costs of [any legacy scheme] are to be taken into account for the purposes of this section" (i.e. for the purposes of measuring changes in costs). In fact, Section 12(5) mandates the making of directions which require "the cost of a scheme (<u>and any connected scheme</u>) to remain within specified margins either side of the employer cost cap". This imposes a duty to implement a CCM. The purpose of measuring changes in the cost of the scheme is to enable the CCM to operate: if changes in costs were not measured, then

deviations from the target cost would not be apparent.

113. The fact that the costs of the legacy scheme may be taken into account does not undermine that purpose: changes in the cost of the new scheme may well arise from, or relate in part to, past service costs, which could include the cost of benefits accrued as a result of service in the legacy scheme. This interpretation is consistent with the Second November 2012 policy document, which stated:

> "1.19 The cost cap will control all other member cost risks, including the past and future cost risks associated with:
>
> • Active members of the reformed schemes, including any service they have in the existing schemes
>
> • Deferred and pensioner members of the reformed schemes; and
>
> • Transitionally protected active members of the existing schemes." (Emphasis added)

114. I acknowledge that the 2014 Directions did, in the event, exclude transitional protection costs from the cost cap future service cost and/or took account of legacy scheme costs on the assumption that no transitional protection benefits were received. However, the fact that HMT exercised its discretion to take that approach in respect of transitional protection costs on the occasion of the 2014 Directions cannot dictate the interpretation, or impose limits on the scope, of the statutory provision.

115. Mr Short accepted that some costs of the legacy scheme, i.e. those relating to longevity and salary risk, can be taken into account for the purposes of the CCM, but only to the extent that those costs resulted in a change to the costs of the new scheme (unsurprisingly, given that such costs were the basis for the floor breaches that arose, it was not argued by the Claimants that such legacy costs should not be taken into account at all). Mr Short maintained, however, that the CCM was never intended to capture all costs, that there was a line to be drawn - although Mr Short was unable to say where - and that transitional protection costs fell outside of that line. In my judgment, the

inability to identify the boundary between what is to be included and what is not, is telling, as it seems to confirm that the statutory provisions do not lead to any clear conclusion that any such boundary exists, or if it does, that transitional protection costs should certainly lie outside it. Parliament's chosen formula of "measuring changes in the cost of the [new] scheme" does not intrinsically exclude transitional protection costs, even if such costs could (as Mr Short appears to contend) be described as being solely a cost of the legacy scheme and therefore not capable of giving rise to any change in the cost of the new scheme.

116. Mr Short submitted that to conclude that it was open to include costs such as transitional protection costs in the CCM would give the Government carte blanche to ride roughshod over members' entitlements, and in particular the "protected elements" under s.22 of the 2013 Act. The 2013 Act contains a procedure that must be followed before changes can be made to the scheme in respect of "protected elements". Sections 21 and 22 of the 2013 Act, so far as relevant, provide:

> "21 Consultation
>
> (1) Before making scheme regulations the responsible authority must consult such persons (or representatives of such persons) as appear to the authority likely to be affected by them.
>
> …
>
> 22 Procedure for protected elements
>
> (1) This section applies where, after the coming into force of scheme regulations establishing a scheme under section 1, the responsible authority proposes to make further scheme regulations containing provision changing the protected elements of the scheme within the protected period.
>
> (2) The responsible authority must—
>
> > (a) consult the persons specified in subsection (3) with a view to reaching agreement with them, and
> >
> > (b) lay a report before the appropriate legislature.
>
> (3) The persons referred to in subsection (2)(a) are the persons (or representatives of the persons) who appear to the responsible

authority to be likely to be affected by the regulations if they were made.

(4) The report under subsection (2)(b) must set out why the responsible authority proposes to make the regulations, having regard to the desirability of not making a change to the protected elements of a scheme under section 1 within the protected period.

(5) In this section—

"the appropriate legislature" means—

(a) Parliament, where the responsible authority is the Secretary of State, the Minister for the Civil Service or the Lord Chancellor;

(b) the Scottish Parliament, where the responsible authority is the Scottish Ministers;

(c) the National Assembly for Wales, where the responsible authority is the Welsh Ministers;

"protected period" means the period beginning with the coming into force of this section and ending with 31 March 2040;

"protected elements", in relation to a scheme under section 1, means—

(a) the extent to which the scheme is a career average revalued earnings scheme;

(b) members' contribution rates under the scheme;

(c) benefit accrual rates under the scheme.

(6) In this section, references to a change to the protected elements do not include a change appearing to the responsible authority to be required by or consequential upon section 12 (employer cost cap).

(7) In a case where this section applies, there is no requirement to consult under section 21(1)."

(Emphasis added)

117. The legislation thus does not preclude changes to the benefit structure under the scheme, but it does impose conditions (consultation and the laying of a report before the legislature) in respect of changes to "protected elements" (including members' contribution rates and benefit accrual rates) before it can do so. Changes appearing to the responsible authority to be required by or consequential upon the application of s.12 of the 2013 Act are expressly

not subject to this procedure: s.22(6), 2013 Act. This procedure provides some protection to members against detrimental changes to the scheme. However, the exclusion from that procedure of changes required by the application of s.12, and the absence of any limitation on the costs that can be taken into account in applying that section, do not, in my judgment, mean that Government can thereby blithely circumvent the protection conferred by s.22. The 2014 Directions were themselves the subject of consultation, and further consultation is required when deviation from the target exceeds the margins set as to the steps to be taken to bring costs back to the target cost.

118. Ms Morris' construction argument did not in fact seek to rely on any construction points in respect of s.12 of the 2013 Act as such; rather, her argument was that interpretation should be guided by context and the purpose of the legislation, and that a correct interpretation required "adherence to, or at least due regard to be had to, the definitions set out in the policy papers and records of negotiations."

119. As to the context and purpose point, reliance was placed on *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 in which Lord Bingham said as follows:

> "8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment." (Emphasis added)

120. The key historic contextual document in the present case is the Hutton

Report. I have not been taken to any provision in that which provides support for Ms Morris' contention that the term "cost(s)" is to be construed so that costs in the nature of the MRC are to be excluded. In fact, the references to that report set out under the Factual Background above indicate that the recommendation for a cost ceiling was in order to introduce some control to address the problem of rising costs. By way of example, the Hutton Report stated as follows:

> "Ex.12 But the taxpayer should also have confidence that public service pension costs are under control and are sustainable. That requires mechanisms in the scheme design to share cost and risk fairly and a fixed cost ceiling to assure cost control."

Later in the Hutton Report, it is stated:

> "4.26 However, the Commission believes consideration should also be given to an overriding mechanism to ensure that public service pensions remain affordable and sustainable. This mechanism would act as a safety valve in case costs within the new scheme increased due to factors not taken account of in the scheme design.
>
> 4.27 This mechanism could be expressed as a 'fixed cost ceiling' and would be the upper limit on the amount that the Government would commit to employees' pensions over the long term to each scheme."

121. These conclusions would appear to indicate a desire to control the risk of rising costs generally. However, in considering the significance of such conclusions and the contents of policy documents and negotiations, it is important to consider what status such external aids have when construing legislation. Mr Giffin referred me to the opinion of Lord Nicholls in *R v Environment Secretary, Ex p Spath Holme Ltd* [2001] 2 AC 349 at 396D to 398E, where it was stated:

> "I go back to first principles. The present appeal raises a point of statutory interpretation: what is the ambit of the power conferred on the minister by section 31(1) of the Landlord and Tenant Act 1985? No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose: "the policy and objects of the Act", in the oft-quoted words of Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997* , 1030. The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred

from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation.

Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591* , 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used."

In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute. Another, recently enacted, principle is that so far as possible legislation must be read in a way which is compatible with human rights and fundamental freedoms: see section 3 of the Human Rights Act 1998. The principles of interpretation include also certain presumptions. To take a familiar instance, the courts presume that a mental ingredient is an essential element in every statutory offence unless Parliament has indicated a contrary intention expressly or by necessary implication.

Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents.

Use of non-statutory materials as an aid to interpretation is not a new

development. As long ago as 1584 the Barons of the Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, "the mischief and defect for which the common law did not provide": *Heydon's Case (1584) 3 Co Rep 7a* , 7b. Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.

This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question. This difference is of constitutional importance. Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament. This gives rise to a tension between the need for legal certainty, which is one of the fundamental elements of the rule of law, and the need to give effect to the intention of Parliament, from whatever source that (objectively assessed) intention can be gleaned. Lord Diplock drew attention to the importance of this aspect of the rule of law in *Fothergill v Monarch Airlines Ltd [1981] AC 251* , 279-280:

"The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation."

This constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation was enacted. This is a matter of everyday occurrence.

That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for

> confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations." (Emphasis added)

122. As discussed above, the provisions of ss.11 and 12 of the 2013 Act, and in particular the term "costs" as used therein, are clear and unambiguous in that they do not seek to exclude from the scope of the CCM any particular category or type of costs. That conclusion does not give rise to a result that is manifestly absurd or unreasonable, and nor has that been seriously argued by the Claimants. In such circumstances, as stated by Lord Nicholls in *Spath Holme*, the Court should be circumspect about placing reliance on external aids to construction. That is all the more so where the external aids, such as the documents upon which Ms Morris seeks to rely in the present case, do not lay down any clear and unambiguous definition of either "costs" or "member costs" that could drive the Court to reach a different conclusion as to meaning of s.12 than the one to which the plain ordinary language of the provision, read in context, lends itself.

123. Ms Morris' skeleton argument refers to two documents in particular which she submits should lead the Court to interpret "cost(s)" more narrowly. The first is the Second November 2012 policy document referred to above at [21]. The second is the 2014 Guidance referred to above at [27]. As Mr Giffin rightly points out, the latter document postdates the 2013 Act and cannot be said to have changed its meaning. That aside, neither of these two documents purports to set out any definition of the word "costs" or the term "member costs". Instead, these documents were setting out the Government's policy intentions as to how it would use the powers conferred by the legislation. However, such statements of policy intent cannot affect the meaning of the legislation as ascertained using the standard tools of statutory interpretation: see *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, where

Lord Reed, President, said:

> "32. As explained at paras 166 and 174—176 below, the relevant intention, when one is considering the intention of primary legislation, is that of Parliament, not that of the Government. Parliament's intention is ascertained primarily from the language which it has used. It is also legitimate to look at other materials in order to identify the problem or "mischief" which Parliament was seeking to remedy…"

124. For these reasons, I gain no assistance in the task of construction from the documents on which Ms Morris seeks to rely.

BMA Ground 1B – Legitimate Expectation

125. I turn therefore to Ms Morris' alternative argument under BMA Ground 1B, namely legitimate expectation. The relevant principles are not in dispute and were reviewed by the Supreme Court recently in *Re Finucane's Application for Judicial Review* [2019] 3 All ER 191, where Lord Kerr said as follows:

> "62. From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment.
>
> 63. In this case, it was argued for the respondent that it was incumbent on Mrs Finucane to show that she had suffered a detriment. That argument simply does not avail in this instance, since the question of detriment can only arise, if it arises at all, in the context of a substantive legitimate expectation. Here the promise made did not partake of a substantive benefit to a limited class of individuals (as, for instance, in *Ex p Coughlan*); it was a policy statement about procedure, made not just to Mrs Finucane but to the world at large.
>
> 64. The onus of establishing that a sufficiently clear and unambiguous promise or undertaking, sufficient to give rise to a legitimate expectation, is cast on the party claiming it - see, for instance, *In re Loreto Grammar School's Application for Judicial Review [2012] NICA 1; [2013] NI 41* , para 42 *et seq* . In *Paponette v Attorney General of Trinidad and Tobago [2012] 1 AC 1*, para 37, Lord Dyson said:

> "The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too."" (Emphasis added)

126. Thus, the first hurdle for the Claimants is to establish that there is a "promise and that it was clear and unambiguous and devoid of relevant qualification". If it is established that there has been such a promise then the question is whether departing from that promise and/or acting inconsistently with it amounts to "a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest": per Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]. At [69] of the same judgment, Laws LJ said:

> "… where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. … On the other hand where the government decision-maker is concerned to raise wide-ranging or 'macro-political' issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact." (Emphasis added)

127. Although it is for the Court to decide whether a departure from the promise is proportionate in this sense, the more that the subject matter lies in the "macro-political field" as Laws LJ described it, the more likely it is that the Court would conclude that the response was proportionate.

128. As to whether it is necessary to show detrimental reliance, Lord Hoffman in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, said as follows at [60]:

> "It is not essential that the applicant should have relied upon the

> promise to his detriment although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power…".

129. The size of the class to which the promise relied upon has been made may also be relevant, both to whether it is properly to be characterised as a "promise" at all, and to whether any departure from it is justified. As stated by Laws LJ in *R (Bhatt Murphy (a firm) and Ors) v The Independent Assessor* [2008] EWCA Civ 755:

> "46. These cases illustrate the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced. I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class. As Lord Woolf MR said in *Ex p Coughlan* (paragraph 71):
>
>> "May it be … that, when a promise is made to a category of individuals who have the same interest it is more likely to be considered to have binding effect than a promise which is made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be in conflict?"
>
> The second reason is that the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of. In *Ex p Begbie* I said this (1130G — 1131B):
>
>> "In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear … In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players … The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes.""

(Emphasis added)

130. More recently in *Police Superintendents' Association*, Heather Williams J considered whether a legitimate expectation arose in a case where the relevant representation (namely that members could remain in their legacy schemes until they retired, irrespective of the date of retirement) was found to have been made to several hundred thousand people. At [184], Heather Williams J said:

> "As Laws LJ recognised in both *Begbie* and in *Bhatt Murphy* in the passages I cited earlier (paras 141 - 142 above), whilst in theory there may be no limit to the number of beneficiaries of a promise, in reality the larger the class, the less likely it is that the statement/s made will generate a legally enforceable representation. Here the size of the class is very large, and the subject matter concerns the macro-economic and political field. Mr Sharland relied on the decision of Cox J in *R (HSMP Forum (UK) Limited) v Secretary of State for the Home Department* [2009] EWHC 711 (Admin), that it would be unlawful for the Home Secretary to resile from a substantive legitimate expectation that the terms on which people had joined the Highly Skilled Migrant Programme, would be the terms on which they qualified for settlement. The Judge observed that the issue affected a specific well-defined group of people and did not lie within the macro-political field. She noted that in *Begbie* (at 1131D) the group of between 1,200 – 1,500 affected children was said to constitute a "relatively small, certainly identifiable, number of persons"; and commented that the number of skilled migrants affected in the present case was "considerably smaller and is clearly identifiable" (para 71). As such, I do not consider this authority assists the Claimant. Cox J applied the approach identified in *Begbie*, as I have done. In addition to the Judge's characterisation of the subject-matter, the size of the class was much smaller. As Ms Callaghan pointed out, even if the cohort is limited to officers in the legacy schemes who were potentially affected by the representations to police (rather than members of the other public sector legacy scheme as well), the correct number is around 30,000, rather than the Claimant's 7,750 officers, because the position for these purposes, should be considered at the time when the representations were made.
>
> 185. For these reasons I conclude that the representations to police did not give rise to an enforceable legitimate expectation. However, if I am wrong about this, both the numbers involved, and the subject matter are highly relevant to the question of whether the Defendant can lawfully resile from the representations." (Emphasis added)

131. To summarise:

a. The Claimants must establish the existence of promise that is clear, unambiguous and devoid of any relevant qualification.

b. If there is such a promise, the Court must consider whether the departure from it amounts to a proportionate measure.

c. In considering both whether a promise is made and the justification for any departure therefrom, the Court will consider the size of the class of persons to which the promise is made and the extent to which the subject matter lies in the macro-political field.

d. Whether there is any detrimental reliance on the part of the promisees may be relevant in determining whether a departure from the promise is justified.

132. What then is the promise relied upon? The Claimants do not rely on a single specific statement, but on a series of statements (taken from the First and Second November 2012 policy documents and the 2014 Guidance) which are summarised in the BMA's Skeleton Argument thus:

> "11. The content of the policy papers and records of negotiations is set out in the Chronology ... Particular reliance is placed upon the following:
>
> > a. a division between "member costs" and "employer costs", with "only" the former to be included in the costs to be taken into account for the purpose of measuring changes in the valuation of the scheme subject to the cap; …
> >
> > b. "member costs" covering matters which arose from the "profile" of members of the scheme such as life expectancy, career, salary, age and gender; …
> >
> > c. the exclusion of "transitional costs" from those to be taken into account for that purpose…"

133. Whilst it is correct to say that the statement at (a) that "only" "member costs" would be taken into account for the purposes of the CCM is clear and was one that was made consistently, that simply begs the question, "What is a member cost?". An enforceable expectation would only arise if there were

some clear and unambiguous statement that costs in the nature of the MRC would not be a "member cost". However, the statements as to what kinds of cost would fall within the ambit of "member costs" are not at all definitive or unambiguous. At their highest, they seek to describe (rather than define) "member costs" by reference to the somewhat vague notion of "member profile", which notion is itself merely illustrated by examples "such as life expectancy, career, salary, age and gender". At points in the documents, member costs were described as those over which the members can exercise "control". But that too would not be a reliable guide as to the types of costs to be included since the costs associated with life expectancy (which both sides accept is a member cost) do not sit easily with the notion of "control" in the sense of being something over which the member could exercise any sort of real choice (short of perhaps exercising a lifestyle choice like foregoing smoking).

134. Furthermore, the statements relied upon do not state unambiguously that transitional protection costs (which is what the Claimants say the MRC are, or at least are akin to) are not "member costs". On the contrary, at 1.14 to 1.19 of the Second November 2012 policy document (see [113] above), in a section headed, "Costs that will be controlled by the cap", it is stated that the:

> "…cost cap will control all other member cost risks, including the past and future cost risks associated with …
>
> Transitionally protected active members of the existing [i.e. legacy] schemes."

135. That would appear to suggest that transitional protection costs were intended to be included in the CCM. In these circumstances, it is difficult to see how the statements relied upon could be said to meet the requirement of unambiguity or the absence of qualification so as to give rise to a legitimate expectation.

136. It is relevant to mention at this stage that whilst the MRC are described in the 2021 Directions as "transitional protection remedy costs", they are not the same as the transitional protection costs that gave rise to the claims of discrimination in *McCloud/Sargeant*. The original transitional protection

that was the subject of that litigation was intended to protect those closest to retirement. It was the distorting effect of including the cost of that protection in the valuation, by reason of the fact that the number of such members will dissipate as they retire or leave the legacy schemes, that led to the assumption, in setting the cost cap, that such costs did not exist. However, those affected by the McCloud remedy are, for the most part, newer, younger members of the legacy scheme (and in service as at 31 March 2012), who will in most cases have a good many years before retiring or leaving the scheme. The MRC may therefore be said to be part of the longer term costs of the scheme and not such as to give rise to the same sort of distorting effect that necessitated the particular treatment of the original transitional protection cost. Thus, even if it were established (which it is not in my judgment) that HMT had clearly promised that transitional protection costs were not a "member cost" for the purposes of the CCM, that would not amount to a promise that costs of a different nature such as the MRC (albeit referred to as "transitional protection remedy costs") would also not be a member cost.

137. Similarly, there is no unambiguous statement of what amounts to an "employer cost" that would enable one to declare definitively that costs in the nature of the MRC would fall into that category. Nor was there any promise that costs of that type would be treated as such.

138. "Employer costs" have been described as:

> "… decisions and assumptions that must be made to carry out a valuation [that] are financial or technical in nature – for example the discount rate that is used to assess the present costs of future benefits, or the actuarial methodology to be used… will be defined as "employer costs"."

139. It was not seriously contended that the MRC must amount to a "financial or technical matter" or that they have anything to do with actuarial methodology. The contention is not wholly unarguable, but the fact that it is just about arguable that the MRC amounts to an employer cost (or indeed a "member cost") falls far short of a clear and unambiguous statement that it would (or in the case of a member cost, would not) do so.

140. These two classes of costs were not stated to be exhaustive. As one would expect, the policy documents anticipated that there may be unexpected costs that may need to be accounted for within the CCM. The relevant passages of the 2014 Guidance are set out in full above at [27(c)] and are not repeated here. What emerges from those is that, as there is no way of forecasting what effect such unexpected costs may have on the scheme, any decisions as to whether such effects should be taken into account in the CCM "will need to be taken on a case-by-case basis". Furthermore, in deciding how such costs should be accounted for in the CCM it was stated that:

> "…the government will need to balance the interests of scheme members against the need to protect the taxpayer and ensure that the costs to employers remain sustainable. If any adjustments are made, these may be via an adjustment to the level of the cap, to the valuation process, or by some other means."

141. HMT's decision-making at the time is described by Mr Elks as follows:

> "170. Also to be noted is paragraph 2.25, which set out that costs in relation to past service would be controlled by the cap for active members of the reformed schemes, including for the service in the legacy schemes (which members without full transitional protection would have); for deferred and pensioner members of the reformed schemes; and for protected members of the existing schemes. The point is that, whilst the McCloud Remedy as such was obviously not foreseen at that stage, it was always envisaged that changes in past service costs could be within the scope of the CCM.
>
> 171. It is evident that the increase in costs resulting from the McCloud Remedy was a matter of a completely different nature to the potential changes in wider economic assumptions, or to technical actuarial methodology, which were mentioned in paragraph 2.33 of the March 2014 Valuation Paper. It is also right to say that it was not one of the matters specifically mentioned as a member cost in paragraph 2.31. However, those matters were not expressed to be an exhaustive list.
>
> 172. In my view, having discussed this matter with colleagues, including some of those who were directly involved at the time, the April 2020 ministerial submission was justified in taking the approach that it did. If one has to choose between the two categories envisaged by the March 2014 Valuation Paper, then in the context of that paper McCloud Remedy costs were in the nature of member costs rather than employer costs. The costs described as employer costs are indeed "financial or technical" in nature. The price and earnings assumptions are financial assumptions applied to generate the projected future cashflows in and out of the scheme, whilst the

> discount rate and the actuarial methodology are actuarial assumptions which are used to capitalise those projected cashflows. Discount rate and actuarial methodology changes do not change the cash cost of paying benefits net of income from member contributions. By contrast, the McCloud Remedy costs do affect the cash cost. They relate to the benefit design features of the scheme, and represent a real change, one that is beyond uprating in line with inflation, to the amounts of the benefits actually provided to members.
>
> 173. As the April 2020 submission also pointed out, the March 2014 Valuation Paper expressly contemplated (at paragraph 2.38) the need for case-by-case decision-making about certain changes, and whether they should "feed through" into the CCM and thus to scheme members. The sort of changes to which this approach was expected to apply were changes which were foreseeable but incapable of being accurately quantified at the preliminary valuation (paragraph 2.37), and changes which were unexpected (paragraph 2.36), including "one-off shifts in the cost of the schemes". The implication of paragraph 2.36 is that unexpected changes in scheme costs would normally be intended to feed into the CCM, but that in some cases the Government might decide to take a different approach. Paragraph 2.39 of the March 2014 Valuation Paper spells out that, in making such decisions, the interests of scheme members will need to be balanced against the need to protect the taxpayer, and to ensure that the costs to employers remain sustainable.
>
> 174. The need for the McCloud Remedy is, in my view, aptly characterised as a "one-off shift" in the costs of the public service schemes. I would describe it as a one-off step change in benefit entitlements. By its very nature it was a change of an unexpected kind, since it was dealing with the necessary response to a judicial finding that what had been intended as a lawful form of benefit provision was not in fact lawful. To the extent that it is of any relevance to consider what was in fact "expected" at any given time, the McCloud Remedy cost was certainly not a cost which was expected at the time of the preliminary valuations, which were (with one Scottish exception) signed off before the new scheme regulations containing the transitional protection were made, nor one which could have been quantified at that time. Again, it can be seen from the April 2020 submission that the balancing of interests for which the March 2014 Valuation Paper called in such cases of an unanticipated shift in costs is precisely what the Chief Secretary was invited to undertake.
>
> 175. So it is my view that the McCloud Remedy costs are either member costs, or a third category of cost which was simply not addressed in the March 2014 Valuation Paper. ...."

142. HMT's approach of taking a specific decision as to how to deal with the MRC, which it viewed as an unexpected cost that did not fall clearly into

either the member cost or employer cost category, would appear to be consistent with the case-by-case approach to decision-making on such matters described in paragraph 2.38 of the 2014 Guidance.

143. A further factor that is relevant in deciding whether there is an enforceable expectation is the size and nature of the class of persons to whom the relevant representation is made. The Claimants submit that the size of the class is not determinative; that, in any event, the promises were made to a defined and specific class of individuals; that these promises were not intended to affect the behaviour of the national or regional economy; and that they cannot therefore be said to concern the macro-economic and political field.

144. Whilst the Claimants are correct that the size of the class is not determinative, it is undoubtedly a highly relevant factor. The representations relied upon potentially affected any member of a public service pension scheme to which the CCM applied. It is difficult in these circumstances to accept the Claimants' contention that the affected group was confined to a specific class numbering in the tens of thousands (which is itself a very large number): the reality is that the number of affected persons ran into several hundreds of thousands, if not the millions. The sheer scale of the number potentially affected renders it less likely that any legally enforceable representation was created.

145. That scale also means that the economic consequences are such that the relevant decisions go beyond the mere departmental level and enter the general political domain. The estimated total cost is in the region of £19bn. Whilst that may seem a relatively small amount in comparison to overall government expenditure, it is clearly at a level that would fall within the macro-economic and macro-political realm. That is the realm in which decisions will tend to be the result of political judgment based on balancing the interests of members against those of taxpayers. I see no real distinction between this case and the decision in *Police Superintendents* (which involved a smaller number of affected persons) in this respect.

146. For these reasons, the BMA's claim as to legitimate expectation fails at the

first hurdle: there was no clear and unambiguous promise giving rise to any enforceable expectation that costs in the nature of the MRC (whether correctly described as transitional protection costs or not) were not to be included in the CCM.

147. I go on to deal very briefly with Ms Morris' further arguments under this head, all of which are predicated on the basis that there was an enforceable expectation.

148. First, Ms Morris submits that this was a case of abuse of power or of unfairness in that HMT radically changed the approach to valuation without legal or actuarial advice merely in order to pass the cost of its own wrongdoing on to those who were not responsible for the discrimination, including some of those who were discriminated against. Second, it is submitted that HMT's departure from the promise was not justified since there was no proper consideration of the promises made and the legitimate expectation created.

149. As to the first of these submissions, it is difficult to see how the failure to take legal or actuarial advice before departing from the promise would have any bearing on whether, objectively, such departure was lawful. Ms Morris sought to rely upon the decision of Popplewell J's decision in *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin) in support. However, the passages at [130] and [149] of that case to which I was directed say nothing about the need to take such advice before a departure from an earlier promise in the context of a claim for legitimate expectation. In that case, the Secretary of State for the Home Department had previously stated that a certain level of support provided to asylum seekers was the minimum necessary to avoid destitution. The Court was of the view, in the context of a challenge based on irrationality, that a subsequent significant departure from that statement requires justification by a careful investigation if it is to be defended as rational. That is very different from the present case.

150. As to the second submission, this too appears to be based on the notion that

a failure to take account of something (in this case, the failure to consider the nature of the promises made) before departing from a promise, is itself sufficient to render the departure unlawful and unjustified. No authority is cited for that proposition, which seems to place more importance on alleged failures to seek advice rather than whether the departure was a proportionate means of pursuing a legitimate aim.

151. For all of these reasons, BMA Ground 1 fails and is dismissed.

FBU Ground 2 – Legitimate Expectation

Submissions

152. Mr Short also relies on legitimate expectation but does so in respect of the different representation that the accrual rate of benefits would increase (or member contributions would be reduced) in the event that the cost of providing benefits under the new scheme was below the relevant statutory margin in the CCM. He submits that there were numerous statements to that effect from 2011 onwards. Notwithstanding those statements, when the CCM floor breaches occurred, the legitimate expectation that benefits would correspondingly be improved (or contributions reduced) was breached without proper justification. In particular, the effect of the 2021 Directions, was that the floor breaches that did exist became, after including the MRC, ceiling breaches instead.

153. Mr Giffin submits that the representations relied upon did not say anything about how costs in the nature of MRC would be treated without which the claim for legitimate expectation does not get off the ground.

FBU Ground 2 – Discussion

154. Much of what has already been said in relation to BMA Ground 1B also applies here.

155. Thus, there is no clear and unambiguous promise devoid of relevant

qualification that is capable of giving rise to a legitimate expectation. Mr Short relies on three statements in particular:

a. The first is that contained in HMT's letter to the TUC dated 14 December 2011. As with other documents considered above, this refers to the distinction between "member costs" and other costs, and states that a floor breach would go back into the scheme to the benefit of members. However, as with the statements relied upon by Ms Morris, there is no clear statement that costs in the nature of the MRC will not be treated as a member cost for the purposes of a CCM. As such, these statements say little more than that there will be a CCM, which of course there was.

b. The second is the statement at [2.19] of the 2014 Guidance which provides that the cost cap for the preliminary valuation would be set on the assumption that no members are entitled to transitional protection. The BMA relied upon a similar statement in respect of transitional protection. For the reasons set out already, this too fails to give rise to any clear and unambiguous statement that MRC (which are not transitional protection costs of the same nature as those referred to in the 2014 Guidance - see [136] above) would not be taken into account for the purposes of the CCM.

c. The third and final statement relied on is that contained in a WMS from the then CST (Liz Truss) dated 6 September 2018 which states that, "[I]nitial results show that the protections in the new cost cap mechanism mean public sector workers will get improved pension benefits for employment… Where the value of the pension scheme to employees has changed from the levels set when reformed pension schemes were introduced in 2015, steps must be taken to return costs to that level". As a statement of what the CCM is intended to achieve, it is correct. However, that does not advance the FBU's case that there was any sort of promise as to how the MRC would be treated. The reference to these being "initial results" indicates that the valuation work was no more than provisional at that stage and yet to be finalised. Indeed, the

letter dated 13 September 2018 from the GAD to the Head of Firefighter Pensions Policy at the Home Office emphasises that the indications of floor breaches arise from a "provisional valuation" "until the directions are confirmed and finalised" and that "the results are expected to remain unchanged should the directions be finalised in line with the draft". The directions that followed in fact had the effect of pausing the CCM. Thus these initial results were never finalised. I do not accept that provisional indications of this type (which by their very nature are subject to change) amounted to a categoric assurance that a particular course (namely that benefits would increase or that contributions would reduce) would be followed so as to give rise to an enforceable expectation.

156. Other points made by Mr Short – in particular that the size of the class of persons affected did not preclude the creation of a legitimate expectation and that departure from the promise was not justified because of the failure to act on advice or consultation - were similar to those made by Ms Morris and do not succeed for the same reasons as set out under BMA Ground 1B.

157. Accordingly, FBU Ground 2 is not made out.

FBU Ground 3 – Breach of *Padfield* principle

158. This ground is based on the *Padfield* principle:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act [which] must be determined by construing the Act as a whole … [I]f the Minister… so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.": per Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, HL at 1030.

159. Mr Short's submission under this ground is that the 2021 Directions unlawfully frustrate the policy and objects of the 2013 Act and the 2015 Scheme Regulations in that there is no warrant, on a proper construction of the 2013 Act, and of s.12 thereof in particular, for the inclusion of the MRC as part of the costs to be taken into account for the purposes of the CCM. That submission clearly overlaps to a considerable extent with BMA Ground

1A as it is based on a construction of s.12 of the 2013 Act which is said to preclude what the 2021 Directions did. For the reasons already set out under BMA Ground 1A, I do not agree with the construction points which form the bedrock of Mr Short's submission. Thus, s.12 of the 2013 does not, as a matter of construction, exclude certain types of costs, in particular transitional protection costs, from being taken into account for the purposes of the CCM.

160. There is, however, one aspect of Mr Short's argument that was not addressed above, and that is that the Defendant acted contrary to the purpose of the s.12 power by using it to pass on to the members the cost of its own discriminatory conduct. Mr Short submits that the notion that the Government could use the s.12 power in this way is so extraordinary that it could not be what Parliament had intended.

161. Mr Giffin's response is that this is little more than a jury point which does not assist the Court as to the meaning of the relevant provisions.

162. The purpose of the CCM is to ensure that costs remain sustainable and that the burden of those costs is fairly distributed as between members and taxpayers. It is not disputed that the MRC represent a substantial additional cost, and a question clearly arises as to how and by whom that cost should be borne, but not necessarily as to why that cost arose in the first place. There is nothing in the terms of the 2013 Act, as discussed above, that precludes taking into account costs in the nature of the MRC for the purposes of the CCM. That in itself tends to militate against a conclusion that the Defendant's acts in deciding whether costs should be treated as a member or employer cost and in opting for the former, were intended to thwart or run counter to the policy and objects of the 2013 Act. The fact that those costs are the result of a finding of discrimination against the Government does not of itself render it absurd or unconscionable for them to be taken into account, any more than might be an increase in costs that were the result of irretrievably poor economic policy choices made by Government. Were that not the case then any additional cost would be subject to scrutiny as to whether it was an "acceptable" cost, in terms of its moral, political or

economic legitimacy, to include. That, it seems to me, is not the purpose of the 2013 Act at all.

163. For these reasons, FBU Ground 3 fails.

FBU Ground 1 – Breach of Art 6, fair trial rights

Submissions

164. The FBU Claimants say that the effect of the 2021 Directions was the retrospective extinction of the First JR and amounted to a violation of their right to a fair trial contrary to common law and Article 6, ECHR. They rely on the principle, affirmed by the European Court of Human Rights (the "**ECtHR**") in *Zielinski v France* (2001) 31 EHRR 19 (the "**Zielinski principle**") that Article 6 rights may be infringed by the enactment of retrospective legislation which affects the outcome of pending proceedings. At [51] of its judgment, the ECtHR said:

> "57. The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature - other than on compelling grounds of the general interest - with the administration of justice designed to influence the judicial determination of a dispute."

165. Mr Short submits that a central part of the First JR was the argument that the SSHD had acted unlawfully by failing to fulfil her duties under Reg.150A of the 2015 Scheme Regulations in that, following a valuation in February 2019 indicative of breaches in the CCM, she had failed to take the mandatory steps to adjust the rate at which benefits accrue so that the target cost for the 2015 Scheme is achieved. The effect of the 2021 Directions (which are the subject of the present challenge) was that the FBU Claimants "are now prevented from pursuing their claim and seeking remedy". In particular, the statutory adjustment process set out in Reg 150A is not triggered and has been stymied by the decision to treat the MRC as member costs. It is submitted that that amounts to a violation of the FBU Claimants' Article 6, ECHR right to a fair trial. That violation cannot be justified since the policy reasons behind the

Government's decision are purely financial and in direct response to the outcome of the *McCloud/Sargeant* litigation.

166. Mr Giffin responds that there was no accrued right to the operation of the Reg.150A procedure because there was no completed valuation "in accordance with Treasury directions" which disclosed a floor breach. As such, there was never any arguable claim that could give rise to any Article 6 right. Even if there had been any such claim, there was nothing in the 2021 Directions that prevented the FBU Claimants from pursuing it under the First JR by having the stay set aside. In any event, there is nothing retrospective about the 2021 Directions that could engage the Zielinski principle: all that occurred was that a future valuation that was going to be on one basis would now be on a different basis that included the MRC.

FBU Ground 1 – Discussion

167. The case law applying the Zielinski principle was extensively considered by the Court of Appeal in *R (Reilly) v Secretary of State for Work and Pensions* [2017] QB 657 at [42] to [75]. One of the themes emerging from the case law is the need for the impugned legislation to be retrospective in effect. Thus, we see that in *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 293 (cited at [42] of *Reilly*), the challenged legislation "purported to render all arbitration awards arising out of contracts made during the previous regime unenforceable"; in *Pressos Cia Naviera SA v Belgium* (1995) 21 EHRR 301 (cited at [46] to [47] of *Reilly*), "legislation was enacted … with explicitly retrospective effect" and that, in the context of considering proportionality, the ECtHR had drawn "a distinction between changing the law for the future and changing it retrospectively"; in *National & Provincial Building Society v United Kingdom* [1997] STC 1466 (cited at [48] to [54] of *Reilly*), the Government had indicated that "it would enact legislation retrospectively validating" earlier regulations; in *OGIS-Institut Stanislas, OGEC St Pie X et Blanche de Castille v France* CE:ECHR:2004:0527JUD004221998, a decision of the Conseil d'Etat (considered at [59] to [60] of *Reilly*) the "Government enacted retrospective legislation to limit the rate" at which private schools were able to claim

reimbursement from the state in respect of pension contributions; *Kopecký v Slovakia* (2004) 41 EHRR 43 (cited at [61] of *Reilly*) was considered by Underhill LJ as "not concern[ing] the effect of retrospective legislation and so …only tangentially relevant for our purposes."; in *Draon v France* (2005) 42 EHRR 40 (cited at [62] of *Reilly*), legislation, which removed entitlement to a previously established head of compensation in clinical negligence claims and which applied expressly to pending claims, was held to amount to "legislation retrospectively depriving them of that possession [that] could not be justified."; in *Scordino v Italy* (2006) 45 EHRR 7 (cited at [67] of *Reilly*), the legislation in question, "… simply extinguished, with retrospective effect, an essential part of claims for compensation… that … the applicants, could have claimed from the expropriating authorities"; in *Tarbuk v Croatia* [2012] ECHR 2049 (cited at [72] of *Reilly*), "The Croatian Government … introduced retrospective legislation removing the right to compensation from persons released under the amnesty"; and in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016 (cited at [75] of *Reilly*), complaint was made that "legislation interfered (retrospectively) with their rights".

168. Whilst one or two of these and other cases considered in *Reilly* were focused more on rights under Article 1 of the First Protocol to ECHR than Article 6 rights, the general position that it is principally legislation that is retrospective in effect that engages the Zielinski principle holds good. Mr Short does not contend otherwise, but submits that the 2021 Directions <u>were</u> retrospective in effect in that they invalidated the valuation report that would otherwise have resulted in the Reg. 150A procedure being triggered. I do not agree that there is any such retrospective effect.

169. The valuation that would, but for the pause, have been carried out for two purposes, namely for the setting of the employer contribution rate and for the comparison of costs against the ECC for the CCM, was not invalidated; it was merely carried out only for the former purpose. That was the effect of the omission of Part 3 of the 2014 Regulations by the 2019 Pause Directions. The 2021 Directions (which are the subject of the present Article 6 challenge)

reintroduced Part 3, the only difference now being that, in assessing the cost cap cost of the scheme, the MRC would be taken into account. It is difficult to see any retrospective act in that scenario. The 2021 Directions did not seek to neutralise or invalidate any earlier valuation.

170. In any event, I find Mr Giffin's argument that there was never any arguable claim as to any accrued right that could trigger the operation of the Reg. 150A procedure compelling. That procedure, for achieving the target cost, is triggered where the scheme cost "calculated following a valuation in accordance with Treasury directions" exceeds the specified margins. As stated above, under BMA Ground 1, provisional valuations in 2018 indicated that floor breaches were anticipated. These provisional valuations were not valuations "in accordance with directions" and therefore would not have had the effect of triggering the Reg. 150A procedure. Mr Short relies, however, specifically on the February 2019 valuation, which had concluded that employer contribution rates should be increased with effect from 1 April 2019 to 30.2%. It is submitted that in order for HMT to so conclude, the value of the CCM breach must have been calculated because otherwise the employer contributions necessary to cover that breach could not be known. However, the need to draw an inference as to what 'must have been calculated' merely serves to confirm the fact that the February 2019 valuation did not amount to a valuation for the purposes of the CCM "in accordance with Treasury directions". That valuation was undertaken after the 2019 Pause Directions had come into effect. These omitted Part 3 of the 2014 Directions and had the effect (as stated above) that the valuation process continued for the purpose of setting employer contributions but not for the CCM purpose of comparing costs with the employer cost cap. There was therefore no arguable claim that there had been a completed valuation so as to trigger the steps under the Reg. 150A procedure.

171. The relevance of the underlying merits of the claim, the outcome of which is said to have been affected by the impugned legislation, was considered by Bourne J in *R (Enterprise Managed Service Ltd) v Secretary of State for Housing, Communities and Local Government* [2021] 1 WLR 5062. At [89]

and [90] Bourne J stated:

> "89. In my judgment, the Zielinski principle is not confined to cases where a court claim is undisputed or indisputable. The ECtHR in that case referred to an offending measure being "designed to influence the judicial determination of a dispute" without such a qualification. The Court of Appeal in *Reilly* [2017] QB 657 commented on those words at para 44:
>
> > "it is important to appreciate that the core principle on which the Court's reasoning is based is that it is - at least prima facie - contrary to the rule of law for the state to interfere in current legal proceedings in order to influence the outcome in a manner favourable to itself. That seems to us self-evidently correct."
>
> 90 If the legal proceedings in question were clearly without merit then it might also be questionable whether the supervening legislation was, in fact, designed to influence their outcome. In the present case, however, the Chancery claim was based on a clearly identifiable statutory cause of action and there was, at least, a serious prospect of it succeeding. The effect of the 2020 Regulations was to make that "outcome" impossible." (Emphasis added)

172. In my view, for the reasons discussed, Ground 2 of the First JR, which is said by the FBU Claimants to be the "central part" of that claim, is unarguable and lacks merit. In those circumstances, the argument that the 2021 Directions were "designed to influence" the outcome of that claim does not really get off the ground. It is also relevant to note for these purposes that the First JR was stayed by consent specifically to enable directions (which were, in the event, the 2021 Directions) to be made. It is somewhat odd for the FBU Claimants to say, in these circumstances, that the 2021 Directions, which were expected, amounted to a violation of the rule of law designed to influence the outcome of the First JR.

173. Even if, contrary to my view, there were some merit in the claim and the 2021 Directions could be considered to be retrospective in effect so that they did amount to an interference with the FBU Claimants' Article 6 rights, such interference would be justified. The reasons for implementing the 2021 Directions and for including the MRC within the CCM were not, as the Claimants say, "purely financial", by which I understand them to mean solely in order to save costs. There was a very substantial additional cost of the scheme arising from the outcome of the *McCloud / Sargeant* cases which (as

the Claimants do not dispute) had to be accommodated; the question being how best that cost should be met having regard to the interests of members balanced against those of taxpayers. That is not simply a question of cost-saving, but a question of the appropriate allocation and distribution of finite resources against the background of increasingly costly pension provision. Such matters constitute a legitimate aim in the context of interferences with ECHR rights and are ones that give rise to a wide margin of appreciation for the State. As stated by Lord Kerr in *In re Brewster* [2017] 1 WLR 519 at [64]:

> "64. Where a conscious, deliberate decision by a government department is taken on the distribution of finite resources, the need for restraint on the part of a reviewing court is both obvious and principled. Decisions on social and economic policy are par excellence the stuff of government. But where the question of the impact of a particular measure on social and economic matters has not been addressed by the government department responsible for a particular policy choice, the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished…"

174. For these reasons, FBU Ground 1 fails.

FBU Ground 4 – Discrimination

Submissions

175. The complaint under this ground is that the inclusion of the MRC within the CCM is indirectly discriminatory in that younger members (and correspondingly those more likely to be women or from an ethnic minority) are put at a particular disadvantage in comparison to older members or those not sharing those protected characteristics.

176. Mr Short submits that the inclusion of the MRC within the CCM is a provision, criterion or practice ("**PCP**") within the meaning of s.19 of the 2010 Act. That PCP applies to all members of the scheme. Accordingly, the pool for the purposes of assessing disparate impact comprises all members. Mr Short submits that the PCP has an obvious and substantial adverse impact on all those who will take their benefits from the 2015 Scheme for the 2019-2023 implementation period, namely those who were not members as at the

cut-off date of 31 March 2012 and who would not therefore have the option of electing to take benefits in the legacy schemes for that period. This disparate impact is the result of a desire to reduce costs and cannot be justified.

177. Mr Giffin submits that, on analysis, any disparate impact is the result of the McCloud Remedy and not the PCP; that is to say, it is not the inclusion of the MRC in the CCM which puts any cohort at a disadvantage but the characteristics of the McCloud Remedy itself, which is not the subject of challenge.

FBU Ground 4 – Discussion

178. In Baroness Hale's illuminating analysis of the concept of indirect discrimination in *Essop v Home Office* [2017] 1 WLR 1343, she identified (at [24] to [29]) a number of salient features of the cause of action, of which the following is of particular relevance to the present claim:

> "25. A second salient feature is the contrast between the definitions of 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. …"

179. This need for a causal link between the PCP relied upon and the disadvantage suffered means that one must be careful not to elide disadvantages caused by other factors and attribute those to the PCP.

180. The PCP here is the inclusion of the MRC in the CCM. The effect of that inclusion was to negate the floor breaches that were found to exist, and which would have led to increases in benefits or reductions in contributions. Those floor breaches would have benefited all members. The negation of those breaches meant that all members lose that benefit (albeit the precise value of the benefit may differ in individual cases). In other words, the effect of the PCP (in terms of negating the floor breaches and the corresponding benefits that would have resulted) is indiscriminate, and is certainly age-neutral. Viewed thus there is no disparate impact at all and the claim of indirect

discrimination fails.

181. Mr Short's submission, however, is that the disparate impact arises from the fact that the cohort of members not in service as at 31 March 2012 suffers a particular disadvantage as compared to those that were in service on that date. However, that disparity is a direct consequence of the McCloud Remedy itself, which was based around a cut-off date of 31 March 2012. It is a disparity that was inherent in the design of the remedy and which was, critically, not causally linked to the PCP. Whilst the PCP might have exposed the inherent disparate impact of the McCloud Remedy (which might itself be a PCP), it would not be the cause.

182. There is no complaint in the present claim about the McCloud Remedy itself or the cut-off date chosen for it. Indeed, Mr Short accepted that the rationale for that cut-off date (which, amongst other matters, was that the remedy should apply only to those subject to the original discrimination giving rise to the *McCloud/Sargeant* claims) was sensible.

183. In these circumstances, Mr Giffin is correct to say that the differential impact complained of was in fact caused by a measure that is unchallenged and unchallengeable (because it is contained in the Public Service Pensions and Judicial Offices Act 2022). The claim of indirect discrimination would fail to get off the ground for that reason.

184. Even if that is wrong and there is a disparate impact which is causally linked to the PCP, the particular context in which that disparity arises, namely pension schemes, provides a weak starting point for a claim of age-related discrimination.

185. In *R (Harvey) v Haringey London Borough Council* [2019] ICR 1059, the issue was whether the eligibility of a cohabitee (as opposed to a spouse) for a survivor's pension was lawfully limited to persons in local government employment on or after 1 April 2008. The claimant contended that the cut-off date gave rise to differential treatment on the grounds of cohabitee status and/or age contrary to Article 14, ECHR and was not justified. Julian Knowles J dismissed the claim, stating as follows in respect of the age claim:

"186. In my judgment the answer to the claimant's age claim is that, in reality, what she is complaining about is a difference in treatment arising from different rules applying to different schemes at different times; however, that is not an age-based reason for the different treatment complained of. In *Ackermann v Germany* (2005) 42 EHRR SE1 the European Court said:

> "In so far as the applicants further complained about discrimination on ground of age, alleging that earlier generations of pensioners received considerably higher pensions than they themselves would on reaching pension age, the court notes that the applicants have not established that their own situation is comparable to that of earlier pensioners. In this respect, it has to be taken into account that the state must be in a position to adapt the pension system to the change of socio-economic circumstances. Accordingly, the applicant cannot claim equal treatment 'in time'."

187. In *R (Gurung) v Secretary of State for Defence* [2008] EWHC 1496 (Admin) the claimants were Gurkhas challenging army pension arrangements. Gurkha pensions from 1 July 1997 were paid at a rate equivalent to that of other army soldiers; Gurkha pensions under the Gurkha Pension Scheme established in 1949 were paid at a much less favourable rate. The claimants asserted that this amounted to indirect age discrimination, on the basis that (a) Gurkhas with more years of service were disadvantaged; and (b) those Gurkhas would on the whole be older. Ouseley J was not convinced that such an argument gave the claimants any "other status" for the purposes of article 14 at all; but, if it did, he considered that <u>the matter was correctly approached on the basis that the Secretary of State had a wide margin of discretion; that the selected date of 1 July 1997 was not irrational; and that the challenge failed accordingly</u>.

188. He also observed, at para 74, that <u>this type of differentiation between one group and another, based upon a particular cut-off date, was inevitable whenever there was a transition from one welfare scheme to another; and this could not form a strong basis for challenging a decision on social and economic policy</u>:

> "There may be differences of view about whether 'age' is or can be a suspect ground for discrimination, requiring a more intense scrutiny, or whether 'old age', which is not quite the same, can be. But the grounds of differentiation here, not wholly aptly characterised as those of age, are not suspect grounds. The grounds of difference do not arise because someone is above or below a particular age, but because the introduction of changes which are not directly age-related are defined by dates, and years of service. <u>The drawing of lines, by reference to dates, around schemes which help some and not others is an inevitable part of many legislative or policy changes; this is the more so where a past disadvantage or even</u>

wrong is being remedied retrospectively. Of course, this means that either the older or the younger will be affected; the date itself will import an indirect differentiation on age grounds. But that is a weak starting point for an assertion of indirect discrimination on age grounds. In any event, if there is a rational basis for the selection of the date as at which the changes are made, that disposes of the article 14 challenge."

189. This, it seems to me, is largely dispositive of the claimant's case on age. As the defendants rightly point out, by their nature pensions are linked to age. The application of an indirect age discrimination claim to a pension scheme context can be problematic because the membership and benefits of all pension schemes are determined by rules based directly on, or otherwise related to, age. They are right to submit that pension schemes are necessarily linked to age and age-related concepts, such as length of service. If the claimant were correct then it seems to me that to introduce a new pension scheme with improved benefits would nearly always be liable to give rise to age-based claims, because it will generally be the case that older people are more likely to be members of the older and less advantageous pension scheme. But it is clear that pension schemes cannot stay static and have to be updated from time to time to reflect macro-economic and societal and demographic changes, among other reasons. That suggests that she cannot be correct. But that is not to say that pensions can never give rise to age-based claims: see eg *Lord Chancellor and Secretary of State for Justice v McCloud* [2018] ICR 1039 , where age discrimination was conceded in relation to the New Judicial Pension Scheme, but the Lord Chancellor argued it was objectively justifiable. There, however, the rules expressly defined benefits by reference to age, with older judges being eligible for more generous benefits than younger judges. It was not a case where a new pension scheme had been introduced with effect from a certain date." (Emphasis added)

186. In my judgment, much of that analysis applies equally in the present case. Mr Short submits, however, that *Harvey* falls to be distinguished because the comparison in that case was as between benefits available under different schemes whereas the offending PCP here applies to all active members irrespective of the scheme they were in. That, to my mind, is a distinction without substance in this context. The fact that the particular disparate impact alleged is the result of the inclusion of the MRC in the CCM as opposed to the introduction of a new scheme does not make a substantive difference; that is because the disparate impact results from a cut-off date which seeks to a draw a line between those who can and cannot continue to benefit from the legacy schemes for a period. It is the drawing of such lines in the context

of pension schemes, whether that be because of the introduction of a new scheme or because of a remedy to correct a past wrong, that inevitably gives rise to different benefits as between members of different ages and lengths of service. However, that provides a "weak starting point" for a claim of age-based discrimination. The position might be otherwise in a case of direct discrimination (which is not this case) or if the cut-off date chosen was irrational. Far from there being any suggestion that the date in this case, 31 March 2012, is irrational, it is in fact accepted to be "sensible".

187. In these circumstances, the need for justification does not arise, notwithstanding any disparate impact, or if it does, justification is readily made out.

188. If that is wrong and the PCP in question does give rise to a disparate impact that requires to be justified, then the question is whether it is established that the PCP was a proportionate means of pursuing a legitimate aim.

189. Mr Short submits that the aim here is purely to save costs, which is not a legitimate aim that can be invoked in order to justify discrimination. This has already been considered under the previous ground. I was also referred to the analysis in *Heskett v Secretary of State for Justice* [2021] ICR 110, in which the Court of Appeal reviewed (at [45] to [90]) the case law on the deployment of cost pressures as justification for indirect discrimination. Underhill LJ concluded:

> "83. <u>It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs</u>. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle (to adopt the Supreme Court's language in *O'Brien*) but it is real…
>
> …
>
> 88. The upshot of all this is that there is certainly an established principle that, to take Rimer LJ's formulation in *Woodcock [2012] ICR 1126* , para 66, "<u>the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim</u>" for the purpose of

> the defence of justification in a discrimination claim; but that that principle needs to be understood in the way that I have sought to explain it in the preceding paragraphs. It only bites where the aim is, as the CJEU put it in *Hill v Revenue Comrs [1999] ICR 48* , "solely" to avoid costs." (Emphasis added)

190. Later in the same judgment, Underhill LJ considered the extent to which budgetary constraints may be relevant in justifying an employer's actions:

> 98. Neither *Benson* nor *Edie* is binding on us, and in neither of them was it argued that the aim identified by the Employment Appeal Tribunal as legitimate fell foul of the "cost alone" principle deriving from *Hill v Revenue Comrs [1999] ICR 48*. Likewise there was no such contention in *Harrod*, and I do not think that Bean LJ's general endorsement of my judgment in *Benson* nor my own reasoning can be treated as directed specifically to that question. Nevertheless, they do afford some support to the proposition that an employer's need to reduce its expenditure, and specifically its staff costs, in order to balance its books can constitute a legitimate aim for the purpose of a justification defence.
>
> 99. More importantly, however, I think that that proposition is correct in principle. There is nothing to suggest that the CJEU in *Hill v Revenue Comrs* , *Kutz-Bauer [2003] ECR I-2741* or *Steinicke [2003] IRLR 892* had in mind a case of the present kind, where an employer is having to make choices about how best to allocate a limited budget: the justification advanced in those cases was purely that avoiding discrimination would cost more. I can see no principled basis for ignoring the constraints under which an employer is in fact having to operate. It is never a good thing when tribunals or courts are required to make judgements on an artificial basis. As Burton J in *Cross [2005] IRLR 423*, Elias J in *Bainbridge [2008] ICR 249* , and myself and Rimer LJ in *Woodcock [2011] ICR 143; [2012] ICR 1126* have all observed, almost any decision taken by an employer will inevitably have regard to costs to a greater or lesser extent; and it is unreal to leave that factor out of account. That is particularly so where the action complained of is taken in response to real financial pressures, as was very clearly the case in all three of the authorities relied on by Ms Darwin and as is the case, on the tribunal's findings, in the present case. It is also necessary to bear in mind that because age, unlike other protected factors, is not binary it is difficult, to put it no higher, for an employer to make decisions affecting employees that will have a precisely equal impact on every age group, however defined. This makes it particularly important for them to be able to justify such disparate impacts as may occur by reference to the real world financial pressures which they face.
>
> 100. It is important to emphasise at this point that the issue with which we are concerned relates only to the first step in the consideration of the justification defence. If it is permissible for an employer to rely,

as a legitimate aim, on a real need to reduce or constrain staffing costs, it still has to show that the measures complained of represent a proportionate means of achieving that aim, having regard to their disparate impact on the group in question. It is in my view entirely appropriate that a proportionality exercise of that kind should be the focus of the justification inquiry. Such an exercise will enable the tribunal to examine carefully the nature and extent of the financial pressures on which the employer relies as well as the possibility that they could have been addressed in a way which did not have the discriminatory effect complained of. That kind of exercise was carried out by the tribunals in *Benson* and in *Edie* —and indeed by the tribunal in the present case.

101. I recognise that it may sometimes be difficult for a tribunal to draw the line between a case where an employer simply wishes to reduce costs and cases where it is, in effect, compelled to do so. But tribunals often have to make judgements of that kind and there is nothing uniquely difficult about this one. The judgement that would be required if Mr Menzies's submission were correct—that is, to assess the justification on the basis that any consideration of the employer's financial position should be excluded—would be at least equally difficult, indeed more so.

102. Mr Menzies's principal response on this part of the argument was to rely on para 74 of the judgment of the Supreme Court in *O'Brien [2013] ICR 499* and specifically on the statement that

> "the fundamental principles of equal treatment cannot depend upon how much money happens to be available in the public coffers at any one particular time or upon how the state chooses to allocate the funds available between the various responsibilities it undertakes"

and that that argument "would not avail a private employer and … should not avail the state in its capacity as an employer".

103. I do not believe that that passage is applicable to the present case, or others of the kind which I have been considering in the previous paragraphs. The court was concerned with a case of (overt and deliberate) direct discrimination against part-time workers. At the end of para 74 it expressly equates it with a case of direct pay discrimination against women. As it says, such treatment contravened "the fundamental principles of equal treatment". In that context it is hardly surprising that it should make it clear that neither a private employer nor the state in its capacity as employer could seek to justify such discrimination (where, untypically, justification is an available defence) on the basis that times were hard and it could not afford to treat part-timers, or women, equally. But the present case does not involve direct discrimination. We are concerned with indirect discrimination—more specifically with a situation where the employer has altered its pay arrangements in a way which has had a

> disparate impact on employees of different ages (as such changes are very liable to do). I see no sign that the Supreme Court had in mind a case of this kind. What "the fundamental principles of equal treatment" require in such a case is that the disparate impact of the measures in question should be justified. Mr Menzies pointed out that the test of justification was expressed in identical terms in the case of indirect discrimination under section 19 of the 2010 Act and in the case of direct age discrimination: see section 13(2). That is no doubt correct, but it does not follow that the question of the legitimacy of a particular aim requires the same answer in both contexts.
>
> 104. … However, leaving aside the kind of case which the Supreme Court was discussing at para 74 of its judgment in *O'Brien*, I would take some convincing that it was illegitimate for a government department or agency to seek to keep its pay budget within the limits imposed by the Treasury or a parent department. That was certainly the basis on which *Benson [2012] ICR 627* was decided." (Emphasis added)

191. The present case, like *Heskett*, does not involve any claim of direct discrimination: there was no attempt simply to curtail the pension benefits of younger members. Instead, the decisions to implement the McCloud Remedy and to include the MRC in the CCM affected younger members to a greater extent because of the operation of the cut-off date for eligibility for accruing, or continuing for a period to accrue, benefits under the legacy scheme. Those decisions were made having regard to legitimate concerns about keeping within certain financial constraints, and in particular with a view to ensuring that, in the longer term, pension provision for public sector workers remains affordable and sustainable with the burden being shared fairly between members and taxpayers. Would it be fair to characterise that aim as "solely" about costs? In my judgment that would not be a fair characterisation. Questions about long-term affordability and sustainability of public sector pension schemes and the equitable sharing of the burden as between the members (of whom there are millions) and the taxpayer, go well beyond costs alone, and were clearly identified in the Hutton Report as forming the basis for its review. These questions also demonstrate that the aim transcends concerns about pension payments for a particular group: it extends to broader societal concerns about how best to fund public sector pensions in an era of increasing life-expectancy. As such, they will involve decisions in the sphere of social and economic policy that are for government, and in respect of

which there will be a broad margin of appreciation. The limited role of the Court in reviewing such decisions is obvious.

192. Mr Short submits that HMT is in a different position from the many cases considered in *Heskett* in that it is not in receipt of a "finite sum" as were the government departments and agencies in those cases and it was not "compelled" (*Heskett* at [101]) to keep costs within certain limits. I do not agree with that submission. In the first place, whether a budgetary constraint is the result of a limitation imposed by another (superior) department or a consequence of fiscal policy determined for other reasons, the effect for the department in question will be the same, namely that it will have to act within certain financial parameters. That is different from having the freedom or choice to allocate a greater quantity of funds to a particular need. Furthermore, the reference in *Heskett* to being "compelled" to reduce costs is not synonymous with the absence of choice. As Underhill LJ stated at [99] in *Heskett*, "I can see no principled basis for ignoring the constraints under which an employer is having to operate"; and that may include the situation where "…the employer is having to make choices about how best to allocate a limited budget".

193. Of course, a legitimate aim is not sufficient on its own to justify the alleged discrimination if the means used to achieve that aim are not proportionate. Mr Short submits that it cannot be proportionate for the Government to pass on the cost of its own discrimination to members who do not benefit from the McCloud Remedy. In my judgment, the premise of that submission appears to be that the Government's actions were somehow targeted towards a particular group. If that is so, then, given that the inclusion of the MRC in the CCM meant that the floor breaches were negated for all members, that premise would appear to be incorrect. Furthermore, this approach to the MRC corresponded with a waiver of the ceiling breaches which meant that members (irrespective of age or date of membership) were not required to forego any accrual of benefits or suffer increased contributions that might otherwise have resulted. The Defendant's choice when faced with the additional MRC was whether those costs should fall on public sector

employers (which would mean either an additional burden on taxpayers or the diversion of finite resources from elsewhere, or both), or whether they should be met by withholding from scheme members the benefits that they might otherwise have enjoyed as a result of the floor breaches and if the MRC were excluded from the CCM. No other options appeared to be available and nor were any suggested by the Claimants. The reasons given by the Defendant for choosing the latter option are summarised by Mr Elks:

> "176. … The outcome of the McCloud litigation had huge implications, organisationally and financially. The discrimination identified had to be remedied. … Any solution would have had very significant costs indeed. The whole nature of a choice-based remedy is that many scheme members will receive better pension benefits than would otherwise have been the case, and those are benefits which have to be paid for. To let that huge cost fall upon employer contributions, and thus ultimately in very large measure upon the taxpayer, would (in the view which HMT took at the time and continues to take now) significantly undermine the purpose for which the CCM was introduced.
>
> 177. I appreciate, of course, that there will be some individuals who do not personally benefit from the McCloud Remedy, and who might have benefited in some way from the rectification of the floor breaches which would have resulted if the McCloud Remedy costs had been excluded from the 2016 valuations. However, almost any change in the design of pension scheme benefits will tend to benefit some individuals more than others. But it is in the nature of the CCM that it operates on a collective basis, so that changes in the collective cost of providing member benefits may have an impact upon future benefit and contribution structures for everyone, regardless of the relevance of that changed cost to themselves."

194. In my judgment, in this context where the employers have a broad margin of appreciation and where the decisions made bear on matters of social and economic policy, the choice made by the Defendants was proportionate. The fact that some members will be affected more adversely than others is a consequence of the design of the McCloud Remedy and does not render that choice disproportionate.

195. For these reasons, FBU Ground 4, and therefore the FBU Claimants' claim overall, fails and is dismissed.

BMA Ground 2 – Failure to consult

Submissions

196. Ms Morris submits that HMT was under a duty to consult with the BMA in relation to the topic of whether the MRC should be treated as a "member cost" and included in the CCM. That duty is said to arise from statements made by HMT that "stakeholders" would be "involved" when considering the approach to valuations, and that the consultation that did take place in relation to the form of the McCloud Remedy ought to have included consultation on the treatment of the MRC. The duty is said to have been "generated by the duty cast by the common law upon a public authority to act fairly": *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947 at [23-24 and 35]. The significant impact of HMT's decision on members and the fact that the cost of the Government's own wrongdoing was being passed on to them rendered it unfair not to consult. Such discussion as did take place was not conducted at a formative stage in that the decision as to the MRC had already been taken by April 2020, and did not in any event involve conscientious consideration of the concerns raised.

197. Mr Giffin submits that there was no duty to consult. In the absence of any statutory duty, it is only in exceptional circumstances, where otherwise there would be conspicuous unfairness, that a duty to consult could arise. Insofar as statements made by HMT indicated that there would be stakeholder involvement any expectation created thereby was amply fulfilled by the numerous meetings held at which the MRC issue was raised, albeit not as a formal agenda item. Even if there had been such a duty and a failure to comply with it, this was a situation where compliance would have made no difference to the eventual decision.

BMA Ground 2 - Discussion

198. The circumstances in which a duty to consult can arise were helpfully summarised in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice and ors* [2015] 3 All ER 261, [2014] EWHC 1662 (Admin), in which the Divisional Court (at [98]) derived 10 principles from the authorities of which

the following are of most relevance here:

> "1. There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. *R (Harrow Community Support Limited) v. The Secretary of State for Defence* [2012] EWHC 1921 (Admin) at paragraph [29], *per* Haddon-Cave J).
>
> 2. There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (*R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68–82], especially at [72]).
>
> 3. The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) (*R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755* , at paragraphs [41] and [48], *per* Laws LJ).
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> …
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> 6. The courts should not add a burden of consultation which the democratically elected body decided not to impose (*R (London Borough of Hillingdon) v. The Lord Chancellor* [2008] EWHC 2683 (QB)).
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> 7. The Common Law will, however, supply the omissions of the legislature by importing Common Law principles of fairness, good faith and consultation where it is necessary to do, e.g. in sparse Victoria statutes (*Board of Education v Rice* [1911] AC 179 , at page 182, per Lord Loreburn LC) (see further above)…"
>
> 9. The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was to be cast upon them (*Westminster City Council v Greater London Council* [1986] 2 All ER 278 at 288, [1986] AC 668 at 692 per Lord Bridge)…" (Emphasis added)

199. Of the four main circumstances identified in (2) above as to when a duty to consult will arise, Ms Morris appears mainly to rely on the second ("promise

to consult") and the fourth ("conspicuous unfairness"). Whilst Ms Morris did not dispute that the *Plantagenet* principles were correctly stated, she submitted that the approach to fairness as set out in the slightly later decision of the Supreme Court in *Moseley* ought to be preferred. There Lord Wilson said:

> "23. A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, Ex p Baker [1995] 1 All ER 73*. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.
>
> 24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In R (Osborn) v Parole Board [2014] AC 1115, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested": para 67. Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel": para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not: "Yes or no, should we close this particular care home, this particular school etc?" It was: "Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our borough, should we make one in the terms which we here propose?"
>
> 25. In *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said, at p 189:
>
> > "Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First,

> that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

Clearly Hodgson J accepted Mr Stephen Sedley QC's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in *Ex p Baker [1995] 1 All ER 73* , cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213* , para 108. In Ex p Coughlan , which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated, at para 112:

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts (2012) 126 BMLR 134*, para 9, "a prescription for fairness".

200. Ms Morris also relies on the following passages in *Moseley* as to what ought to be done once consultation is embarked upon:

29. Paragraph 3(1)(c) of the Schedule imposed on Haringey the requirement to consult. The requirement was to consult "such other persons as it considers are likely to have an interest in the operation of the scheme". So the subject of the consultation was Haringey's preferred scheme and not any other discarded scheme. It is, however, at this point in the analysis that the division of opinion arose in the Court of Appeal. Sullivan LJ, with whom Sir Terence Etherton C agreed, concluded, at para 18:

> "In this statutory context fairness does not require the council in the consultation process to mention other options which it has decided not to incorporate into its published draft scheme; much less does fairness require that the consultation document contain an explanation as to why those options were not incorporated in the draft scheme."

Pitchford LJ, by contrast, agreed with Underhill J who, at para 27, had concluded: "consulting about a proposal does inevitably involve inviting and considering views about possible alternatives." It is clear to me that the latter conclusion is correct. … Fairness demanded that in the consultation document brief reference should be made to other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England: see para 15 above) Haringey had concluded that they were unacceptable. The protest of the Reverend Nicolson in his letter dated 10 December 2012 was well-directed.

> 30. It would not have been onerous for Haringey to make brief reference to other ways of absorbing the shortfall. …" (Emphasis added)

201. There is certainly no statutory duty to consult in the present case. The 2013 Act contains express provision for consultation before the making of scheme regulations (s.21) and in respect of such regulations containing retrospective provision (s.23(2)), but Parliament clearly did not see fit to impose any duty to consult in respect of other matters. Whilst the demands of fairness can impose such a duty, they will only do so "in exceptional cases, where a failure to consult would lead to conspicuous unfairness." (*Plantagenet* at [98(2)]). Although not put in terms of exceptionality, Lord Wilson did state in *Moseley* (at [23]) that such a duty would arise "not infrequently", often where there was a legitimate expectation of such consultation. In the same judgment, Lord Reed, placed less emphasis on fairness than Lord Wilson:

> "34. I am generally in agreement with Lord Wilson JSC, but would prefer to express my analysis of the relevant law in a way which lays less emphasis upon the common law duty to act fairly, and more upon the statutory context and purpose of the particular duty of consultation with which we are concerned.
>
> 35. The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139; [2008] ACD 20*, paras 43–47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach

of the common law is illustrated by the cases of *R v Devon County Council, Ex p Baker [1995] 1 All ER 73* and *R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213* , cited by Lord Wilson JSC, with which the BAPIO case might be contrasted." (Emphasis added)

202. In my judgment, *Moseley* cannot be read as if the demands of fairness will always, or generally or even more often than not impose a duty to consult. Such duty will arise only in limited circumstances such as those where a failure to consult would give rise to conspicuous unfairness or where there is a legitimate expectation or established practice of such consultation.

203. The range of circumstances that might be regarded as "conspicuously unfair" (fairness being a "a protean concept") is not limited. An example was cited to me in the case of *Rainbow Insurance Company Ltd v Financial Services Commission and ors* [2015] UKPC 15, where the Privy Council stated:

> "51. The courts have developed the principle of legitimate expectation as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectations as it prohibits the arbitrary use of power by public authorities. Such expectations can arise where a decision-maker has led someone to believe that he will be consulted or be given a hearing before a decision is taken which affects him to his disadvantage (a "procedural legitimate expectation") or that he will retain a benefit or advantage (a "substantive right legitimate expectation"). The source of the expectation may be either an express promise given on behalf of the public authority or an established practice which the claimant can reasonably expect to continue: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 401 per Lord Fraser. The expectation of a continuance of a substantive right is not absolute, even in the strongest cases such as *Ex p Coughlan* (above), because a sufficient public interest can still override a legitimate expectation to which a representation had given rise. In this appeal counsel founds his argument on what Laws LJ in *Niazi* (above) has described as a "secondary case of procedural expectation", which arises where the public authority has given no assurance of consultation or as to the continuance of a policy but its past conduct has been "pressing and focussed" on potentially affected persons and there is at least
>
> > "an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to ensure for their particular benefit: not necessarily for ever,

> but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult." (Laws LJ in *Niazi* at para 49)

> Laws LJ in formulating this expectation was considering unusual circumstances where, absent a representation that the policy would continue, an abrupt change of policy was held to be so unfair as to amount to an abuse of power. A classic example is *R v Inland Revenue Commissioners, Ex p Unilever plc* [1996] STC 681. In that case the Inland Revenue Commissioners on thirty occasions over twenty years had exercised their lawful discretion to entertain late claims for loss relief against corporation tax and then suddenly, without notice or consultation and for no good reason, refused such claims as out of time. The Board does not need to address questions of taxonomy by deciding whether this is a separate head of legitimate expectation or whether it is a particular example of what Lord Fraser described as an established practice which the claimant could reasonably expect to continue. It is enough to observe that there are cases in which fairness requires that a change in policy cannot be made abruptly because it would defeat the legitimate expectations of an individual or group. In such cases, as Sedley LJ stated in *Niazi* at para 70, it is not the alteration of the policy but the way in which it is done which is capable of frustrating a legitimate substantive right expectation." (Emphasis added)

204. In the present case, there were no statements (of those drawn to my attention) that could generate an expectation of consultation as such. Typical of the statements relied upon is the following, taken from the Second November 2012 policy document:

> "1.9 The Bill specifies that the Treasury will consult the Government Actuary before making these directions to ensure that they meet actuarial standards. The Treasury will also involve other stakeholders, such as public service employers, scheme actuaries and trades unions, when considering the approach to valuations. This will ensure that directions reflect individual scheme circumstances and economic and demographic changes." (Emphasis added)

205. The statement that stakeholders will be "involve[d]" when considering the approach to valuations does not give rise to any legitimate expectation of consultation comprising all of the requirements set out in *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 (and endorsed by the Supreme Court in *Moseley* at [25]). Furthermore, the circumstances here were not such that a failure to consult would give rise to conspicuous

unfairness. Ms Morris is undoubtedly correct in stating that the changes affected a very large number of members who are important public sector workers and who have significant pension benefits. However, the size and importance of the affected class or the importance of the proposed change to that class does not mean that a failure to consult is necessarily conspicuously unfair. As stated in *Plantagenet* at [98(9)], "The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended...". Almost every decision of an authority or change in policy is likely to have an adverse effect on some, but that fact alone cannot give rise to a duty to consult in respect of every such decision or change.

206. The decision to include the MRC in the CCM was not taken abruptly or without warning. There was discussion about it over a number of meetings. The effect of that inclusion, which was to negate the floor breaches, did not remove benefits that members had already accrued or were enjoying. In these circumstances, I am not persuaded that the manner in which HMT chose to effect this change gave rise to any conspicuous unfairness.

207. It is relevant to deal at this stage with another of Ms Morris's points under this ground which is that the decision to include the MRC in the CCM was taken in April 2020, and that that was a final decision that explains the absence of consultation on it thereafter. The Defendants say that the decision in April 2020 was an 'in principle' decision that was not finally confirmed until the CST approved the making of the 2021 Directions on 7 October 2021. I accept that certain statements appearing in the documents, when read in isolation, give the impression of finality. An example is that contained in the WMS of 16 July 2020 which announced the consultation in respect of the McCloud Remedy and also the pause, and in which it was stated:

> "When the mechanism was established, it was agreed that it would consider 'member costs': i.e. costs that affect the value of schemes to members. <u>As the proposals in the consultation published today will increase the value of schemes to members, this falls into the 'member cost' category. As a 'member cost', this will be considered as part of the completion of the cost control element of the 2016 valuations</u>

> process. Current employer contribution rates will not be affected. The government has published an 'Update on the Cost Control Element of the 2016 Valuations' today, providing additional details." (Emphasis added)

208. Similarly, in a submission to the CST on 27 July 2020, there is reference to the CST having "made two decisions", one of which is said to be "That McCloud remedy falls into the category of a 'member cost' (as it increases the value of schemes to members) and, consequently, will be reflected in the completion of the cost control element of the 2016 valuations".

209. These references to "decisions" are not necessarily inconsistent with the decision being only "in principle" at that stage; one would not expect the epithet "in principle" to be used to qualify references to such decisions in documents which are not contractual or intended to set out definitive statements of policy. A better guide to whether it was in fact a decision "in principle", is perhaps the extent to which it appears that questioning of the 'decision' was broached in subsequent meetings. Evidence indicating that HMT was open to hearing such questioning, without seeking to shut down the discussion on grounds that the decision had already been taken and was final, would support the view that this was still an in-principle view capable of being changed before finalisation. There is evidence in this respect from Mr Elks. He describes a series of eight meetings with trade union representatives "over the course of September 2020" and states:

> " 144. … Typically unions were represented by officials dealing with pensions matters. The intention of the meetings was to give us the opportunity to explain the proposals, and to give the unions the opportunity to ask questions. Typically I chaired the meetings, and other colleagues presented different aspects of the approach being taken, which included the relationship with the CCM. We ensured that we explained our approach to the CCM and gave the opportunity for attendees to raise questions as we were aware this was a key concern of unions. The desire to exclude the McCloud Remedy costs from the CCM was raised at various meetings alongside questions on the finer detail of how it would be taken into account as demonstrated in the minutes of the meetings. Indeed, it was one of the more prominent issues, not least because the ostensibly fundamental question, in terms of how the remedy should work, of immediate choice versus deferred choice underpin, was an issue on which unions had a clear preference for deferred choice underpin and was the approach which HMT ultimately also favoured.

> 145. Although not formally the subject of the consultation, if any points had been made to us in these meetings, or through consultation responses, or through feedback from SAB engagement, which caused us to think that there might be a need to reconsider the April 2020 "in principle" decision about the treatment of the costs for CCM purposes, we would have done so, and presented submissions accordingly. But the fact is that it was known (and obvious) at the time of that decision that member interests would prefer the exclusion of the costs, and nothing really new emerged on the issue. We simply did not accept the argument, which I remember being made, that we were "making people pay for discrimination by the Government". What members were having to pay for (or, more accurately, forego the possibility of improved benefits on account of) was the enhancement to benefits resulting from the implementation of the McCloud Remedy. This dynamic had been explained to Ministers and decisions had been made by them with the relevant facts available." (Emphasis added)

210. Not only does Mr Elks expressly describe the April 2020 decision as being "in principle", he also describes how attendees at the September 2020 meetings were given the opportunity to raise questions as to this "key concern" of the treatment of the MRC. I was not taken to any evidence contradicting this description of the meetings. In these circumstances, I do not accept Ms Morris' submission that a firm, implacable decision had been taken as at April 2020. The "in principle" decision might well describe the CST's preferred, indeed strongly preferred, position, but that fact alone does not render open discussion about it meaningless.

211. Both Ms Morris and Mr Short took issue with HMT's description in the WMS above (and in other documents) of "member costs" as being "costs that affect the value of schemes to members". Mr Short submitted that this became a "mantra" of HMT which sought to obfuscate the description of "member costs", namely those concerned with the "profile" of the member, that had been given at the outset. I see little merit in this criticism. Neither description of "member costs" purports to be definitive or comprehensive and nor are they mutually exclusive. A change in longevity, for example (which Mr Short accepts is a "member cost") would affect the value of the scheme to members.

212. Ms Morris also submits that, having embarked on consultation as to the McCloud Remedy, HMT ought to have consulted on the treatment of the

MRC as that is a related topic and it would not have been onerous for it do so. However, there is no authority for the proposition that a decision to consult on one topic means that there must be consultation on a related one. Were that not the case then the scope of any consultation could be ratcheted up to include all related matters thereby imposing, in effect, a duty to consult on everything. That clearly cannot be correct. There will of course be situations where consulting about a proposal will "inevitably involve inviting and considering views about possible alternatives": *Moseley* at [29]. However, a consultation about the nature of the McCloud Remedy does not inevitably invite discussion about whether, and if so how, that remedy is to be included in the CCM. The two issues raise different questions and are not two sides of the same coin. The position was quite unlike that in *Moseley* where the failure to consult was in respect of direct alternatives to a proposal that was consulted on.

213. For these reasons, I conclude that there was no duty to consult, whether arising as a matter of legitimate expectation or fairness or otherwise.

214. The discussions which HMT did have with trade union representatives (as described in Mr Elks' evidence) were sufficient to meet the expectation raised by the statement that there would be stakeholder "involvement". Ms Morris sought to dismiss these discussions, and in particular Mr Elks' comment that HMT "simply did not accept [the representatives'] argument", as falling well short of the "conscientious consideration" that would be given to points in a proper consultation. This last point is taken from the fourth *Gunning* principle, which is that "the product of consultation must be conscientiously taken into account in finalising any statutory proposal": *Gunning* at p.189. However, that is an aspect of the <u>duty</u> to consult. As held above, there is no such duty here. But in any case, the mere fact that an argument is not accepted does not mean that it was not given conscientious consideration. Indeed, to be able to decide that an argument is not accepted suggests that at least some consideration was given to it.

215. For these reasons, BMA Ground 2 fails.

216. If I am wrong about consultation, then it is my view that this is one of those cases where even if there had been consultation to the standard submitted by the Claimants, it would have made no or no substantial difference to the outcome.

217. Section 31(2A) of the *Senior Courts Act 1981* (as amended by s.84 of the *Criminal Justice and Courts Act 2015*) ("**the 1981 Act**") provides (so far as relevant) that:

> "The High Court – (a) must refuse to grant relief on an application for judicial review … if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

218. The present case is not one where there was no discussion about the issue of how the MRC should be treated. As set out above, the issue was raised as a "key concern" by representatives (including the BMA) over the course of several meetings (going back to the early part of 2020) and it was one of the more "prominent" features of discussion, notwithstanding the fact that the treatment of the MRC was not formally the subject of consultation or even an agenda item. The only real difference that there might have been, if the Claimants are right, is that this informal, but heavily discussed topic, would have been a formal agenda item and/or part of a formal consultation exercise. As such, the breach, if there is one, is a technical one. Furthermore, the Claimants have not suggested (even now) any alternative option (short of the Exchequer simply meeting the cost from public funds), other than the binary one of treating the MRC as a member or an employer cost that could realistically have caused HMT to deviate from its preferred position.

219. In my judgment, it is highly likely, on the strength of the available evidence, that the outcome for the BMA Claimants would not have been substantially different had there been formal consultation in respect of the treatment of the MRC.

BMA Ground 3 – Breach of the PSED

Submissions

220. Ms Morris submits that there were three key breaches of the PSED:

a. First, it is said that the PSED analysis was undertaken too late in that it was completed 18 months after the decision to include the MRC as a member cost in the CCM was taken. The analysis, completed on 5 October 2021 just two days before the 2021 Directions were made, amounted to a "rearguard action" (see *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [26]) following a concluded decision rather than an analysis that could properly inform policy having had due regard to the objectives under the PSED.

b. Second, it is said that the PSED analysis was inadequate in that there has been an absence of any "rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives (*R (Hurley & Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) (DC) at [77]). Although there was acknowledgment that the members negatively affected would be younger members, and in turn those who are more likely to be female and/or possess other protected characteristics, the analysis was too brief (extending to only 4 pages of a 7-page report) and superficial. No attempt was made to analyse the extent of any adverse impact on different groups in terms of actual financial consequences. The failure to understand the extent of the effect rendered the assessment of mitigation inadequate.

c. Finally, it is said that the fact that no scheme-specific analysis was undertaken necessarily meant that the PSED analysis was overbroad and unspecific. The only scheme-based analysis was contained in the GAD Equalities Analysis published on 6 October 2021 but this did no more than recognise that in some schemes, more members are likely to select legacy benefits and will be less affected by the CCM.

221. Mr Giffin submits that the Minister had sufficient information appropriate to the making of the decision. That decision was not final until after the date of the PSED, and the equalities implications of the proposed policy formed part

of the consideration throughout the process. As to the adequacy of the analysis, Mr Giffin submitted that the PSED analysis expressly considered the indirectly discriminatory effects of including the MRC in the CCM in terms of age, sex and other protected characteristics, and identified the cohort most affected, namely those members not eligible for the McCloud Remedy. The analysis concluded that the differential impacts related to age (and to sex and other protected characteristics) were fair and proportionate. That analysis is supported by the GAD Equalities Analysis which also included a scheme-based analysis. It is wrong to suggest, as the Claimants do, that a detailed and precise mathematical analysis of the impact on each scheme was required in order to discharge the PSED.

BMA Ground 3 – Discussion

222. Section 149 of the 2010 Act provides (so far as relevant) as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act ;
> >
> > (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it,
> >
> > (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
> >
> > …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to -
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> >
> > …"

223. In *Bracking*, (in a summary approved by the Supreme Court in *Hotak v Southwark London Borough Council* [2016] AC 811 at [73]) the applicable

principles were identified as follows:

> "(1) …equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements…
>
> (3) The relevant duty is upon the Minister or other decision-maker personally….
>
> (4) A [decision-maker] must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23 – 24]* .
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
>
>> (a) The public authority decision-maker must be aware of the duty to have "due regard" to the relevant matters;
>>
>> (b) The duty must be fulfilled before and at the time when a particular policy is being considered;
>>
>> (c) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
>>
>> (d) The duty is non-delegable; and
>>
>> (e) Is a continuing one.
>>
>> (f) It is good practice for a decision maker to keep records demonstrating consideration of the duty.
>
> (6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria."
>
> (7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting

to them".

(8) The combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014* and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it."

224. In *Bracking*, the Court also referred to the decision of Elias LJ in *R (Hurley & Moore) v Secretary of State for Business, Innovation & Skills* [2012] ELR 297, recognising the duty of sufficient enquiry in this context:

"89. … the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required".

225. Ms Morris' first point is based on the contention that a final decision to include the MRC in the CCM as a member cost had effectively been taken in April 2020 well before the PSED analysis in October 2021. As discussed above under BMA Ground 2, it is not correct to describe the April 2020 decision as final. If it were otherwise, then that would have been the operative decision for the Claimants to challenge; instead, they have chosen, correctly, to challenge the decision on 7 October 2021 to make the 2021 Directions. The gap between the PSED analysis on 5 October 2021 and the making of the directions on 7 October 2021 is short. But that does not of itself mean that meaningful consideration was not given to the contents of the PSED analysis in making the decision. The submission from HMT, also dated 5 October 2021, expressly asks the Minister whether, "Having considered the equalities impact assessment, [he agrees] to publish the Amending Directions on 7 October 2021". There is no suggestion of bad faith that might cast some doubt on whether the PSED analysis was genuinely considered.

226. Moreover, it is apparent from the overall chronology that the PSED analysis was not the first occasion on which the potential equalities impacts were considered. The context in which the issue had arisen, i.e. following court rulings that transitional protection was discriminatory, meant that there was an acute awareness of equalities issues from the outset. The Public Service

Pensions Board paper of March 2019, which set out some potential options following the Court of Appeal's' judgment, noted that:

> "5. Clearly there are equalities impacts to consider in any change to pensions, including the differential impact faced by younger cohorts, who are likely to experience reduced pension benefits as result of changes. Further detailed work is required for each option to determine fiscal impact and quantify legal/ operational risks - ahead of advising Ministers we would welcome views from the Board on whether we should explore more ambitious options, or rule any options out now…"

227. The fact that such awareness arises outside of a document specifically labelled as a PSED analysis does not mean that it cannot go towards discharging the duty: see *Bracking* at [73(5)].

228. Of course, in this case, there was also the PSED analysis. That was provided to the Minister before the final decision to make the 2021 Directions. The Minister could, notwithstanding the strong preference expressed hitherto for including the MRC as a member cost, have changed his mind in light of the PSED analysis and disagreed with the recommendation made in the submission. The door to a different outcome may well have been only very slightly ajar by that stage but it was not completely shut. I therefore reject the argument that this was some sort of "rearguard" action or an attempt at ex post facto justification for a decision already taken.

229. Ms Morris' next point was based on the contention that there had been a failure to undertake the required analysis with rigour and an open mind. It is important to bear in mind that "the PSED is a duty of process and not outcome", and that "what is required by the PSED is dependent on context and does not require the impossible": *R (Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037 at [176] and [181]. Thus, the depth of analysis or inquiry in one case will not inform what is required in another case where the circumstances may be entirely different. Moreover, as stated by the Divisional Court in *R (Adiatu) v HM Treasury* [2020] PTSR 2198:

> "207. The PSED does not require a detailed analysis of the sort that might be undertaken by leading counsel in the course of submissions in legal proceedings (see *Williams*, paragraph 16). In *R (SG) v*

> *Secretary of State for the Home* Department [2016] EWHC 2639 (Admin), at paragraph 329, Flaux J said that:
>
> > "… what is required is a realistic and proportionate approach to evidence of compliance with the PSED, not micro-management or a detailed forensic analysis by the court …. the PSED, despite its importance, is concerned with process not outcome, and the court should only interfere in circumstances where the approach adopted by the relevant public authority is unreasonable or perverse."”

230. Ms Morris sought to qualify the effect of *Adiatu* by highlighting the urgent circumstances (during the pandemic) in which the report in that case was produced. However, the principle that the PSED does not require a detailed forensic analysis of the issue is, in my judgment, one of general application and was not stated by the Divisional Court in *Adiatu* to apply only where time was short.

231. Mr Giffin also drew my attention to *West Berkshire District Council v Secretary of State for Communities and Local Government* [2016] EWHC 267 (Admin) in which the Court of Appeal considered whether the absence of a detailed analysis of the impact of an affordable housing policy on different affected groups meant that there had been a failure to comply with the PSED. At [83], Lord Dyson MR said:

> “83. It seems to us that this statement demonstrated a consideration of the potential for adverse impacts on protected groups. The requirement to pay due regard to equality impact under section 149 is just that. <u>It does not require a precise mathematical exercise to be carried out in relation to particular affected groups or, for example urban areas as opposed to rural areas</u>. <u>The assessment undoubtedly acknowledged the effect of the proposals upon protected groups</u> but sought to place that in context by reference to other policies impacting on affordable housing.” (Emphasis added)

232. Lord Dyson went on to hold that the “broad brush” approach taken by the authority in that case did not mean there was a failure to comply.

233. What of the PSED Analysis here? It commences by identifying what the PSED requires:

> “This document records the analysis undertaken by the Department to enable Ministers to fulfil the requirements placed on them by the

Public Sector Equality Duty (PSED) as set out in section 149 of the Equality Act 2010. The PSED requires the Minister to pay due regard to the need to:

> • eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
>
> • advance equality of opportunity between people who share a protected characteristic and those who do not; and
>
> • foster good relations between people who share a protected characteristic and those who do not." (Emphasis added)

234. The document therefore does identify, by reference to the wording of the statutory provisions, the precise matters to which due regard must be paid. It also emphasises that the duty is that of the Minister.

235. The analysis goes on, after setting out the background and the design of the CCM, to state that:

> "The design of the cost control mechanism delivers some "intergenerational transfer"; costs associated with an earlier cohort (who are, on average, older) affect the level of benefits available to later cohorts (who are younger on average, although will include some older members)."

236. After explaining the approach of including the MRC as a "member cost" for the purposes of the CCM, there is a section entitled "Remedy Status", which states that:

> "…While this remedy status does not map directly on to protected characteristics such as age, sex, or other protected characteristics, different protected characteristics are more or less prevalent amongst different remedy status groups.
>
> • Members who are not eligible for remedy will have lower benefits by completing the 2016 cost control valuations with 'remedy included.' This group is likely to include the youngest members and the group's members are also more likely to be female and/or to have other protected characteristics, including to be from ethnic minority groups and to have a disability (see below), than the overall group of members affected by the 2016 valuations.
>
> • Members that are eligible for remedy will have either unchanged benefits (if they choose legacy benefits and would have done so even if remedy had not been included) or reduced benefits (if they choose reformed benefits, or if inclusion of remedy means they choose

legacy benefits when they would have otherwise chosen reformed benefits) by completing the 2016 cost control valuations with ‘remedy included.’ Remedy choices will vary by age, sex and other protected characteristics, and also which workforce a member is in.

> • In some workforces, members with transitional protection may be more likely to choose reformed scheme benefits and thus have reduced benefits with ‘remedy included’. Transitionally protected members are older members. This group may also have a lower proportion of members with other protected chacracteristics (sic).
>
> Remedy status is not a protected characteristic and so any differential impact by remedy status does not have an equalities impact. However, there may be a differential impact by protected characteristics due to the relative prevalence in remedy status groups, as described above. Where this is the case, the Government believes this is fair and proportionate given that:
>
> • the Government is required to provide McCloud remedy,
>
> • it is necessary to ensure the subsequent uplift in the value of members’ benefits is subject to cost control to protect taxpayers, and
>
> • all cost-sharing mechanisms will entail the possibility that members’ benefits may be affected by costs associated with other cohorts.”

237. This is followed by a section dealing specifically with the protected characteristic of age, acknowledging that:

> “There may be differential impacts which are indirectly related to age, due to
>
> • Intergenerational impacts due to the inherent design of the cost control mechanism, and
>
> • Differential impacts by remedy status and remedy choice (see above).”

238. Having acknowledged those differential impacts, the analysis proceeds to consider the efforts made to mitigate them:

> “The Government has made efforts to mitigate any differential impacts on younger members as a result of this intergenerational transfer by specifying in the amending directions that the 2016 cost control valuations will:
>
> > • capture the entire remedy impact, including by allowing for the effect of any expected behavioural changes (caused by remedy) on all service, at the 2016 cost control valuations; and

• spread this remedy impact over the 2016 valuation implementation period…

Given the design and nature of the mechanism, it is not possible to exactly align the associated costs captured at the 2016 valuations with those whose benefits will be directly impacted. However, the approach set out in the Amending Directions intends to limit any intergenerational unfairness.

By ensuring that, as far as possible, the entire anticipated remedy impact is captured at the 2016 cost control valuations, this reduces the likelihood that residual remedy impact (i.e. impact not captured at the 2016 valuations) may need to be considered in the CCM at future valuations, irrespective of the future design of the CCM.

GAD has advised that spreading the remedy impact over a long period (such as 15 years as typically used in the valuation when spreading past service) would be expected to have a greater impact on intergenerational unfairness. Similarly, if any of the expected remedy impact is not captured in the 2016 valuations but is captured at later valuations, this could have a similar effect as having a long spreading period.

The Government believes that any differential impact by age is fair and proportionate. In light of the mitigations taken, the amending directions strike an appropriate means of achieving the aim of protecting the taxpayer by ensuring McCloud remedy is subject to cost control through the cost control mechanism."

239. Thus, the PSED analysis acknowledges and identifies the differential impact, sets out the steps taken to mitigate that impact on younger members, recognises the limitations of those steps, takes account of the GAD advice that alternative mitigation could have an even greater impact on intergenerational fairness, and concludes by stating the Government's belief that the differential impact is, in these circumstances, justified. In my judgment, that is sufficient, in this context to discharge the PSED. I say that for the following reasons.

240. This is not a case where (as in *Bridges*) there was a failure to acknowledge or make inquiry about the potentially discriminatory effect of a measure; indeed, there has been express recognition and acknowledgment of the differential impact from the outset. The Claimants have not suggested that a particular category of differential impact has been overlooked or disregarded. Instead, their complaint is that the analysis was not based on a precise

understanding of the extent of the impact on different groups. However, as stated in *West Berkshire*, a precise mathematical analysis of the effect of a measure on different groups is not always necessary. The PSED analysis here did not seek to suggest that the financial impact on younger members was trivial or insubstantial. The language of "intergenerational unfairness" resulting from the differing levels of benefits implies an acceptance that these differences are substantial. It is not apparent why knowing the precise levels of loss (over and above the fact that they are substantial enough to cause "unfairness") would be relevant for the Minister or how such knowledge could have influenced his decision. Ms Morris submits that HMT was required to understand "at least at a high level" the extent of the financial impact. In my judgment, that is precisely what the PSED analysis enabled the Minister to do in this case.

241. Furthermore, contrary to Ms Morris' submission, the analysis does not cease after acknowledging that there is a greater impact on younger members. It goes on to consider efforts to mitigate the differential impact including by limiting the period over which the remedy is spread. In doing that, the analysis is inviting the Minister to have due regard to the need to eliminate unlawful discrimination and foster good relations between those who share a protected characteristic and others. In the context of pension schemes, age-based differential impacts are unlikely ever to be eliminated completely, and thus minimising or reducing that differential to some degree may be the best that can be achieved. Reducing intergenerational unfairness, as the Government puts it, could limit the sense of injustice that younger members feel about their treatment as compared to older members, thus fostering better relations between the two groups. The Claimants (and many others) may disagree vehemently with the Government's conclusions, but that does not mean that there has been a failure to have due regard to the matters required by the PSED.

242. Ms Morris criticises the fact that other mitigation was not considered. However, this is to challenge the outcome in that the Claimants disagree with the Government's view as to the steps it ought to be taking to comply with

the PSED. That is not what the PSED entails.

243. The PSED analysis also deals with the protected characteristic of sex specifically and with other protected characteristics (including ethnicity and disability) more generally. Given that the differential impacts for these groups arise out of the fact that newer members are likely to have a larger proportion of those with such characteristics than older cohorts, the analysis as to the effect of mitigating measures in their case is unlikely to be substantially different to that undertaken in respect of age.

244. Ms Morris' final criticism is that the analysis is not scheme-specific. However, the GAD Equalities Analysis (which was referred to, although not included, in the material put before the Minister, and which informed the PSED Analysis) did expressly consider "how some of the different impacts described earlier in this report may differ for different schemes". The analysis was at a high level, but did identify "some of the main scheme specific differences and discuss[ed] their impacts". It was considered that age and sex were unlikely to have an impact on the choice of benefits by eligible members. Once again, this is adequate in my judgment, in the context of the measure being considered. Ms Morris suggests that a more detailed scheme-specific analysis might have identified whether schemes with more part-time workers (who are more likely to be women or those with a disability) will accrue less pension as a result. Of course, part-time status is not of itself a protected characteristic for the purposes of the PSED. Insofar as more women and disabled people are more likely to be affected in such schemes, that was taken into account, albeit at an overall non-scheme-specific level. The only real difference which a scheme-specific analysis might have made would be as to the precise levels of loss. However, for reasons already discussed, it was not necessary in this context for the Minister to be aware of the precise levels of loss in order to discharge the duty.

245. It is correct to say, as does Ms Morris, that more detailed Equalities Impact Assessments were undertaken in respect of other changes to the schemes, for example in relation to the choice of remedy. However, that does not render

the analysis in the present case, which related to a different and more limited measure, inadequate. Each analysis must be judged in the context in which it is undertaken.

246. For these reasons, the claim that the PSED was not complied with fails.

247. If that is incorrect, then the Defendants rely upon s.31 of the 1981 Act, as they did under BMA Ground 2 above. Here too, it is my judgment that it is highly likely, on the strength of the available evidence, that the outcome for the BMA Claimants would not have been substantially different had there been a more detailed and/or scheme specific PSED analysis. The main deficiency identified by the Claimants is the absence of information as to the precise levels of benefit lost by different groups across different schemes. However, there has been no credible submission as to how that would have made any difference to the outcome. The Minister proceeded on the basis that the losses were sufficient to produce "intergenerational unfairness". Information as to the precise mathematical levels of loss in different cases is highly unlikely to have caused him to come to a different conclusion as to whether or not to proceed with making the 2021 Directions.

BMA Ground 4 – Failure to obtain and/or to take into account relevant information.

248. Ms Morris submits that in making the 2021 Directions, HMT failed to obtain and/or take account of: (a) alternative options for the treatment of the MRC; (b) any other method of quantifying the value to the schemes of the changes resulting from the need to remedy the discrimination; and (c) a robust assessment of the equalities impacts of the 2021 Directions.

249. The last of these is essentially another way of putting BMA Ground 3. Ms Morris further submits that the HMT's assessment that the inclusion of the MRC in the CCM was fair and proportionate was flawed and that consequently the 2021 Directions were made on the basis of an irrelevant consideration. This argument is difficult to follow. Where an authority has

taken account of a relevant assessment, the fact that the assessment is considered to be incorrect does not render it irrelevant. The taking account of the impugned assessment would only be unlawful if it was unreasonable, in the *Wednesbury* sense to do so. The content of the *Tameside* duty, on which this ground is said to be based, was set out by the Court of Appeal in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647:

> "70. The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, paras 99–100. In that passage, having referred to the speech of Lord Diplock in *Tameside* , Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37 , para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."
> (Emphasis added)

250. In the present case, it is not suggested that the assessment of proportionality was irrelevant, merely that the assessment ought to have been based on further inquiry. However, it is not for the Court to strike down the decision to make the Direction on the basis that the proportionality assessment was wrong (albeit that could form the basis for a challenge on a different ground)

or that it could have been based on further inquiry; such matters are for the decision maker, unless it can be said that no reasonable authority would have relied on the assessment. In my judgment, the Claimants' contentions do not get anywhere near to crossing that high hurdle.

251. The same applies, in my view, to the other two matters upon which Ms Morris relies. It seems to me that it is not correct to say that there was a failure to consider alternative options. As Mr Giffin points out, HMT considered a variety of other options, including, amongst other things, wholesale reform of public sector pensions. No other option, save for simply imposing the entire burden of meeting the MRC on the taxpayer, was seriously mooted by the Claimants. That option was, as Mr Elks described, inconsistent with the cost control and cost sharing objectives sought to be achieved post the Hutton Report. It is impossible to say, in these circumstances, that no reasonable decision-maker would have considered that the range of options was adequate.

252. For these reasons, BMA Ground 4 fails, as does BMA's claim overall.

Conclusion

253. The applications for judicial review are dismissed in both claims because the legal bases on which each was brought are not made out.

Annex 1 - Abbreviations

20 April 2020 FBU claim for judicial review challenging the Government for failing to lift the pause on the operation of the CCM and failing to implement the benefit improvements that should have been made following the 2016 valuations	First JR
British Medical Association	BMA
Chief Secretary to the Treasury	CST
Cost Control Mechanism	CCM
Department for Health and Social Care	DHSC
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
Fire Brigades Union	FBU

Firefighters Pension Scheme (England) Regulations 2014 as amended by the *Firefighters' Pension Scheme (Amendment) Governance Regulations 2015*	2015 Scheme Regulations
Firefighters Pension Scheme 2015	205 FFP Scheme Regulations
Government Actuary's Department	GAD
His Majesty's Treasury	HMT or the Defendant
NHS Pension Scheme	2015 NHS Scheme Regulations
Paper entitled "PSED Assessment for the amending directions to unpause the cost control mechanism and reflect the increased value of public service pensions as a result of the McCloud and Sargeant judgments in the completion of the cost control element of the 2016 valuations"	PSED analysis
Paper entitled "Public Service Pensions: Actuarial valuations and the employer cost cap mechanism"	2014 Guidance
Policy document entitled "Actuarial valuations of public service pension schemes"	Second November 2012 policy
Policy document entitled "Establishing an employer cost cap in public service pension schemes"	First November 2012 policy
Provision, criterion or practice within the meaning of section 19 of the Equality Act 2010	PCP
Public Sector Equality Duty	PSED
Public Service Pensions (Employer Cost Cap) Regulations 2014	2014 Regulations
Public Service Pensions (Valuation and Employer Costs Cap) (Amendment) Directions 2021	2021 Directions
Public Service Pensions (Valuations and Employer Cost Cap) (Amendment) Directions 2018	2018 Directions.
Public Service Pensions Act 2013	The 2013 Act
Public Service Pensions Bill	The Bill
Report entitled "Actuarial Analysis of Equality Impacts"	Actuarial Equalities Report
Report of the Independent Public Service Pensions Commission chaired by Lord Hutton	Hutton Report
Scheme Advisory Board	SAB
The cost of remedying the discrimination in *McCloud/Sargeant*	McCloud remedy costs or the MRC
The decision in *Lord Chancellor v McCloud & Ors, Sargeant and Ors v Secretary of State for the Home Department and Ors* [2019] ICR 1489	*McCloud/Sargeant*
The Equality Act 2010	The 2010 Act
The Public Service (Valuations and Employer Cost Cap) (Amendment and Savings) Directions 2019	2019 Pause Directions
The Senior Courts Act 1981	The 1981 Act
Trade Union Congress	TUC
Written Ministerial Statement	WMS