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EMPLOYMENT TRIBUNALS

Ms V McCloud & Others Mr N Mostyn & Others	**AND**	1. The Lord Chancellor and Secretary of State for Justice 2. Ministry of Justice

Heard at: London Central **On**: 14 - 22 November 2016

Before: Employment Judge S J Williams (sitting alone)

Representation:

For Ms McCloud & Ors:	Mr A Short, Queen's Counsel, and Miss N Ling, of Counsel Instructed by Messrs Leigh Day, Solicitors
For Mr Mostyn & Ors:	Mr M Beloff, Queen's Counsel, and Mr B Jaffey, of Counsel Instructed by Messrs Bindmans, Solicitors
For both Respondents:	Mr M Chamberlain, Queen's Counsel, Mr B Collins, Queen's Counsel, and Ms K Apps, of Counsel Instructed by the Government Legal Department

RESERVED JUDGMENT

The Judgment of the Tribunal is that:-

By reason of the transitional provisions contained in Part 2 **and Part 3** of Schedule 2 to the Judicial Pensions Regulations 2015 made by the respondents, the respondents have treated and continue to treat the claimants less favourably than their comparators because of their age. The respondents have failed to show their treatment of the claimants to be a proportionate means of achieving a legitimate aim.

REASONS

Introduction

1. In this litigation two hundred and ten judges at various levels within the judiciary complain that the new judicial pension scheme which they have

been, or will be, compelled to join subjects them to age discrimination and, in some cases, race discrimination and sex discrimination/unequal pay.

2. Before 1 April 2015 the claimants were all members of the judicial pension scheme ("JPS") established pursuant to the Judicial Pensions and Retirement Act 1993. By section 18 of the Public Service Pensions Act 2013 and regulations made pursuant to it, the JPS was closed on 31 March 2015 and serving judges were compulsorily transferred into a replacement scheme called here, for convenience, the new judicial pension scheme ("NJPS").

3. The NJPS provides, firstly, for less valuable retirement benefits for judges, and, secondly, creates an exception in the form of transitional provisions which permit older judges to remain members of the JPS, either until retirement (full protection members) or until the end of a period of tapered protection (tapered protection members), dependent on their age. The claimants, some of whom have tapered protection, have either already been compulsorily transferred from the JPS into the NJPS or will be so transferred at the end of their period of tapered protection on dates between 1 April 2015 and 1 February 2022. The claimants allege that the transitional provisions, whereby older judges are permitted to remain members of the JPS, either until retirement or until the end of their tapered protection, constitute unlawful discrimination on the grounds referred to above.

4. The respondents contend that their treatment of the claimants is objectively justified. By paragraph 10 of a case management order made on 15 October 2015 it was directed that there should be a preliminary hearing to determine the issue of objective justification. The present tribunal has been convened to consider that issue.

5. By consent, all material made available to the public and to the press was redacted so as to preclude publication of certain personal information and any information leading to the identification of the private addresses of the claimants.

The issue for this preliminary hearing

6. The claimants in these proceedings fall either into the category of unprotected judges or tapered protection members of the JPS. The unprotected claimants contend that they have suffered unlawful discrimination because of their age in that they have been treated less favourably than the tapered protection judges and the fully protected judges. The claimants who have tapered protection contend that they have suffered unlawful discrimination because of their age in that they have been treated less favourably than the fully protected judges and also less favourably than the tapered protection judges who are older than they are.

7. Further, the claimants include judges who are white, BAME, male and female. It is contended that the provisions of Schedule 2 to the regulations of 2015 are indirectly discriminatory against female and BAME judges and that they offend against the principle of equal pay.

8. The respondents concede that the transitional provisions involve less favourable treatment of the claimants because of age, and also accept that, because of the gender and racial profile of the fully protected, taper-protected and unprotected groups, the provisions have a disproportionate impact on female and BAME judges. The respondents nevertheless contend that the transitional provisions are a proportionate means of achieving the legitimate aim of protecting those closest to retirement from the financial effects of pension reform and that the differences in treatment are therefore justified and lawful.

9. The issue for this tribunal is whether the admittedly less favourable treatment of these claimants than their comparator group or groups because of their age is a proportionate means of achieving a legitimate aim: Council Directive 2000/78/EC, article 6(1); Equality Act 2010, sections 13 (1) and 13 (2).

10. The parties are agreed that the claims for race discrimination, sex discrimination/equal pay also depend on the answer to the same question. In the circumstances of this case no party has suggested that the result should be different depending on which protected characteristic is considered.

11. The tribunal was referred to the following authorities:-

United Kingdom cases

R v Secretary of State for Employment ex parte EOC [1995] 1 AC 1
Strathclyde Regional Council v Wallace [1998] ICR 205
De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69
R v Secretary of State for Employment ex parte Seymour-Smith [1999] 2 AC 554
Matadeen v Pointu and ors [1999] 1 AC 98
Glasgow City Council v Marshall [2000] ICR 196
R v Director of Public Prosecutions ex p Kebilene [2000] 2 AC 326
Allonby v Accrington and Rossendale College and ors [2001] ICR 1189
Hardy & Hansons plc v Lax [2005] ICR 1565
In re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593
R (G) v Immigration Appeal Tribunal and anor [2005] 2 All ER 165
A and ors v Secretary of State for the Home Department [2005] 2 AC 68
R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173
R (Unison) v First Secretary of State [2006] IRLR 926
R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213
Rutherford v Secretary of State for Trade and Industry [2006] ICR 785
Middlesborough Borough Council v Surtees [2007] ICR 1644
MacCulloch v Imperial Chemical Industries plc [2008] ICR 1334
Cumbria County Council v Dow [2008] IRLR 91
Loxley v BAE Systems Land Systems [2008] ICR 1348
Coventry City Council v Nicholls [2009] IRLR 345
R (Age UK) v Secretary of State for Business, Innovation and Skills [2009] IRLR 1017
Homer v Chief Constable of West Yorkshire Police [2010] ICR 987
H v News Group Newspapers Ltd [2011] 1 WLR 1645

Woodcock v Cumbria Primary Care Trust [2011] ICR 143
HM Land Registry v Benson [2012] ICR 627
Homer v Chief Constable of West Yorkshire Police [2012] ICR 704
R (Sinclair Collis Ltd) v Secretary of State for Health [2012] QB 394
Seldon v Clarkson Wright & Jakes [2012] ICR 716
Staff Side of the Police Negotiating Board v Secretary of State for Work and Pensions [2012] Pens. L.R 31
Ministry of Justice (formerly Department for Constitutional Affairs) v O'Brien [2013] 1 WLR 522
R (FDA and others) v Secretary of State for Work and Pensions [2013] 1 WLR 444
Lockwood v Department for Work and Pensions [2014] ICR 1257
Seldon v Clarkson Wright & Jakes (No. 2) [2014] ICR 1275
Cockram v Air Products plc UKEAT/0122/15/LA
Chief Constable of West Midlands Police v Harrod [2015] ICR 1311
Trustees of Swansea University Pension and Assurance Scheme and another v Williams [2015] ICR 1197
R (Johnson) v Secretary of State for the Home Department [2016] UKSC 56
Naeem v Secretary of State for Justice [2016] ICR 289

European cases

Johnston v Chief Constable of the Royal Ulster Constabulary [1987] QB 129
Schoenheit v Stadt Frankfurt am Main C-4/02 and C-5/02
Mangold v Helm [2006] IRLR 143
Cadman v Health and Safety Executive [2006] ICR 1623
Palacios de la Villa v Cortefiel Servicios SA [2009] ICR 1111
R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform [2009] ICR 1080
Huetter v Technische Universitaet Graz [2009] All ER (EC) 1130
Petersen v Berufungsausschuss fuer Zahnaerzte fuer den Bezirk Westfalen-Lippe C-341/08
Kuecuekdeveci v Swedex GmbH & Co KG [2010] IRLR 346
Ingeniorforeningen i Danmark v Region Syddanmark C-499/08
Rosenbladt v Oellerking Gebaeudereinigungsgesellschaft mbH [2011] IRLR 51
Georgiev v Tehnicheski Universitet Sofia C-25/09 and C-268/09
Fuchs v Land Hessen [2012] ICR 93
Hennigs v Eisenbahn-Bundesamt [2012] IRLR 83
Hoernfeldt v Posten Meddelande AB [2012] IRLR 785
Commission v Hungary C-286/12
Odar v Baxter Deutschland GmbH C-152/11
Kenny v Minister for Justice Equality and Law Reform C-427/11
HK Danmark V Experian A/S [2014] ICR 27
Dansk Jurist- og Okonomforbund (on behalf of Toftgaard) v Indentigs- og Sundhedsministeriet [2014] ICR 1
Specht v Land Berlin [2014] ICR 966
Felber v Bundesministerin fuer Unterricht, Kunst und Kultur C-529/13
Unland v Land Berlin [2015] ICR 1225

Further cases

United States v Hatter 532 U.S. 557 (2001)

Reference re Remuneration of Judges of the Provincial Court (Prince Edward Island) [1997] 3 S.C.R.

12. Mr Chamberlain adduced the evidence of:-

Julian Thomas Kelly, who was from June 2012 Director for Public Spending at Her Majesty's Treasury with general oversight of the public service pension reforms, and who since June 2014 has been Director General of Public Spending and Finance with overall responsibility for public sector spending, including pay and pension policies;

Nick Goodwin, Director of Access to Justice Policy within the Ministry of Justice, who between April 2014 and April 2016 was Director of Judicial, Policy Pay and Pensions with oversight of the judicial pensions reforms; and

Michael Gerard Thomas Scanlon, Deputy Chief Actuary in the Government Actuary's Department whose responsibilities until July 2012 included advising Her Majesty's Treasury on matters relating to public service pension schemes, and who since July 2015 has been responsible for advising the Ministry of Justice in respect of the judicial pension scheme. All witnesses gave evidence in chief from prepared witness statements and were cross-examined on those statements.

13. The claimants did not give oral evidence. The tribunal received witness statements from the claimants Barry Cotter QC, Jonathan David Braine, Lawrence Bryan Saffer, Paul Brooks, Rita Rogerson, Robin Chaudhuri, Sarah Anne Watson, Victoria McLoud and William Hay Summer, all represented by Mr Short, and a statement from Shah Qureshi detailing the circumstances of each of Mr Beloff's clients.

14. I was also provided with expert evidence comprising a report prepared by Jill Tallon and Michael Lapham of Mercer & Hole, chartered accountants, together with an addendum, detailing the tax consequences of the pension reforms for the claimants, and financial planning reports prepared by Michael Lapham for Paul Brooks, William Summers, Lawrence Saffer and Barry Cotter. For the respondents I was provided with a report prepared by Nikki Peter Rowel, Chartered Financial Planner, of Kingston Smith Financial Advisors, who was instructed to review the reports submitted on behalf of the claimants. By way of summary of that expert evidence, I was provided with a schedule of agreed financial planning and tax expert evidence for the claimants represented by Mr Short and with an agreed schedule of issues arising from Mr Qureshi's statement. Save for some minor matters which are not relevant to this judgment, the effect of the expert evidence is agreed.

15. The tribunal received in evidence a bundle of documents in 9 volumes containing pages 1 - 8,541 and an additional bundle containing material recently disclosed by the respondents containing pages 1 - 526. Counsel presented opening and closing submissions in writing which, in each case, they elaborated orally.

The facts

16. The tribunal found the following facts relevant to the issue to be decided. These claims arise in the context of wide-reaching and well publicised changes which have affected pensions in the private and public sectors as well as state pensions. In recent times concerns have been expressed in many quarters about the effect of demographic changes, such as increased life expectancy and the balance between those at work and those drawing pensions, on the long-term affordability of existing pension arrangements.

17. It is a theme running through this case that the government has two relevant roles: it is the legislator, setter of public policy and controller of public finances; it is also the employer of a large number of public servants. In its former capacity, the government determined that certain changes should be made to the state pension system; these changes concerned both the amount and calculation of the state pension and the age at which it should be payable. In that context, the government published a Green Paper '*A State Pension for the 21st Century*' on 4 April 2011 and invited responses to its proposals. A summary of the responses to that consultation was presented to parliament in July 2011.

18. In its capacity as the employer of a wide range of public servants, as well as guardian of the public purse, the government established the Independent Public Service Pensions Commission under the Chairmanship of Lord Hutton, and set out the terms of reference of the commission in an undated document which invited the commission to produce an interim report by the end of September 2010 and a final report in time for the Budget in 2011. Those terms of reference were:-

> *To conduct a fundamental structural review of public service pension provision and to make recommendations to the Chancellor and Chief Secretary on pension arrangements that are sustainable and affordable in the long term, fair to both the public service workforce and the taxpayer and consistent with the fiscal challenges ahead, while protecting accrued rights. In reaching its recommendations, the Commission is to have regard to:-*
>
> > *the growing disparity between the public service and private sector pension provision, in the context of the overall reward package – including the impact on labour market mobility between public and private sectors and pensions as a barrier to greater plurality of provision of public services;*
> > *the needs of public service employers in terms of recruitment and retention;*
> > *the need to ensure that future provision is fair across the workforce;*
> > *how risk should be shared between the taxpayer and the employee;*
> > *which organisations should have access to public service schemes;*
> > *implementation and transitional arrangements for any recommendations; and wider Government policy to encourage adequate saving for retirement and longer working lives.*

19. Lord Hutton's commission produced its interim report on 7 October 2010 and its final report in March 2011. In a paper entitled '*Public Service Pensions: good pensions that last*' presented to parliament in November 2011, the government set out its preferred scheme design for reformed public service pensions which, in his foreword, the Chief Secretary to the Treasury stated was built on the foundations laid by Lord Hutton in his report. The government's reforms to public service pensions crystallised with the enactment of the Public Service Pensions Act 2013 and, of particular relevance to these claims, the Judicial Pensions Regulations 2015.

20. In its final report, at paragraph 7.34, the Hutton Commission said:-

> '*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* [normal pension age]*. This would particularly be the case if the final salary link is protected for past service, as the Commission recommends. This limitation of impact will also extend to people below age 50, proportionate to the length of time before they reach their NPA. Therefore special protections for members over a certain age should not be necessary. Age discrimination legislation also means that it is not possible in practice to provide protection from change for members who are already above a certain age.'*

21. Lord Hutton's commission thus recommended no transitional provisions beyond the protection of accrued rights. On this point the government did not agree. In his foreword to '*Public Service Pensions: good pensions that last*', the Chief Secretary to the Treasury wrote:-

> '*I believe it is right that we protect those public service workers who, as of 1 April 2012, have ten years or less to their pension age. It is my objective that these people see no change in when they can retire, nor any decrease in the amount of pension they receive at their current normal pension age. Scheme specific discussions will need to determine the fairest way of achieving this objective, taking full account of equalities impacts and legislation, while ensuring that costs to the taxpayer in each and every year do not exceed the Office for Budget Responsibility forecasts of public service pension costs.'*

22. The JPS was closed from the 31 March 2015 and replaced by the NJPS. However, the government gave effect to the Chief Secretary's objective by enacting Schedule 2 to the Regulations of 2015 which contains the transitional provisions providing for full protection members of an existing scheme (at Part 2 of Schedule 2) and for tapered protection members of an existing scheme (at Part 3 of Schedule 2). In summary, a full protection member is someone who was an active member of the JPS both on 31 March 2012 and on 31 March 2015 and who would reach normal pension age under that scheme on or before 1 April 2022; a tapered protection member is someone who was an active member of the JPS on those same dates who would reach normal pension age during the period beginning with 2 April 2022 and ending with 1 September 2025. It will be appreciated,

therefore, that the status of a full protection member and of a tapered protection member of the JPS depends solely upon a judge's date of birth and therefore his or her age. Full protection members are permitted to remain members of the JPS until their retirement and will suffer no adverse changes to their entitlements on retirement; tapered protection members are permitted to remain members of the JPS until the end of their period of tapered protection when they will be compulsorily transferred into the NJPS. Other members of the JPS, referred to here as unprotected judges, were compulsorily transferred from the JPS into the NJPS on 1 April 2015.

23. It is common ground that the NJPS provides substantially less favourable benefits to members than those provided by the JPS which was established under the Judicial Pensions and Retirement Act 1993. In summary, the JPS provides:-

    1. An annual pension which accrues at the rate of 1/40th of a judge's final pensionable pay multiplied by the number of years' service up to 20;
    2. A lump sum payable on retirement at the rate of 2.25 x the annual rate of pension;
    3. A normal pension age of 65;
    4. A surviving spouse's or civil partner's pension paid at half the rate of the member's pension.

24. In place of those benefits the NJPS provides:-

    1. An annual pension which accrues at the rate of 1/43rd of pensionable pay on a career average basis. There is no upper limit on the length of service during which pension may be accrued.
    2. No separate lump sum is payable; a lump sum is payable only on commutation of a portion of pension;
    3. Normal pension age equates to state pension age and will be 65 or, for some younger judges, a higher age.
    4. A surviving spouse's or civil partner's pension paid at 3/8ths of the rate of the member's pension.

    In some important respects the NJPS differs from other public service pension schemes: the accrual rate reflects the fact that judges tend to be appointed later in life than other public servants, and judges may continue in office until age 70 whereas pension schemes for what were termed the uniformed services retain lower normal retirement ages.

25. The Finance Act 2004, implemented on 6 April 2006, introduced significant changes to the taxation of pensions. Registered schemes became subject to both lifetime and annual allowance limits which would, if applied to judicial pensions, have had a dramatic effect on their value. In this context the Lord Chancellor of the day, Lord Faulkener, gave a written assurance to the Lord Chief Justice on 18 March 2004:-

    '*I want you to be assured that the Government's objective, of enabling Judges to remain in an equivalent financial position in respect of their judicial pension benefits, is settled and clear. I am therefore writing to reassure you and your colleagues that positive steps are being taken to mitigate the effects of the changes on the value of the Judicial*

> *Pension. … I want to make it very clear that I consider it extremely important to maintain the attractiveness of the Judicial Pension for the Judiciary, as well as recognising the current entitlements and expectations of serving Judges.'*

26. In letters sent by David Staff, Head of Judicial Pay and Pensions at the then Department for Constitutional Affairs, in December 2005 and March 2006 to the Lord Chief Justice and copied to all serving members of the judiciary, it was stated unequivocally that:-

> *'The Judicial Pension Schemes will fall outside the ambit of the new pensions tax regime for registered pension schemes under the Finance Act …'*
> *'This removes the prospect of the value of Judicial Pension benefits being reduced through the imposition of this new charge on Pension Benefits from Registered Pension Schemes.'*

27. Conversely, because the judicial schemes would remain non-registered, the lump sum benefits payable under them would have become subject to tax and contributions paid from salary for dependents' benefits would have ceased to attract tax relief. In short, Mr Staff explains that compensating arrangements were put in place, firstly, to offset and replace the tax payable on lump sums and, secondly, to reduce the contribution rates for dependents' benefits to reflect the loss of tax relief on those contributions. The Lord Chancellor announced those arrangements to Parliament on 15 December 2005 and concluded by saying:-

> '*I am satisfied that these proposals are in accordance with the terms of the Finance Act 2004. They serve to maintain but not improve the overall remuneration package for the serving Judiciary and to protect the principle of Judicial independence in so doing.'*

28. Views expressed by certain officials to the effect that these taxation arrangements were an "accident", or regarded by her Majesty's Treasury as a "temporary measure" are clearly inconsistent with the letters from the Lord Chancellor and his official quoted above. It is obvious that the Lord Chancellor did not make those arrangements or give his assurance by accident, nor was there any hint that the arrangements were temporary. On the contrary, the language "settled and clear" is intended to, and does, convey an understanding that this was intended to be a lasting settlement.

29. Prior to the introduction of the NJPS there was no public notification of any intended change to the tax status of the judicial pension scheme with the result that applicants continued to seek appointment on the understanding that their terms and conditions, including those relating to the taxation of pensions, would remain as they had been. As Ian Gray, Deputy Director, Pensions and Judicial Reward at the second respondent, wrote in October 2012:-

> *'Switching off this tax advantage has very significant implications for serving judiciary that they could not have anticipated nor reasonably made revised arrangements for and requires this change to be*

handled differently from the standard pension reform being applied across the public service.'

30. The JPS remains unregistered for tax purposes and members are therefore not subject to the annual allowance and lifetime allowance limits. The NJPS is a registered scheme so that the annual allowance and lifetime allowance limits apply with the result that, on transfer into the NJPS, many claimants incur very significant additional tax liabilities compared with their position as members of the JPS. The change from tax-unregistered to tax-registered status of their pension scheme affected judges uniquely amongst public servants because theirs was the only scheme which was previously unregistered. Furthermore, as Mr Scanlon explained, these losses have been increased still further by changes to the pension tax regime announced in the summer budget of 2015, after the making of the regulations of 2015 in February of that year. This serves to magnify the disparity between the unprotected and the protected judges.

31. The loss sustained by the unprotected and taper-protected judges, including these claimants, was very significantly greater than the loss sustained by other public servants whose pension schemes were reformed. There are two reasons for this. Firstly, the value of a judge's pension as a proportion of his or her overall remuneration is significantly greater than in the case of other public service employees. Adverse changes to a judge's pension therefore have a proportionally greater impact.

32. The second reason is that judges alone suffered the combined effect of significant adverse changes to their pension scheme in addition to a radical change to the tax treatment of their pensions. The valuation of the losses occasioned to a judge by the taxation reforms inevitably varies from individual to individual. I am not required in this judgment to compute the claimants' losses, and the figures for individual judges with which I have been provided are illustrative only and are not the subject of precise agreement. Nevertheless, it is clear that the high court judge claimants will incur losses running in many cases into several hundreds of thousands of pounds. It is agreed that the yearly capital investment required to provide a life annuity giving approximately the same benefits on retirement as those lost by the transfer to the NJPS is at least £30,000.

33. There is a wealth of documentary evidence from officials during the period 2011-2012 acknowledging the unique position in which judges were being placed. By way of examples only, Shirley Hales, who was responsible for judicial pensions at the second respondent, wrote on 2 December 2011 to her colleague Ian Gray that, for those judges 'below the line',

'the value of their total reward package can drop significantly, probably far more than most in the public service who are affected by these reforms … it is hard to argue in a reasoned and rational way why this one group … should have such a disproportionate hit.'

34. On 27 October 2011, Andrew Olive, Deputy Director, Workforce, Pay and Pensions in Her Majesty's Treasury wrote:-

> '*For the present, it would advisable to keep an open mind as to what sort of pension arrangement might be appropriate. For example, a tax registered PCSPS CARE [by which he meant principal civil servants' pension scheme with career averaging] Scheme would raise problems for many judges, such as the tax penalties they would incur for exceeding the LTA. Judge-Specific Tax-Registered and Non-Registered options would therefore also need to be considered …'*

35. On 10 October 2012, Mr Gray wrote:-

> *'uniquely across public service pension reform we are trying to effect two changes simultaneously to judicial pensions. We are seeking to reform pension benefits in line with other public service pension schemes, but in addition we are seeking also to end a beneficial and increasingly anomalous privileged tax position*."

And as recently as 7 June 2016, Paul Kirk, Senior Policy Advisor, Workforce, Pay and Pensions at Her Majesty's Treasury, wrote in a briefing note to the Chief Secretary to the Treasury:-

> '*the move to introduce a registered pension scheme was particularly disadvantageous to judges who are not eligible to remain in or join the old pension scheme.'*

36. Apart from the uniquely adverse effect on judges of the combination of changes set out above, there are further features which uniquely distinguish appointment as a judge from other public servants. Whilst it is accepted that all public servants accept office or employment on the basis of the terms and conditions offered at the time, and that those terms and conditions may be varied from time to time, in the case of the judiciary there had been explicit and strongly worded assurances from the then Lord Chancellor in 2004 to the effect that it was the government's settled view that there should be no change to serving judges' pensions. This assurance was in line with the scheme adopted on the coming into force of Part 1 of the Judicial Pensions and Retirement Act 1993 which established the JPS and was expressed in section 1 to apply "*to any person who first holds qualifying judicial office on or after the appointed day"*. The changes made by the JPS compared with its predecessor scheme were thus prospective, affecting future appointees only.

37. Further, it is made clear in the various documents setting out the terms of service of judges, though these are variously worded, that appointments to judicial office are intended to be for the remainder of a person's professional life. Judges undertake not to return to private practice on termination of their appointment and there are also severe restrictions on the categories of remunerated work which judges may undertake during the term of their appointment. Further, in the case of high court judges, the second respondent, through the evidence of Mr Goodwin, accepts that the reduction in income accepted by them on appointment is probably unique.

38. Concerning the restriction on judges returning to private practice on termination of their appointment, it is clear from the documents that some in Her Majesty's Treasury - although not Mr Kelly, the witness in this case –

believe that the time has come for that requirement to be changed. Benjamin Parker, an official dealing with public sector pension reform, wrote on 16 September 2013:-

> *'… given the point about a judicial role being the last post judges can hold, I know we hold that particular piece of employment policy in some contempt, but it does still stand for the moment as far as I am aware*.'

Despite the suggestions in evidence before me that the severity of this requirement could be mitigated because some judges might find work as arbitrators or as judges in foreign jurisdictions at the termination of their UK appointments, I regard those exceptions as so rare as to do nothing to undermine the fundamental understanding on which judges accept appointment.

39. Judges accept appointment on the understanding that their ability to do other remunerated work either during or following their term of appointment will be severely limited. These claimants did so, in many cases accepting significant reductions in earnings, in reliance on assurances that the value of their remuneration package would be maintained.

40. The clear and obvious effect of the transitional provisions referred to above, is that transitional protection was aimed at those who were least affected by the changes. Mr Kelly said in evidence, '*the truth is they protected those for whom the financial effects are smallest',* and again*,* the younger judges '*face a much bigger impact than those closer to retirement, yes.'* The longer judges have been members of the JPS the greater the value of the protected rights they have accrued under that scheme and, even in the absence of any further transitional provisions, the shorter the period of their remaining service during which they will accrue lesser rights under the NJPS. Those who designed the scheme fully understood and foresaw this result. In its Judicial Pensions Reform: Equality Impact Assessment (undated) the government wrote:-

> *'43. Those most affected by the proposals will be those in the 2015 Transfer Group. Those in the Taper Group will also be affected but less so as they are entitled to the transitional protection on a tapering basis (see below).*
> *44. The Government accepts that those in the 2015 Transfer Group would be most affected by a move to a new JPS …'*

The "2015 transfer group" equates to the unprotected judges.

41. Thus, the principle of maintaining the value of accrued rights under existing schemes, regarded as of particular importance by Lord Hutton's commission and accepted by the government, was itself an important transitional protection. In the foreword to his commission's final report, Lord Hutton stated:-

> '*Maintaining the link to final salary for the purposes of calculating the value of a person's accrued rights under the existing schemes will however ensure fair treatment for those who have built up rights in*

those schemes and will mean that those closest to retirement, perhaps in their 50s today, who have less time to adjust are least affected and all existing scheme members retain the link to final salary for the years they have already accrued.'

42. Miranda Worthington of Her Majesty's Treasury, referring to the government proposals as they then stood, wrote on the 13th October 2011:-

'***Transitional protection already included:-***

3. The government's proposals for pension reform would provide Scheme members with costly transitional protection. Maintaining accrued rights and the final salary link will ensure that members receive a total pension that is a weighted average of what they would have earned under the current scheme and the new scheme – the closer they are to leaving the service of [sic] retiring, the less the change will affect them.

4. This protection of accrued rights and the final salary link means that most members close to retirement will not face a sudden increase in the age to which they would need to work to get a pension of the size they had expected. Those closest to retirement will generally be able to take a full pension only a matter of months later than they had been expecting or a very slightly smaller pension at the same age.'

There was no dispute before me about the accuracy of that assessment. However, it is clear that by enacting Schedule 2 to the 2015 Regulations, the government departed from this position. Why the government chose that course was the subject of a considerable amount of evidence and debate in these proceedings.

43. It must be remembered that reform of judicial pensions was part of much wider reforms to public sector pensions as a whole and that a number of other schemes were very much larger and involved workforces on whose behalf trades unions were negotiating with relevant government departments. In her submission to the Chief Secretary to the Treasury of 13 October 2011, referred to above, Ms Worthington set out the issue:-

'*To secure a deal with the Unions you asked us to assess the options for offering enhanced transitional protection, in the move to new public service schemes.'*

44. At her paragraph 1, she wrote *'getting further transitional protection for current members is hugely important to Unions who will want to be able to give a message to more concerned groups of active members that these reforms will not affect them*'. Further, describing her option 3, 'age protection – those over a certain age staying in their current scheme', she wrote:-

'Honouring accrued rights and the final salary link means that those who have been in the scheme the longest will be least affected by changes, so the savings forgone would be targeted on those who would see the least change.'

45. She concludes, at her paragraph 12:-

> *'As this issue is of disproportionate importance to the Unions, any offer should be simple so that its benefit can be easily understood [sic] members.*'

46. By the time '*Public Service Pensions: good pensions that last'* was presented to parliament in November 2011, the Chief Secretary to the Treasury had made up his mind. He made his position very clear in his foreword to that paper to which reference has been made above.

47. The evidence clearly establishes that the objective of securing agreements with trades unions representing large organised workforces of public service workers was an important reason – probably the most important reason - for the government's decision to extend transitional protection in its new scheme of public service pensions beyond that which was recommended by Lord Hutton's commission and described by Ms Worthington.

48. In July 2011, the government presented to parliament a summary of responses to its public consultation on the reform of state pensions under the title: '*A state pension for the 21st Century'*. Question 11 of that consultation posed the question *"how should the government respond to the frequent revisions in life expectancy projections while giving individuals sufficient time to prepare?"* A range from four to fifteen years' notice was suggested by respondents, with the majority thinking that a ten-year notice period would be appropriate for any future change to state pension age. Among the reasons put forward were that lifestyle funds tended to start adjusting investment strategies between three and fifteen years before retirement (per the National Association of Pension Funds), and that to replace a year's state pension lost because of an age increase would cost around £50-£60 per month saved over a ten-year period (per the Association of British Insurers). The government summarised the responses by saying "*there was also strong agreement from nearly all respondents that it was important to give people sufficient time to prepare for any changes to state pension age*." In adopting the ten-year period for full protection from the NJPS reforms, the respondents invoke the argument of consistency with the changes to state pension age.

49. There is, however, an important difference between increasing the state pension age, on the one hand, and the introduction of the NJPS, on the other. As has been noted above, the evidence is clear that a judge close to retirement, even if unprotected by any further transitional provisions, would on transfer to the NJPS be able to retire either at the same age with a slightly reduced pension or at a slightly later age with no reduction in pension. Both Ms Worthington's analysis and Lord Hutton's commission's final report support this view. By contrast, an increase in the state pension age by one year results in a period of one year during which the intended pensioner will have no state pension income at all.

50. The respondents' witnesses acknowledge that there was no analysis or research, whether general or specific, underlying the government's decision to incorporate transitional provisions into the JPR. The need for cogent, evidence-based arguments was appreciated by officials. Peter Hall of Her

Majesty's Treasury wrote on 19 January 2012 about possible transitional provisions, to which Shirley Hales, Judicial Reward and Pensions, Ministry of Justice, responded on 23 January:-

> *'We have to have cogent arguments as to why there is a proposal to put judges, who … are in one of the better/more advantageous schemes, into a scheme which is already less advantageous and is through a reform being made even less so. We will need evidence to show the effect and why it is not disproportionate … I have said we need to push back at Peter Hall to provide evidence for his rather sweeping statements and I still think this is the case and will at the very least need information to be able to contrast/compare.'*

Mr Goodwin, giving evidence for the second respondent, accepted the proposition that '*we need as much evidence as we can gather*'.

51. There was generalised assertion on behalf of the respondents that older judges would have less time to prepare for the financial effects of pension reform. That is tantamount to saying that older judges are closer to retirement than younger judges and is a truism. Older judges have a shorter time to respond to adverse changes and prepare for their consequences, but that shortness of time is in direct proportion to the adversity of the changes brought about by these pension reforms. In other words, those with the shortest time to retirement have the least adversity to prepare for. Not only was there no evidence that older judges would suffer greater hardship than younger judges, but the evidence was unambiguously and consistently to the contrary.

52. There was further general assertion that older judges would be more likely to have fixed, or concrete retirement plans, the suggested implication being that those plans would be more difficult to change than in the case of a younger judge who had more time. However, this Tribunal received no evidence in relation to any judge, or group of judges, concerning their retirement plans or the degree of fixity or concreteness of such plans. Such evidence as I heard consisted of no more than *extempore* speculation from which I was unable to make any finding of fact consistent with the respondents' assertion. Mr Kelly said, for example:-

> '*People may well have worked out how they are going to deal with housing, I don't know, family, education; it could be a whole series of things I suppose.'*

53. Mr Kelly was also asked for the evidential basis for the government's policy and referred to the evidence which came from the consultation on changes to the state pension age. He acknowledged that '*we didn't carry out any further survey of the judges of the sort you have just described*', and added '*if we had chosen to do so, I'm sure we could have done so*'. Summarising this part of his evidence, Mr Kelly said that:-

> *'We had made the decision to protect across the public sector workers, across the public sector schemes, individuals within 10 years of their expected retirement date … When it came to looking at the judges, we started from the principle the same would apply. I think I*

> *have set out the reasons why the government reached that policy decision overall. I think those are the reasons why. I mean, as I said, it clearly was an important thing to the unions, and we did think about how we handled it in the context of the negotiations with the unions.*

54. Mr Kelly agreed that the decision on ten-year protection was made in the context of public sector pension reform as a whole, and added:-

> *'And when the options were put to consider did we do something different for the judges, one of our concerns was maintaining consistency and if you did it for the judges, what the potential knock-on considerations would be for other public sector workforces who would argue why wasn't the same being done for them.'*

55. When asked about the fixed nature of retirement plans people are likely to have at different times, Mr Kelly accepted that no specific analysis was done and said:-

> *'I think there are some generalisations but there is also evidence that people do begin to fix their plans and their investment strategies to match those the closer to retirement that they get.'*

This was again a reference to the responses to the consultation on increasing the state pension age.

56. Based on this evidence I consider it proper to find that the government decided to incorporate the transitional provisions into the JPS for no reasons specific to the judiciary, but rather because similar provisions had been agreed with trades unions for other workforces and the government's preference was for a consistent scheme, and, to a lesser extent, because the state pension age consultation had led to the view that a period of ten years' notice was appropriate in that case. I found the further arguments based on those nearing retirement having less time to prepare for the effects of reform and having fixed retirement plans lacked cogency for the reasons set out above.

57. Mr Beloff seeks to rely on evidence recently disclosed suggesting that the government is proposing to introduce a "recruitment and retention allowance", the background to which is the recent difficulty experienced by the government in recruiting sufficient high court judges to fill vacancies. The evidence before me is that that remains currently a proposal and is not yet a firm commitment. Documentary evidence clearly shows some sensitivity in government about how such an allowance, if made, should be presented publicly. Paul Kirk of Her Majesty's Treasury, an official in the public sector pensions team, wrote on 23 June 2016:-

> *'Publicly the allowance should be about tackling the R&R issue, not directly compensating for new tax charges.'*

58. On 31 October 2016, Helen Whitehouse, Deputy Director Judicial Policy Justice and Court Policy Group in the second respondent wrote:-

> *'Pensions: Long story short, we are working up a proposal to try and mitigate recruitment problems in the High Court. The CST (Chief Secretary to the Treasury) has said we can but we are currently battling on what we can or cannot say publicly about why we are doing it because of related ongoing litigations. We are doing it because of pension changes – specifically it's because of an announcement in the summer budget last year of a tax allowance change which would massively increase Judges' pension tax bills; this was the straw which broke the camel's back."*

59. Those documents speak eloquently of the government's perceived presentational difficultly in this matter. Any overt linkage between the new proposed allowance and the pension changes would foreseeably result in other judges asking for a similar compensatory allowance. By contrast, the government's purpose in proposing such an allowance is to remedy a specific recruitment difficulty felt in the High Court but not elsewhere. It is accepted that there is a broad equivalence between the pension losses to high court judges and the proposed new allowance.

60. In my judgment it is proper to find on this evidence that the combination of adverse pension changes and successive taxation changes have reduced the overall value of a high court judge's remuneration to the point where it has become difficult to recruit new high court judges. The same recruitment difficulty has not, on the evidence before me, been experienced in other areas of the judiciary. I must keep in mind that the issue before me is the objective justification, or otherwise, of the transitional provisions under consideration. There is no necessary connection between those transitional provisions and the proposed recruitment and retention allowance. If there had been full protection for all serving judges, something which was argued for on their behalf both at the time and in these proceedings, then the reward package on offer to a newly appointed high court judge today would be exactly what it is today. On the other hand, if there had been no further transitional provisions beyond what the Hutton Commission recommended, and if all serving judges had been transferred into the NJPS from 1 April 2015 then, once again, the reward package offered to a newly appointed high court judge today would be exactly what it is today. Naturally, if the government had maintained the commitment of its predecessor to preserve the tax-unregistered status of the judicial pension scheme, then the position would be materially different. However, I am concerned with a challenge to the alleged discriminatory effect of the transitional provisions, and not with a challenge to the tax registration status of the NJPS.

61. From the evidence of Mr Scanlon, including his commentary on the expert evidence, the following uncontroversial matters emerge though it is appreciated that the figures are necessarily approximate. The cost of the protection provided by the transitional provisions to salaried judges, both fully and taper-protected, is £23 million; the cost of including the currently unprotected judges is £70 million. If judges who were in fee-paid office before 1 April 2012 and subsequently become salaried are included, those figures rise to £28 million and £118 million respectively. Mr Scanlon arrived at these figures by discounting the future costs using the discount rate approved by the Treasury. The cost of providing transitional protection is approximately 10% of the expected future costs of the scheme.

62. Some 85% of serving judges as at 2012 are in the protected groups (fully and taper-protected), though that proportion will diminish over time as currently protected judges gradually reach retirement. As at 2012 the unprotected group contained 279 individuals, whereas the fully protected group contained 1,123 individuals and the taper protected group 294.

63. There is an important distinction to be drawn between an increase in state pension age, which affects an intended pensioner's entire state pension income, and the changes under the NJPS which affect only future accruals.

64. Messrs Leigh Day put forward for consideration a proposal that all those judges in service at April 2012 should remain protected and that they should bear the cost by paying increased contributions from salary. Mr Scanlon considered that the additional contributions required from them to cover the cost of benefits would be 4% in the first year rising to an average of something less than 5.5% over the first seven years. He added, however, that such a scheme would not be cost-neutral overall because it ignored the impact of tax receipts lost to the Treasury and the additional future risk borne by the government.

The law

65. Article 1 of Council Directive 2000/78/EC lays down a general framework for combating discrimination on grounds of, inter alia, age as regards employment and occupation with a view to putting into effect in the member states the principle of equal treatment. The Directive further provides:-

> **Article 2**
>
> **Concept of discrimination**
>
> 1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
>
> **Article 6**
>
> **Justification of differences of treatment on grounds of age**
>
> 1. Notwithstanding Article 2(2), member states may provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

66. The Judicial Pensions and Retirement Act 1993 provided, in Part 1, New arrangements for judicial pensions:-

> 1(1) This Part applies - (a) to any person who first holds qualifying judicial office on or after the appointed day.

67. The Constitutional Reform Act 2005 provides:-

34 Salaries and allowances

(1) A judge of the Supreme Court is entitled to a salary.
(2) The amount of the salary is to be determined by the Lord Chancellor with the agreement of the Treasury.
(3) …
(4) A determination under subsection (2) may increase but not reduce the amount.

68. The Equality Act 2010 provides:-

In Part 2, Chapter 2, Prohibited Conduct

13 Direct discrimination

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

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if–

(a) A applies, or would apply, it to persons with whom B does not share the characteristic;
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are - …race…sex…

69. **Defence of material factor**

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

70. The Public Service Pensions Act 2013 provides:-

18. Restriction of existing pension schemes

(1) No benefits are to be provided under an existing scheme to or in respect of a person in relation to the person's service after the closing date.
(4) The closing date is –

(b) 31 March 2015 in any other case.

71. Schedule 2 to the Judicial Pension Regulations 2015 provides:-

Part 2 Exceptions to section 18(1) of the Act: full protection members of an existing scheme

8. (1) A person (P) is a full protection member of an existing scheme if sub-paragraph (2) … applies –

(2) This sub-paragraph applies if –

(a) P was an active member of an existing scheme on 31 March 2012;
(b) P was an active member of that scheme on the scheme closing date; and
(c) unless P dies, P would reach normal pension age under that scheme on or before 1st April 2022.

Part 3 Exceptions to section 18(1) of the Act: tapered protection members of an existing scheme

12. (1) A person (P) is a tapered protection member of an existing scheme if sub-paragraph (2) …applies –

(2) This sub-paragraph applies if –

(a) P was an active member of an existing scheme on 31 March 2012;
(b) P was an active member of an existing scheme on the scheme closing date; and
(c) unless P dies, P would reach normal pension age during the period beginning with 2nd April 2022 and ending with 1st September 2025.

72. Full protection members of an existing scheme are not eligible to be active members of the NJPS. Tapered protection members of an existing scheme are not eligible to be active members of the NJPS until their tapered protection closing date, which is a date between 31 May 2015 and 31 January 2022 (inclusive) determined by the scheme manager: Schedule 2, Part 1, paragraph 3.

Discussions and conclusions

The constitutional argument

73. The claimants advanced an argument, articulated by Mr Beloff and adopted by Mr Short, based on constitutional principle. It is said that the combination of the pension and taxation reforms referred to above involves both an immediate reduction in the claimants' take-home pay and a reduction in their future pension benefits. Such a reduction in the overall remuneration of judges is said to violate a constitutional principle coupling security of tenure of judges with a guarantee of remuneration which emanates from the Act of Settlement of 1701. The principle exists to ensure the independence of the judiciary and to protect judges from adverse action by the executive: *R (G) v IAT* [2004] EWCA Civ 165, per Lord Phillips at para. 12; *US v Hatter* 532 US 557 (2001) US Supreme Court, at p. 568.

74. For the respondents Mr Chamberlain acknowledges that there is a statutory prohibition on reducing judicial salaries: s 34 of the Constitutional Reform Act 2005 concerning salaries and allowances paid to judges of the Supreme Court, and other provisions covering other judges to like effect. However, he submits that in each case the statute refers to salary alone and excludes any mention of pension. The level of salary is protected; pension is not. Mr Chamberlain resists the suggestion that there is any wider constitutional rule, principle or convention that the remuneration of judges, including pensions, is immune from adverse change; more especially if pension reforms affect not only the judiciary but also other public service workers. Indeed, he argues, if judges alone were immune from adverse reforms which affected others, then that could itself undermine confidence in the independence of the judiciary: *Reference Re Judges of the Provincial Court (Prince Edward Island)* 1997 3 S.C.R. at para. 158.

75. It is clear that there is no statutory prohibition on reducing judicial pensions or remuneration in the wider sense. If there were then the 2015 Regulations would be *ultra vires* and these arguments would be made in another court. Nor does Mr Beloff argue that there is; rather, he submits that it is a matter of constitutional principle.

76. Mr Beloff submits that the combined pension and tax reforms involve an immediate reduction in a judge's net pay; and so they do. If there were such a principle as Mr Beloff contends for, it seems to me that the judiciary would have to be held immune from any and every fiscal change which would have the effect of reducing their net pay. It would follow that an increase in the rate of general taxation applied to the population at large, which would similarly reduce judges' net pay, could not apply to them. In my judgment that would not be a correct conclusion. I cannot accept that there is such a principle.

77. Further, if there were the principle contended for by Mr Beloff, it would extend far beyond the transitional provisions and undermine the foundations of the NJPS itself, as well as the reforms to the taxation of pensions, for those are the mechanisms by which judges' remuneration in the wider sense has been reduced. However, there is no challenge before me either to the taxation reforms or to the transfer of judges from the JPS to the NJPS. My field of view is narrower and focuses on the transitional provisions alone. Far from reducing pay, the effect of the transitional provisions is to maintain the pay of the older, protected judges at the higher JPS level. That is precisely what the younger, unprotected judges complain about. In conclusion, therefore, I do not accept the existence of a wide constitutional principle of the kind contended for by Mr Beloff. But even if such a principle existed I do not think that it would have any bearing on the narrow question before me.

The test of justification

78. Some time was taken above to sketch the background of pension reforms in the private and public sectors, as well as the state pension, in order to set the regulations with which I am concerned in context. In a wider sense, the aim of the respondents, and of the government as a whole, was to establish public service pension arrangements which were, in the words of the terms of reference for Lord Hutton's commission:-

> *'Sustainable and affordable in the long term, fair to both the public service workforce and the taxpayer and consistent with the fiscal challenges ahead, while protecting accrued rights.'*

79. Those are matters which belong in the realm of public policy and finance for which the government of the day is responsible to the electorate. It is for the government to define its policy objectives, to identify its priorities and to determine what resources it will allocate to them. This tribunal must take particular care not to trespass into areas which are not its proper purview. I am concerned solely with the respondents' attempt to justify the disparate impact of the transitional provisions contained in Schedule 2 to the 2015 Regulations.

80. The principle of equal treatment established by article 2(1) of the Directive, and incorporated into UK law by section 13 of the Equality Act 2010, deserves the highest respect. That principle means that there shall be no discrimination whatsoever on grounds, inter alia, of age. The respondents admit that the transitional provisions found in Schedule 2 to the Judicial Pensions Regulations 2015 treat the claimants less favourably than their comparators because of their age. In order to save such less favourable treatment from amounting to unlawful discrimination it must be established that those transitional provisions are objectively justified, meaning that they are a proportionate means of achieving a legitimate aim. In order to determine the question of objective justification, the authorities to which I have been referred establish that a number of different principles need to be considered:-

(1) It is accepted on all sides that the onus is on the respondents to make out their justification for derogating from the principle of equal treatment by establishing that their less favourable treatment of the claimants is a proportionate means of achieving a legitimate aim. Furthermore, in *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ICR 1080 at para. 65 the ECJ stated that article 6(1) of the Directive imposes on the respondents:-

> 'notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued.'

(2) In *Seldon v Clarkson Wright & Jakes* [2012] ICR 716 Baroness Hale, reviewing the earlier European jurisprudence at para. 30, stated:-

> 'only certain kinds of aim are capable of justifying direct age discrimination … The distinction drawn in the evolving case law of the European Court of Justice/Court of Justice of the European Union … is between aims relating to "employment policy, the labour market or vocational training", which are legitimate, and "purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness", which in general are not.'

(3) In *Age Concern* the ECJ stated at para. 46:-

> 'the aims which may be considered legitimate within the meaning of [article 6(1)], and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives'

such as those referred to in article 6(1). It is common ground that there is not an exhaustive list of such objectives.

(4) Lack of precision in formulating the aim pursued does not exclude the possibility that it may nevertheless be justified. However, in *Age Concern* the ECJ stated at para. 45:-

> 'In the absence of such precision, it is important, however, that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purpose of review by the courts of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary.'

The point was echoed by the ECJ in *Rosenbladt v Oellerking Gebaeudereinigungsgesellschaft mbH* [2011] IRLR 51 at para. 58, and by Baroness Hale in *Seldon* at para. 34.

(5) In addition to their broad discretion in matters of social policy (see *Age Concern* at para. 65), the ECJ has stated in *Specht v Land Berlin* [2014] ICR 966 at para. 46 that member states enjoy:-

> 'broad discretion in their choice, not only to pursue a particular aim in the field of social and economic policy, but also in the definition of measures capable of achieving it.'

This same formulation is found also *Unland v Land Berlin* [2015] ICR 1225, at para. 57. The court is here restating a generic wording very similarly expressed in earlier ECJ authorities: *Palacios de la Villa v Cortefiel Servicios SA* [2009] ICR 1111 at para. 68; *Rosenbladt*, at para. 41, which were considered by the Supreme Court in *Seldon.* Mr Chamberlain relies on the court's statement in *Unland,* at para. 65, that in view of that broad discretion 'it does not appear unreasonable' for the respondent to have adopted the measure which it did, and suggests that the court is here taking a somewhat less rigorous approach to the evaluation of aims and means. The court in *Unland* referred to its own slightly earlier decision in *Specht* in which it reviewed extensively the relevant jurisprudence, including *Palacios de la Villa* and *Rosenbladt.* I do not find in *Unland* anything suggestive of an intention by the court to modify the well-established principles set out in the earlier cases. Specifically, I see no basis for saying that the government's acknowledged broad discretion in matters of social policy extends beyond that public arena into the arena of private relations between employer and employee.

(6) When choosing means capable of achieving their social policy objectives, however, the broad discretion enjoyed by member states is not without limit. In *Age Concern* the ECJ said, at para. 51, that it:-

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

(7) In *MacCulloch v Imperial Chemical Industries plc* [2008] ICR 1334, at para. 10(4), Elias (P) said:-

> 'It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweighs the latter. There is no "range of reasonable response" test in this context: *Hardy & Hansons plc v Lax*'.

(8) In addition to being appropriate, the means must be shown also to be reasonably necessary. In *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704 Baroness Hale stated at para. 22 that it was an error to regard the terms "appropriate", "necessary" and "proportionate" as interchangeable, and continued:-

> 'It is clear from the European and domestic jurisprudence that this is not correct. Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so.'

And further, at para. 23:-

> 'A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.'

(9) It is not always possible, or necessary, to distinguish clearly between aims and means. In *HM Land Registry v Benson* [2012] ICR 627 EAT Underhill (P) said at para. 33:-

> 'The truth is that the distinction between means and aim is not always easy to draw.'

And at para. 36, referring to the appeal tribunal's earlier observations in *Pulham* [2010] ICR 333 at para. 15:-

> '"Tribunals need not cudgel their brains with metaphysical inquiries about what counts as aims and what counts as means as long as the underlying balancing exercise is carried out."'

The application of the test to the facts of this case

Legitimate aim

81. In the context of public service pension reform the government's aim of protecting certain categories of public service workers from the full effects of reform was first formally articulated by the Chief Secretary to the Treasury in November 2011. The objective he expressed extended to all public service workers affected by the Hutton Commission's recommendations. That objective was ultimately formulated with specific application to the judiciary in the transitional provisions contained in Schedule 2 to the 2015 Regulations.

82. In the numerous authorities to which I have been referred a wide range of aims have been examined and found legitimate. In each instance some broad objective has been identified and expressed in terms going beyond the age *per se* of the group to be more, or less, favourably treated, and found to fall within the scope of 'legitimate employment policy, labour market and vocational training objectives' set out in article 6(1). For example, increasing the availability of part-time work: *Reg. v. Secretary of State for Employment, Ex p. E.O.C.* 1995 1 AC 1 HL; the encouragement of recruitment: *Reg. v. Secretary of State for Employment, Ex p. Seymour-Smith* 1999 2 AC 554 E.C.J.; *Palacios de la Villa v Cortefiel Servicios SA* [2009] ICR 1111 CJEU; the prevention of windfall payments: *Loxley v BAE Systems Land Systems Ltd* [2008] ICR 1348 EAT; the recruitment and

retention of staff: *Homer v Chief Constable of West Yorkshire Police* [2012] ICR 704 SC; intergenerational fairness and preserving the dignity of older workers: *Rosenbladt v Oellerking Gebaeudereinigungsgesellschaft* mbH [2011] IRLR 51; *Seldon v Clarkson Wright & Jakes* [2012] ICR 716 SC; standardisation of the compulsory retirement age in the public sector: *Commission v Hungary* (C-286/12) 2012 CJEU; length of service as a means of rewarding professional experience: *Specht v Land Berlin* [2014] ICR 966 CJEU.

83. In each of the instances referred to above the formulation of the aim serves to answer the question: why has a measure been chosen which treats less favourably workers in a particular age group. In each case the answer is: in order to achieve the stated aim.

84. By contrast, in the present case, the Chief Secretary stated that his aim was to protect a group by reference to the number of years remaining to their pension age. As Maurice Kay LJ said, 'In one sense there is unreality in differentiation between age and retirement. In most cases they are not unrelated': *Chief Constable of West Yorkshire Police v Homer* [2010] ICR 987, at para. 34. To refer to 'those who have ten years or less to their pension age', as the Chief Secretary did, is simply another way of identifying a particular age group. The respondents' objective identifies an age group to be protected, but no wider, *'underlying aim'* is identified. Thus far, therefore, the question '*why?'* posed above is not answered.

85. It is clear from the principles set out above that a lack of precision in formulating the aim is not fatal to an argument that the aim may nevertheless be legitimate, and may be justified. But it is necessary, in the absence of precision, that the underlying aim of the measure should be identifiable. I have therefore examined the respondents' evidence and submissions for any insight which they might yield into the thinking underlying the bare expression by the Chief Secretary of his objective.

86. The formulation of the respondents' aim which was most frequently canvassed in evidence and in submissions before this tribunal was taken from the case pleaded in their response to these claims: '*the legitimate aim of protecting those closest [to] retirement from the financial effects of pension reform*'. This adds a little to what the Chief Secretary wrote and might suggest that it was thought that the pension reforms would affect most adversely those closest to retirement and/or that they would be in particular need of protection from their financial effects. But it is quite clear from ample contemporary documentation and the unanimous evidence in this case, not only that the opposite is true, but that it was well known to be true long before the enactment of the 2015 Regulations. The older judges are, the less adversely are they affected by the reforms.

87. If an aim is to be described as a legitimate social policy aim, then it must in my judgment be something for which there is a rational explanation. The government has a wide discretion in such matters and its aim does not have to be one with which the tribunal agrees; but its aim may not be, for example, capricious or arbitrary, and it must be capable of being understood. To set out consciously to treat more favourably a group who, as was well known at the time, were the least adversely affected by the

reforms appears counter-intuitive and at very least calls for such a rational explanation. In the absence of such explanation it would be difficult to resist Mr Beloff's categorisation of the result as a bizarre.

88. The respondents stated in their grounds of resistance, at paragraph 4, that '*scheme members closest to retirement have less time to make the necessary lifestyle and financial adjustments*,' a theme which was canvassed thoroughly in evidence and submissions. This formulation seems to me to add little to the two considered above, and to be subject to the same objections. Those with 'less time to make adjustments' are almost inevitably the older judges, just as are those 'closest to retirement'. Once again, this phrase merely states in different words that the group to be protected was selected by reference to its age. And insofar as the words go further and suggest an 'underlying aim' (*Age Concern*, at para. 45), namely to protect older judges from more adverse effects to which they had to adjust, or from greater difficulty experienced by them in making necessary adjustments, then once again the opposite is true. They had both less time, and less need to adjust.

89. It was also suggested in evidence that older judges would be more likely to have made fixed or concrete plans for retirement which they would find difficult to change. This formulation of the respondents' objective again suggested an underlying aim to relieve older judges from a hardship which they particularly would experience in adjusting to the reforms in the absence of transitional protection. I accept the proposition that in considering the balance of competing interests it is not appropriate to consider cases of individual hardship: *Rosenbladt*, at para 71. However, I heard no evidence in support of the suggestion that any such plans existed; the suggestion was no more than speculation. The respondents sought in this connection to rely on the extremely generalised responses to the consultation on state pension age reform to the effect that lifestyle fund managers tended to switch funds to less adventurous investments between three and fifteen years before retirement of the fund-holder. I saw no reason to reject that evidence, but it did not in my judgment support the edifice which the respondents wished to construct on it. Firstly, a delay in receipt of state pension is quite a different matter which results in an intended pensioner having no state pension income at all for the period of delay. No such draconian consequence would be caused by a relatively small change to a judge's retirement age or income. Secondly, assuming a judge approaching retirement, prudently advised, had switched his investments over the period of years suggested, there is once again no reason to suppose that that process would have been affected in any material respect by a minor change in either the judge's retirement income or retirement age. On the evidence I heard I could not find it established that older judges had – or were likely to have - fixed retirement plans which would be likely to require other than very minor alterations in the absence of transitional provisions. By contrast, although there is again no evidence and I therefore make no finding on the point, it is very easy to see how younger judges might have significant financial commitments which could be regarded as fixed, such as mortgages and dependent children.

90. I have considered also whether the respondents are entitled to rely on the government's wish that, so far as practicable, public sector pensions should

be consistent across the piece. There is no doubt on the evidence I heard that the idea of protecting those within ten years of retirement had its origin in discussions between relevant government departments and trades unions. The latter argued vociferously for transitional protections and appeared to officials to regard them as disproportionately important. The government wished to have consistency in order to avoid other groups arguing for special treatment.

91. In their grounds of resistance to these claims, the respondents did not rely expressly on the objective of consistency with other schemes, stating (at paragraph 6) *'[t]he first respondent had to consider whether to apply these principles to judges' pensions',* without explaining there or later why he so decided. Nor did the Chief Secretary explain in 2011 why he extended his objective consistently to all public service pension schemes rather than tailor schemes to meet particular needs. Nothing prevented the respondents from arguing before me matters which were not articulated earlier, but the argument in favour of consistency might have been more persuasive had it been cogently reasoned and supported by specific evidence; rather, it emerged in evidence and submissions. In response to questions about why the government selected the ten-year criterion for protection, for example, Mr Kelly said, 'one of our concerns was maintaining consistency.' And in his closing submissions Mr Chamberlain relied on the observation of the CJEU in *Fuchs v Land Hessen* [2012] ICR 93, at para 85, that:-

> 'legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.'

92. The transitional provisions constitute one of very few respects in which the NJPS is consistent with the other reformed public service pension schemes; the benefits and accrual rate are very different, and some schemes retain different retirement ages; and, as has been noted above, both Mr Gray and Mr Olive recognised, there were factors unique to the judiciary which meant that consistency between schemes was scarcely attainable. In my judgment that must detract significantly from the argument that in this one respect, namely transitional protection, it was an important objective that the NJPS should be consistent with those other schemes.

93. I accept that consistency is an aim which might legitimately be pursued by government. It has obvious advantages of certainty, fairness in the eyes of the public and ease of communication. All of those might be considered to be within the broad discretion accorded to member states to set the aims of their social policy. I have no direct evidence concerning the reasons why trades unions argued in favour of transitional protections for older workers in other schemes beyond what Lord Hutton's commission envisaged, or why the government conceded the point. It may be that the trades unions thought their position was justified; it may also be that the government was motivated by the perceived benefit of maintaining good industrial relations. There was naturally no suggestion by the respondents that the maintenance of good industrial relations was of any concern in relation to the judiciary. I therefore refrain from forming any view about the merits of the transitional protections incorporated in those other schemes. However, if it were to be the case that those protections constituted unlawful age discrimination it

would in my judgment not avail the government to argue for consistency between those other schemes and the NJPS. Further, schemes which are unlawfully discriminatory remain unlawful, however consistent they may be with other schemes. Beyond the general advantages referred to above, the respondents have not explained why there was a need to pursue the aim of consistency in this one respect as between the judicial and other public service pension schemes. I shall return to the topic of consistency when considering the question of proportionality below.

94. In summary, my conclusions on the question of the legitimacy of the respondents' aims are as follows. Descriptions of a group having 'ten years or less to their pension age', being 'closest to retirement' or having 'less time to adjust' all necessarily define that group by reference to the age of those in the group. In my judgment, an aim which amounts to an intention to treat one group more favourably and another less favourably, solely by reference to the age of those in the groups cannot, without further rational explanation of the reason for it, be legitimate. An aim thus expressed amounts to a declaration of intent to do precisely that which the statute prohibits. The respondents have failed to advance any such rational explanation of their reason. Mr Chamberlain's formulation in his closing submissions, 'whether … it was lawful for the respondents to introduce these limited and affordable transitional protections, whose aim was to identify a category of scheme members closest to retirement who would see no change at all,' restates the question succinctly, but does not answer the question 'why?' The respondents have failed to adduce any evidence of disadvantage suffered by the fully protected and the taper-protected groups of judges which called for redress, or any social policy objective which was served by treating those groups more favourably and the claimant group less favourably. I accept that in implementing their pension reforms the respondents and the government as a whole were entitled in principle to pursue the aim of consistency, and that such consistency could, in a properly evidenced case, be conducive to a social policy objective. However, in my judgment, the respondents have failed to demonstrate beyond the level of '*mere generalisations'* how consistency in the matter of transitional protection was capable of contributing to their social policy objective, especially since so much else in the JPS was inconsistent with other reformed pension schemes. I find accordingly that it has not been shown in this case that the aim of consistency is capable of justifying derogation from the principle of non-discrimination on the ground of age: *Age Concern*, at para. 51.

Proportionate means

95. In order to achieve their aims, the means chosen by the the government, were the transitional provisions contained in Schedule 2 to the 2015 Regulations. The test of proportionality involves the tribunal in the task of balancing competing objectives. First and foremost, the entitlement of the government to set and pursue social policy objectives and appropriate means of achieving them must be weighed against the discriminatory effect of the chosen means on the claimants. That exercise involves considering whether the chosen means are both appropriate *and* reasonably necessary to achieve the aim, or whether they are excessive because they go further than is reasonably necessary to achieve the aim.

96. In reliance on the cases of *R (Unison) v First Secretary of State* [2006] IRLR 926 and *Commission v Hungary* C-286/12, Mr Chamberlain submits that transitional provisions, of the kind under consideration here, have received the approval of the higher courts. He argues that in *Unison* a challenge to transitional provisions identical to those in the present case was dismissed by the High Court, and that in *Hungary* the failure to protect those closest to retirement from the effect of pension reform was criticised. He submits this tribunal is bound to follow those authorities. I therefore consider them.

97. Following the implementation of the prohibition on age discrimination by article 2(1) of the Directive, the government decided that it was required to amend the Local Government Pension Scheme so as to abolish the so-called 'rule of 85' which permitted scheme members aged 60 or over to take early retirement with unreduced benefits if the sum of their age and length of service was 85 years or more. The government took the view that, if challenged, it would be unable to justify pursuant to article 6(1) the less favourable treatment of younger scheme members. The trade union Unison sought a judicial review of the amending regulations on the grounds, inter alia, that if the rule was discriminatory on grounds of age then such discrimination was justifiable. The amending regulations contained transitional provisions which are agreed to be in all relevant respects the same as those I have to consider, and which the government defended in very similar terms: *Unison* at para 38 (a)-(c).

98. Mr Andrew Nichol QC, sitting as a Deputy High Court Judge, dismissing Unison's application, set out the scope of his decision, saying in relation to the rule itself, at para 34:-

> 'This Court is not an employment tribunal or Court hearing a private claim between an employee contending that the rule of 85 is discriminatory and a respondent or defendant seeking to defend a practice which it believes is justified. Rather it has to apply conventional public law principles to judgments and assessments … No doubt in making those judgments the decision-maker will have been aware that the outcome of any such future litigation could not be predicted with exactitude. I have to decide whether the implicit judgment that the government could not successfully defend the 85-year rule as justified was one which was legally open to it. That does not mean deciding whether the judgment was correct.'

99. Referring, at para. 39, to the government's defence of the transitional provisions, the judge said:-

> 'In my judgment these are all rational bases on which the defendant could have made the choices as to transitional protection that he did. The fact that other arrangements could also have been lawfully adopted as the scheme which the government might have wished to defend as justified within Article 6(1) is nothing to the point.'

100. In those passages the court was making it abundantly clear that it was not deciding whether either the rule of 85 or the transitional provisions were

justified pursuant to article 6(1) of the Directive. That argument, if it arose, would be for another day.

101. In *Commission v Hungary,* Hungary pursued the aims of standardising compulsory retirement ages across the public sector and establishing a more balanced age structure in public sector professions, and sought to achieve those aims by reducing the compulsory retirement age to 62. Until that point judges, prosecutors and notaries had, according to the court, at paras. 67-8,

> 'a well-founded expectation that they would be able to remain in office until [age 70]. However, the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned.'

102. The court also observed, at para 70:-

> 'the persons concerned are obliged to leave the labour market automatically and definitively without having had the time to take the measures, in particular measures of an economic and financial nature, that such a situation calls for.'

And the court noted further that their income would be at least 30% lower and that a full pension was not guaranteed because of their reduced contribution period.

103. Having found, at paras. 63-4, that the contested provisions were justified by legitimate aims and that they were appropriate means of achieving those aims, the court dealt with the question of necessity, at para. 66, in this way:-

> 'In order to examine whether the provisions at issue go beyond what is necessary for achieving that objective and unduly prejudice the interests of the persons concerned, those provisions must be viewed against their legislative background and account must be taken both of the hardship they may cause to the persons concerned and of the benefits derived from them by society in general and the individuals who make up society.'

104. The court concluded that Hungary had not 'provided any evidence to enable it to be established that more lenient provisions would not have made it possible to achieve the objective at issue' (para. 71), and that 'the provisions at issue are not necessary to achieve the objective of standardisation' (para. 75). The 'more lenient measures' the court had in mind were a 'gradual staggering' of the amendment (para. 73) so as to reduce the hardship caused to those affected.

105. Mr Chamberlain in his closing submissions (paragraph 20 (g)) argues that "the absence of … transitional protections made the measure unlawful". I cannot accept Mr Chamberlain's submission that the justification, or otherwise, of transitional provisions can be divorced from the particular facts of the case. The 'hardship' of which the court spoke can be considered only by examining closely the facts of the case. The proposal in *Hungary*

involved compulsory retirement and could result in up to eight years' lost salary for a judge with not even the guarantee of a full pension in its place. These facts are far removed from those of the instant case in which it is acknowledged that the nearer a judge is to pension age the less hardship he or she will suffer. I understand the court in *Hungary* to be saying that the aims pursued by Hungary were legitimate, that the means chosen were appropriate to achieve the aims, but that those means went beyond what was necessary because Hungary had not shown that more lenient means would not have enabled its aims to be achieved. It is noteworthy that in *Hungary* the means of achieving the government's aims was the reduction of the compulsory retirement age; transitional provisions were considered by the court as a possible way of mitigating the hardship caused. In the instant case the transitional provisions are themselves the means chosen by the government to achieve its aim.

106. Consideration of the justification of differential protection for a given group must take into account the impact that group would suffer if no protection were given. Whether transitional provisions which would otherwise be discriminatory are justified depends on whether they are appropriate and reasonably necessary to achieve a legitimate aim. Different factual circumstances may result in different outcomes. I do not find anything in the court's judgment in *Hungary* to undermine these propositions.

107. When considering the adverse impact of the pension reforms on the claimants I have reminded myself that it is the transitional provisions about which complaint is made and not the implementation of the NJPS itself. It is those provisions therefore which must be justified. And although the changes to the tax registration status of the scheme had a very significant effect on the value of pensions in the NJPS, no complaint is made about those changes in these proceedings and they do not have to be justified. However, in all of the evidence, documentary and oral, which I have received there has been a clear recognition throughout that the taxation changes have exacerbated the adverse impact of the pension reforms on the affected judges; moreover, the transitional provisions shield the protected judges from the consequences of those taxation reforms as well as from the pension reforms *per se*. I have therefore taken into consideration the effect of the taxation changes so as to weigh cumulatively the extent of the less favourable treatment of the claimants. Since it is quite clear that officials were at the relevant time fully aware of that cumulative effect, and advised ministers accordingly, I consider that it would be unrealistic not to do so.

108. On all of the evidence I have heard there can be no doubt – and none was expressed – that judges compelled to transfer from the JPS to the NJPS suffer an extremely serious adverse impact on the value of their pension which is further exacerbated by the taxation reforms. Whilst the annual investment required in order to replace the lost value is agreed in a sum of at very least £30,000, for the vast majority of judges that is a measure of a loss which it is impossible to replace because the investment of any such figure out of net income is utterly unrealistic.

109. The effect of the transitional provisions is that only the younger, unprotected judges will suffer losses of the order described; the taper-protected judges

will suffer loss only from the end of their period of taper protection; whereas the older, fully protected judges will suffer no loss of benefits at all. In my judgment it is proper to conclude from the above analysis, based on evidence which is not disputed, that the impact of the admitted less favourable treatment on the claimants is extremely severe compared with their comparator groups.

110. The additional impact of the tax-registration of the NJPS depends to a significant extent on the personal circumstances of individual judges, something I have not had to consider in this hearing. That impact is likely to fall far more heavily on the higher-earning judges, and at the upper end the attributable losses will run into hundreds of thousands of pounds.

111. For reasons I have given above, I do not derive any assistance from the evidence concerning the government's proposed recruitment and retention allowance for high court judges when approaching the question of the proportionality of the transitional provisions.

112. If, contrary to my earlier finding, the respondent had established that the protection of those closest to retirement was a legitimate aim then, subject to the question of necessity considered below, I accept that the transitional provisions are, in principle, appropriate to achieve that aim because that is precisely what they are designed to do. However, it is impossible to escape the circularity of this formulation which arises because both the aim and the means are defined in terms of age. The reason why a particular age group was chosen for protection has not been satisfactorily explained.

113. Notwithstanding my earlier finding that the respondents have not established that the aim of consistency justifies derogation from the principle of non-discrimination on the ground of age in this case, I consider here the proportionality of the means by which they sought to achieve it. Despite the starting point being the desirability of a uniform public service pension scheme, it was recognised by both officials and the government that an entirely consistent scheme was not practicable across the public service as a whole. The respondents acknowledge this in their grounds of resistance at paragraph 2, '*the details of the different public service schemes differ in some respects'*. Whereas the government initially wanted to incorporate the judiciary within the principal civil servants' scheme, it ultimately opted for a bespoke scheme for the judiciary. The evidence is that the same transitional provisions were, nevertheless, applied to all the reformed public service pension schemes. To that limited extent, therefore, because they were applied across the board, it must be accepted that the transitional provisions were an appropriate means of achieving consistency. The same would be true whatever the transitional provisions contained provided that they were consistently applied.

114. I have to balance the reasonable need of the government to achieve its policy aim of establishing consistent transitional provisions in public service pension schemes, on the one hand, against the extremely severe disparate impact those provisions have on these claimants. Whilst, in the absence of contrary indications, consistency may be thought a desirable result in public administration, it falls in my judgment far short of outweighing the very

significant derogation from the principle of equal treatment which results from its application in this case.

115. Turning to the question of reasonable necessity, if the protection of a particular age group was a legitimate aim, then clearly that group had to be defined by a limit. It is an uncontentious proposition that the setting of any limit or dividing line by reference to age is necessarily arbitrary to some extent. I said in argument that I would not conclude that ten years was wrong but that, for example, nine years or eleven years would have been right. Neither Mr Short nor Mr Beloff invited me to take any different view. The arbitrariness of such limits was discussed at some length by the employment appeal tribunal in *Seldon v Clarkson Wright & Jakes (No.2*) [2014] ICR 1275, at paras. 26-7. Langstaff (P) said at para. 27 that the issue for the tribunal was to determine:-

> 'the balance between the discriminatory effect of choosing a particular age … and its success in achieving the aim held to be legitimate.'

116. I have asked myself whether the setting of the limit by the respondents represents a rational attempt to achieve the aim in question. That same question arises whether the aim is said to be to protect those closest to retirement or to achieve consistency across the public sector. In this case the ten-year criterion was "read across" from the other larger public sector schemes with some – albeit that I have found it to be inadequate - support from the state pension age consultation. There was no specific reference to the judiciary at all.

117. The nearest the evidence in this case takes me to an answer to the question why ten years was chosen is that it was what was necessary in order to do a deal with the trades unions in the other larger public sector schemes. There was no research or analysis, and nor was there any process of reasoning which led the respondents to consider that – making due allowance for the arbitrariness referred to above – approximately ten years would achieve the desired aim, whereas something like four or five years, for example, would be far too short and something like fifteen to twenty years, for example, would be far too long. I am not, of course, suggesting that any process of precise calculation should, or could, result in such a figure, but I would have expected to see evidence of some thought process which led the thinker to the view that ten years was about right. There was no such evidence and I am satisfied on all that I have heard that there was no such thought process. Rather, the ten-year figure was imported from discussions with trades unions in relation to other schemes where it may have had some rational basis of which I have naturally not heard in these proceedings.

118. The transitional provisions initially protected something of the order of 85% of serving judges, many if not most of whom suffered only minor adverse effects from the reforms, whilst leaving the unprotected judges, including the claimants, exposed to a severe adverse impact. In my judgment the balance described by Langstaff (P) in *Seldon (No 2)* has not been properly struck in this case. The respondents have failed to provide evidence that a shorter period, or lesser degree, of protection would not have enabled them to achieve their aim, whether of protecting those closest to retirement or of

consistency; the respondents adduced no specific evidence – beyond the generalities already referred to – to explain why they chose to set the relevant age limits where they did. One returns repeatedly in this case to the importing of age limits from other schemes and the analogy of the state pension consultation. These transitional provisions were not a reasonably necessary means of achieving the government's aims because they go beyond what was necessary either to achieve consistency or to protect those closest to retirement.

Non-discriminatory alternatives

119. Whilst it is not this tribunal's function to devise a judicial pension scheme, the claimants argue that there were non-discriminatory alternatives to the transitional provisions contained in the 2015 Regulations. The provisions enacted were costed by Mr Scanlon at around £23 million. To the suggestion that all serving judges be allowed to remain members of the JPS until retirement – broadly analogous to what happened when the JPS was introduced in 1995 - the respondents objected that it would cost of the order of £70 million and was therefore too expensive. Further, Mr Chamberlain argues that, because the Directive is directly applicable to these respondents, then despite the Equality Act (Age Exceptions for Pension Schemes) Order 2010 any discrimination against younger judges would still have to be justified. Mr Chamberlain does not, however, argue that such an approach would be unlawful; any such justification argument would be based on entirely different facts from the case I have to decide.

120. Had the sum of £23 million been spent on granting all serving judges the same period of deferment before compulsory transfer into the NJPS, each would have had approximately one and a half years' additional membership of the JPS. A further option was to follow Lord Hutton's commission's recommendation and make no transitional arrangements for any serving judge beyond the protection of accrued rights; that proposal would have involved no additional cost at all. It is therefore not the case that elimination of the less favourable treatment complained of necessitated extra money being spent.

121. The respondents did not explain why they rejected the latter two options. Mr Chamberlain said that an additional one and a half years' membership of the JPS was only a very short delay; but that fails to explain why whatever financial 'cushion' the available resources could provide was not made available in a non-discriminatory way. Mr Chamberlain also submitted that, had either of those options been adopted, younger judges would still be substantially worse off than most of their older colleagues. That is true: any lasting change will inevitably have a greater impact on younger people because they have longer to live under the changed circumstances. That is a fact of human existence. What the respondents have failed to do in this case is explain why they chose to implement a mechanism which they well knew would exacerbate rather than mitigate that disparate impact.

The claims of indirect discrimination and equal pay

122. The submissions of the parties on the claims of indirect discrimination and equal pay took the form of a brief postscript to their primary submissions on

age discrimination. It is clear that the test of justification in the two categories of claim is not identical. In *Chief Constable of West Yorkshire v Homer* [2012] ICR 704, Baroness Hale said at para 19:-

> 'The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from articles 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz [1987] ICR 110.'

123. Notwithstanding the different test of justification, it is not contended that there could, or should, be any different result in this case when considering the different causes of action.

124. In recent years efforts have been made to improve the diversity of the judiciary at all levels with the result that the more recently appointed cohorts of judges include a greater proportion of female and ethnic minority judicial office holders than those appointed earlier. The respondents concede that for this reason the transitional provisions put female scheme members and those of BAME origin at a particular disadvantage and rely on the same matters as those discussed above to justify the transitional provisions. For all the reasons I have set out above I find that the respondents have failed to do so.

Conclusion

125. By reason of the transitional provisions contained in Part 2 **and Part 3** of Schedule 2 to the Judicial Pensions Regulations 2015 made by the respondents, the respondents have treated and continue to treat the claimants less favourably than their comparators because of their age. The respondents have failed to show their treatment of the claimants to be a proportionate means of achieving a legitimate aim.

Employment Judge Williams
13 January 2017