Appeal No. UKEAT/0189/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 11 to 13 March 2015
Judgment handed down on 8 July 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

CHIEF CONSTABLE OF WEST MIDLANDS POLICE AND OTHERS APPELLANTS

(1) MS DEBORAH HARROD AND OTHERS
(2) MR FOWKES AND OTHERS RESPONDENTS

JUDGMENT

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APPEARANCES

For the Appellants	MR JOHN CAVANAGH QC (of Counsel) & MR CHRISTOPHER KNIGHT (of Counsel) Instructed by: Joint Legal Services Civic House 156 Great Charles Street Birmingham B3 3HN
For the Respondents	(1) MR PAUL GILROY QC (of Counsel) Instructed by: LHS Solicitors LLP Queens Chambers 5 John Dalton Street Manchester M2 6ET (2) MR IAN SKELT (of Counsel) Instructed by: Rebian Solicitors 12 Park Square Leeds LS1 2LF

SUMMARY

AGE DISCRIMINATION

Five Police Forces needed to make manpower savings to ensure continuing efficiency whilst suffering budget cuts. By law (A19) no officer could be retired in order to secure efficiency unless he had an entitlement to a pension worth 2/3 of average pensionable pay, which an officer was entitled to start receiving, without actuarial reduction, after 30 years service. The Forces retired those officers who had such an entitlement. The officers complained they had thereby been indirectly discriminated against on the ground of age, and an ET upheld their claims. On appeal, it was held that although (contrary to the contention of the Forces) what was in issue was the practice of the Forces in adopting A19, the ET failed to have regard to the fact that the discriminatory element was entirely Parliament's choice, failed to consider whether the means adopted was appropriate and reasonably necessary to the scheme actually adopted by the Forces and thereby fell into the error of law exposed in the cases of **Benson** and **Blackburn**, wrongly took into account and criticised the process by which the Forces had adopted their schemes rather than asking whether to do so was justified objectively, applied too high a standard of scrutiny anyway, and suggested as alternative means of achieving the aim of the Forces matters which could not provide that certainty of saving which the evidence had established was essential. Since there was no way in which the Forces could have achieved their aims other than by use of A19 it was reasonably necessary to do so, and this was appropriate: the Tribunal decision was reversed, and the claims all dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Police Officers are not employees but office holders. They have security of tenure beyond that of typical employees: provided they are not found guilty of misconduct or proved to lack capability, for which purposes specific regulations apply, their office will terminate compulsorily only upon retirement at the age of 60 for ranks up to that of inspector, and 65 for more senior officers (the Police Pensions Regulations 1987, A18); on grounds of disablement (provided for by A20); or in the general interests of efficiency (A19), which is the provision central to this appeal.

2. At the relevant time A19 provided:

> **"A19-(1) This Regulation shall apply to a regular policeman other than a chief officer of police, deputy chief constable or assistant chief constable, who if required to retire will be entitled to receive a pension of an amount not less than two-thirds of his average pensionable pay or would be entitled to receive a pension of such an amount if it did not fall to be reduced in accordance with Part viii of Schedule B or if he had not made an election under Regulation G4(1).**
> **(2) If a police authority determine that the retention in the force of a regular policeman to whom this Regulation applies would not be in the general interest of efficiency he may be required to retire on such date as the police authority determine."**

Summary of the Facts

3. The Comprehensive Spending Review, following the election of the Coalition Government in 2010, required Police Forces to make 20% cuts in their budgets over the following 4 years, front-loaded as to the first two. The Forces therefore had to find a way of achieving efficient policing (as it was their duty to secure under Section 6(1)(a) of the **Police Act 1996**) within substantially less resource. Inevitably, this required careful budget planning to ensure that the elements necessary to keep policing efficient remained in place.

4. Since 80% of their costs related to staffing, it was inevitable that the Forces would look to reduction in staff numbers in order to achieve this efficiency. Each of the Forces concerned in the present appeals (Devon and Cornwall, West Midlands, Nottinghamshire, North Wales and South Wales) therefore decided to reduce staff numbers. Their aim was efficiency. The means taken to achieve it was ensuring a reduction in staffing. To some extent, that could be achieved by a recruitment freeze. But that was insufficient. There was a need for a number of existing posts to be reduced.

5. The five Forces concerned in the appeals before me took the view that that required them to use the power provided by A19, since it was the only means of achieving the necessary certainty of reduction. They therefore used it. A19 did not permit the compulsory retirement of anyone who had not yet become entitled to a pension worth ⅔ annual pensionable pay (⅔ APP), to achieve which took a minimum of 30 years' service. Accordingly, utilisation of the power provided by A19 had the effect of disadvantaging those over 48 who wished to continue in service until their required retirement at age 60 (ranks) or 65 (superintendent ranks). Absent A19, the policy of effecting redundancies across the Force need not have involved any discrimination on the grounds of age: but that possibility was ruled out by the combined effect of the provisions ensuring security of tenure for police officers, because they left no lawful power by which the Force could effect a dismissal by reason of redundancy, unless it were by use of A19. Discrimination was thus inevitable if the A19 power were to be used: to apply a criterion which restricted the use of the power by reference to a feature representing length of service undoubtedly did disadvantage those over the age of 48 when compared with those who were younger, in that the latter group, who were defined by a criterion closely linked with age, were denied the free choice whether to continue in service which was available to those who were younger.

6. Age discrimination, which this constituted, is not unlawful where it is justified, whether it is direct or indirect in nature. An Employment Tribunal at London Central (EJ Tayler, Mr Buckleigh, Mr Carter) whose decision is under appeal before me, approached its application of the relevant law upon the basis that the application of A19 was indirectly discriminatory. In doing so it was following without question the lead given by the parties. I have some reservations about whether the discrimination concerned was correctly classified as "indirect" rather than "direct", which I shall spell out in a post script to this judgment in case it might be relevant to future cases, since the appeals before me are avowedly test cases: other cases which follow their lead, though in relation to other Forces, may wish to explore more closely the nature of the discrimination said to be involved, since this arguably might affect the analysis of proportionality which is central to this appeal, and which (in this appeal, given the way the matter was approached below) was that applicable to a case of indirect discrimination.

7. Under the **Equality Act 2010**, indirect discrimination is defined by section 19 as follows:

> **"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 if age is one of the relevant protected characteristics.**

8. Assuming (as the parties and Tribunal assumed) that the provision, criterion or practice was the use of A19 to secure termination of office, and that this put those of the same age as the Claimants at a disadvantage compared with those who were younger, the question

determinative of any claim in this case is that posed by Section 19(2)(d), namely whether the application of A19 was a proportionate means of achieving a legitimate aim, since the parties and Tribunal were agreed that the aim pursued by the Forces was legitimate, though they did not wholly agree what that aim was.

9. Taking the legitimate aim of being at least that of achieving efficiency, the focus shifts to whether the means of achieving it were "proportionate". That involves asking whether they corresponded to a real need of the undertaking, were appropriate and necessary. Plainly, it was a necessary operational decision that staff should be shed. The only means of doing so compulsorily was by the application of A19. It was conceded in argument before me that the only way in which "categorical certainty" of reduction in officer numbers could be achieved was by that means, since there is no power to make a Police Officer redundant unless it is that in A19, and the use of that power is limited by its terms to those with over 30 years service.

The Tribunal Judgment

10. The Tribunal decided for reasons sent on 5th February 2014 that "…the practice of requiring the retirement of nearly all officers in the Forces who could be required to retire under Regulation A19 of the Police Pensions Regulations 1987 was not a proportionate means of achieving a legitimate aim". The "Forces" to which the judgment relates are Devon and Cornwall, Nottingham, West Midlands, North Wales and South Wales. Although technically each claim of each officer against his or her Force amounts to a separate claim, the judgment was structured so that those issues common to all cases, which were determinative of the claims, were considered in the first 89 paragraphs. The facts considered in respect of each of the separate Forces, though no separate conclusion was reached in any, followed in five separate annexes. Importantly for present purposes, there was no conflict of fact: as one would

hope in the case of police officers and their Forces those were not in dispute, though the appropriate analysis of their legal effect undoubtedly was.

11. The judgment began by setting out the factual background summarised above, and recording that 27 Police Forces had sought advice from Mr Cavanagh QC whether they might lawfully fulfil their duty to ensure efficient policing in part by using the power in A19 to reduce the numbers of police officers. Seven Forces subsequently determined to proceed to do so, regarding his advice as positive. Five of these were represented in the test cases.

12. Both in Mr Cavanagh's advice, and in evidence, it was recorded and noted that between approximately 80-95% of police officers retire once they have achieved ⅔ APP. The parties indicated to me that this is the first time before retirement age that an officer may normally take an unreduced pension: though an officer may retire earlier from the Force, with an accrued right to receive a pension later, that particular entitlement will fall due at age 60. Though in practice the effect of taking retirement with ⅔ APP has not universally been beneficial to officers, many take the view in advance of retirement that there is a significant financial advantage, overall, in their doing so. No one suggested before me, however, that the precise number of officers who would retire in any given year could be calculated with certainty in advance. Some prefer to remain in the Force, for personal, career, or financial reasons.

13. The Tribunal thought, however, that the fact that the substantial majority of Police Officers chose to retire at ⅔ APP meant that it was "unrealistic to treat the saving obtained by the compulsory application of A19 as being the total salary saving from all officers who retire at⅔ APP." It thought that the police authorities had placed "insufficient emphasis" on the fact that the majority would leave in any event (paragraphs 20, 21). In paragraphs 22-33 which

followed, the Tribunal also focussed almost exclusively upon the process of decision-making by which the Forces had come to reach their respective decisions – the reference to "insufficient emphasis" in paragraph 21 itself being indicative of this approach.

14. Having then set out the law over some 18 paragraphs, the Tribunal turned to its analysis. It first rejected the Claimants' argument that the sole ground for the application of A19 was cost, that the applicable law showed that cost alone could not justify discrimination, and that therefore the Claimants should succeed. It thought that although cost was the precipitating factor (paragraph 59) cost saving and efficiency were not the same thing, even though intimately related (paragraph 58), and that "the aim of increasing efficiency was a legitimate aim". There has been no cross-appeal against that conclusion.

15. It also considered and rejected the Forces' argument that all that required justification was A19 itself, since any discriminatory impact arose solely from the terms of that provision. Since Mr Cavanagh maintains that argument on behalf of the Forces in this appeal I shall set out the Tribunal's reasoning on this point in a little greater detail.

16. Mr Cavanagh was arguing that A19 was to be justified on the grounds of both efficiency and fairness. The restriction on the power of compulsory retirement of officers in the interests of the general efficiency of the Force to their first having attained ⅔ APP was plainly intended to ensure that only those officers would be retired from the Force who had an entitlement to immediate payment of a pension, at a level (⅔ APP) which would provide a substantial financial cushion against what would otherwise have been the difficulties of facing redundancy. At that stage, moreover, officers can secure a larger lump sum by commutation of a proportion of pension than they can later in their careers (crudely, this is because the length of anticipated

receipt of the pension payable at the earliest point would be greater than that in respect of the same pension paid later, and therefore a lump sum representing its commuted value would be higher). Thus, the restriction ensures that only those best able to suffer the financial consequences of enforced retirement are subject to it.

17. Before me, Mr Cavanagh argued that the aim of A19 was also to secure delegation to a Police Force, since it provided that each Force could make a decision for itself, and did not have to exercise the power. The Tribunal did not expressly consider this third contention.

18. As to his submissions about A19 the Tribunal said (beginning at paragraph 63):

> **"We consider that A19 should be seen in the context of A18 and A20. They are interlinked provisions that deal with the special status of Police Officers as office holders rather than employees. They are provided with a level of security of tenure that is greater than most, if not all, employees. Their role in upholding and enforcing the law has been considered to require that they have special protection. We can also see that such security of tenure has anti-corruption benefits. The social policy objective is that Police Officers should have security of tenure with only limited exceptions. A18 to A20 provide exceptions to that general security of tenure…**
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> **64. Rule A19 allows a Police Officer to be forced to retire where their retirement would be in the general interest of the efficiency of the force. It is clear that this is another exception to the general policy of security of tenure. It is also clear that a key factor is that when they are so required to retire they do so with a substantial financial cushion of their lump sum payment, should they choose to commutate, and their pension. …**
>
> **…..**
>
> **66. We consider the appropriate analysis is as follows. As Mr Cavanagh contends, A19 is a *provision*. It includes within it a *criterion* namely that retirement can only be enforced where the officer has obtained ⅔ APP. We consider that the Forces have added a *practice* that they would require all officers to retire at ⅔ APP, subject to the very limited exception that those who could not immediately be replaced would be kept on for a short period while replacements were trained. Put in public law terms, A19 provides a legislative discretion in relation to which the forces have adopted a policy of applying it in all cases subject to the omitted exceptions. The Bedford Police case [**this was a reference to **Police Superintendents' Association of England and Wales v Chief Constable of Bedford Police and Secretary of State for the Home Department** [2013] EWHC 2173 (Admin)**] is authority for the proposition that this is legal in public law. However, that does not preclude an analysis of whether the indirect discrimination that is involved is justified. We**

do not accept that the discriminatory impact arises only from regulation A19 itself: it also results from the practice that the Forces adopted as to its application."

19. In the course of argument Mr Gilroy QC, who appeared for the Claimants of Superintendent rank, and whose submissions were generally adopted by Mr Skelt who appeared for the federated ranked Claimants, accepted that he could point to no feature of the evidence which showed that the way in which the Forces adopted A19 had any discriminatory impact other than that which was inherent in A19 itself: there was no particular fact showing any additional age discrimination from the actual steps that were taken. He said: "I openly accept that there is nothing inherently age discriminatory in the practice". (He was referring to the practice taken in isolation from the provisions of A19).

20. The Tribunal's conclusion at paragraph 66 flowed through to paragraph 67, the last two sentences of which read:

> **"To the limited extent that A19 has been applied in the past if (sic) has been focussed on individual officers. This supports our view that the introducing (sic) a policy whereby all A19 Officers will be required to retire, save for very limited exceptions, adds substantially to the discriminatory impact of A19 generally, and requires objective justification."**

The Tribunal thought that the policy had the consequence of removing nearly all of one group of officers who were considerably younger than the age fixed for default retirement, and thereby worked against encouraging diversity in the workforce. And (presumably, "therefore") "we consider that the adoption of the policy requires justification."

21. Though recognising that justification might lie in matters not in the mind of those who made the decisions, the Tribunal thought that two factors were given insufficient weight by decision makers – that most of the officers concerned would be retiring in any event, and that

the police authorities acted as though the Forces had obtained advice that use of A19 was justified whereas the advice was just that it was capable of justification. If (paragraph 73):

> **"…the decision makers had sufficiently in mind that the savings from the enforced retirements were only for the relatively small number of officers who would not retire in any event, that would have focussed their minds on the possibility of finding some alternative means of avoiding the detriment to the limited group who planned to stay"**

The detriment for those officers made to retire who did not wish to do so was "very severe" (paragraph 74). At paragraph 75 there were further criticisms of the decision making process, and then, having again emphasised the need to seek alternatives, the Tribunal postulated three measures which might have been taken, and which would have reduced the discriminatory impact of applying the provision: (1) asking officers what their intentions were; (2) part time working; or (3) career breaks. At paragraph 81 this line of reasoning was summed up:

> **"These possibilities seemed to have been disregarded by the majority of the Forces largely on the basis that it was thought that the saving being made was the salary of the entire cohort of officers reaching two ⅔ APP (sic) so enforced retirement on A19 was the only possible mechanism to make the saving. Irrespective of what was thought by the decision makers we consider, looking at the matter objectively, the alternatives are such that the Forces have not established that enforced reliance on A19 was necessary. The key point is that the majority of the reduction in officer numbers was achieved by the recruitment freeze.**
>
> **82. Whilst certainty is beneficial to budgeting, the Forces knew that they were, even on their analysis, likely to require the retirement of more officers than they needed to balance their budgets. While that might be seen as creating some further efficiency gain, the Forces were seeking to improve efficiency to make the savings required by the CSR.**
>
> **83. If, after the other alternatives had been exhausted, the Forces had decided that they needed to require a number of A19 officers to retire we consider that there was no reason why they could not have selected between A19 officers. This might have been done by an analysis of their job skills.**
>
> **84. While Police Authorities are under a statutory obligation to balance budgets, budgeting necessarily involves an element of forecasting. A degree of uncertainty can be provided for by projecting the likely rate of retirement.** [It was agreed that either the words should have been "certainty" not "uncertainty", or that "provided for" was to be understood in the sense of "accommodated"**]. Insofar as forces, such as Devon and Cornwall, did this their figures appear to have been based on an unrealistic assessment of the proportion of officers that would retire in any event. There was the possibility of adopting a policy of wait and see: only forcing retirement under A19 should the expected level of**

retirement not occur. If necessary some temporary reliance could have been placed on the Force's reserves.

85. It is important to bear mind (sic) that when one comes to the stage of justification there is already disparate impact on a group that shares a protected characteristic. That is why a defence of justification should be subject to detailed scrutiny. Such scrutiny was not applied by the decision makers in the Forces. When it is applied by the Tribunal we conclude that there were a number of alternatives that meant that enforced reliance on regulation A19 was not a proportionate means of achieving a legitimate aim. While certain of the forces considered (and to a limited extend (sic) adopted) some alternatives we do not consider that they did so to nearly a sufficient extent or that they have established that their application of A19 was appropriate and necessary. The defence of justification fails."

Grounds of Appeal

22. There were 16 grounds of appeal. In oral argument, however, the main thrust was that the Tribunal lost focus of that which was indirectly discriminatory about Regulation A19, which was part of the drafting of the Regulation itself. There was nothing, separately, about the way in which the Forces adopted or applied A19 that was itself a further act of discrimination. A19 was concerned not just with the promotion of efficiency, but also aimed at fairness, in that only officers with the support of a ⅔ pension could be required to retire, and thirdly, delegation, in that Parliament had decided that it should be for police authorities to decide whether A19 should be used in particular circumstances. Next, it was said that the Tribunal wrongly took the view that it was the decision by each Force to make use of A19 which was required to be objectively justified (see paragraphs 66 and 69) whereas it was the provisions of A19 itself, since it was those which gave rise to the indirectly discriminatory element. These arguments were linked to the submission that the Tribunal was wrong to accept that of the phrase "provision, criterion or practice" contained in section 19 of the **Equality Act** this was a case of the *practice* adopted by the Forces, rather than the *provision* applied by them. In any event, the Tribunal had failed (contrary to **Land Registry v Benson** [2012] ICR 627 (EAT)) to respect the employer's decision on the allocation of its resources with a view to maximising efficiency in the face of swingeing cuts, had imposed too high a standard of scrutiny in its evaluation of

objective justification, and had wrongly focussed on the decision making process, rather than the outcome, when evaluating whether the measure adopted by the Forces was objectively justified: it was largely irrelevant to consider, for instance, whether witnesses called by the Forces understood the concept of indirect discrimination or had sufficiently in mind that the savings from enforced retirement were only for a relatively small number of officers. It had failed to analyse whether the means adopted were appropriately necessary (i.e. reasonably so) to achieving a legitimate aim which it considered the Forces were targeting. More generally Mr Cavanagh QC submitted that there was only one permissible conclusion to which the Tribunal on the facts could have come, that being in favour of the Forces: accordingly, its decision was perverse and the Appeal Tribunal should substitute its own decision to the contrary.

23. Mr Gilroy QC, on behalf of the Superintendent ranks bore the brunt of the response of the officers. He sought to argue that the Forces had not sought in their answers to the claims to rely on ex post facto justifications for the use of A19, but had contended that the justification they would rely on was that stated in each case at the time of the relevant decision. What was in issue was a *practice* adopted by the Forces, not the *provision* itself. It was for the Forces to prove justification: for them to show that what they did in the relation to the Claimants constituted a proportionate means of achieving a legitimate aim, and not for the Claimants to show that. The widespread enforced retirement of police officers, albeit on efficiency grounds, was not the embodiment of a social policy of government or legislature. The Tribunal reached its own view as to whether there was objective justification for what the Forces chose to do, as the law required it to do, and this view could not be shown to be in error. The approach of the Tribunal having been correct, its conclusion that the Forces had not established that the use of A19 was appropriate and necessary was within its entitlement. It was not obliged to respect the Forces' views as to whether there were efficiency reasons for the use of A19, nor had it

confused outcome with process. It was permissible for the Tribunal to think that the wholesale use of A19 was unnecessary, given, for instance, that to some extent the Forces were recruiting officers whilst at the same time dismissing others from the Force concerned by the use of A19. Perversity was the last resort of a desperate Appellant, and should be rejected.

Discussion

24. The parties were and are agreed that the issue in the present case is whether what was done was a proportionate means of achieving a legitimate aim. This involves determining what the aim was which the Forces actually had in mind when taking the steps which are complained of as being discriminatory, and not that which they might have had if they had started out with justification for the means adopted at the front of their minds. Identification of such an aim is a question of fact for a Tribunal to determine, and will usually if not inevitably be established by evidence as to relevant history. However, in doing so a Tribunal must bear in mind that the actual aim may be defined within a range which spreads from that which is very broad, to that which is quite specific. Here, it might be said (broadly) that the aim was efficiency; or (more closely related to means) achieving a reduction in staffing; or (running the two together) that it was achieving efficiency by reducing numbers. Since a central feature of what the Forces sought to achieve was certainty, that too might find its way into the expression of the aim, as would be the case if it were expressed as being "to achieve efficiency by reducing officer numbers with certainty". Whether a broad or specific approach is taken cannot sensibly affect the outcome of the proceedings, since if it were to do so the same set of facts, productive of the same disadvantage, might be capable of giving rise to two equally legitimate results. The examples given of three possible statements of aims here shows that the more specific they become, the more they may seem to incorporate means within the definition of aims. This does not invalidate the reasoning: as Underhill J (President) recognised in **Pulham v Barking and**

Dagenham London Borough Council [2010] ICR 333 and repeated in **HM Land Registry v Benson** [2012] ICR 627 (at paragraphs 15 and 36 respectively):

> **"..the dichotomy of 'aim' and 'means' is not always clear cut and the two elements can sometimes reasonably be formulated in more than one way."**

In saying so he quoted the observation of Elias J (President) in **Loxley v BAE Systems Land Systems (Munitions and Ordnance) Ltd** [2008] ICR 1348, when he said that "whether [they] are better described as aims or as proper means of achieving the aims is perhaps a matter of semantics" and added his own memorable phrase:

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

I agree.

25. Though identification of the aim which the Respondents had in mind is a question of historical fact, whether the aim is legitimate is a conclusion of law, which is to be answered by the Tribunal.

26. Mr Cavanagh QC contends that the Forces' aim included the need for there to be certainty of savings. Whether it is to be regarded as aim or means is not critical in the light of the law I have just set out, providing it was an intrinsic part of that which the Forces set out to achieve. They had no means of achieving certainty other than by the use of A19, for none of the alternative means set out at paragraph 21 above, which the Tribunal considered would give rise to less adverse effects when considering age, could have provided it. Asking a Police Officer whether he intended to retire could not on its own ensure that the amount of his salary would be saved for the coming budgetary year. Part-time working and career breaks were not explored in evidence: it could not therefore be said by the Tribunal that they would certainly have produced the necessary savings. They were described by Mr Cavanagh QC in his skeleton

argument as "fanciful in the extreme": ignoring the element of forensic over-emphasis in this, it nonetheless seems to me to be optimistic and uncertain that they could on their own have achieved this aim.

27. This point is predicated on there being a need for certainty. Mr Cavanagh addresses that in two ways – both factually, and legally. As to the facts, he relied on the Tribunal's recognition (at paragraph 76) that alternatives to the use of A19 were "generally disregarded on the ground of certainty", and appeared to accept the need for it in paragraphs 78 ("While it would not produce absolute certainty, officers could be expected…"); 80 ("Again while there may not have been absolute certainty, the vast majority would fulfil their commitment to career breaks"); 81 ("…the Forces….thought…enforced reliance was the only possible mechanism to enforce the saving"); 82 ("While certainty is beneficial to budgeting…"); and 84 ("A degree of uncertainty can be provided for…"). This reflected the Tribunal's recitation of fact in the case of the individual Forces: the evidence of Mr Haselden of Devon and Cornwall at 116 ("..the Force could not base its budget on unassured or unreliable forecasts"), of Mrs Goscombe, also of Devon and Cornwall who (at 129) was reported as stressing her wish to obtain certainty, a need further reflected at 132 and 156, and of Mr. Bull (of the same Force) who had rejected other options on certainty grounds (paragraph 138); that of Mr. Thompson (West Midlands) in whose report at paragraph 224 is mentioned that "reliance on… volunteering would not provide the certainty that was required…"; at 235, where the Tribunal found "As with other force of (sic: presumably "Forces") the approach taken by West Midlands was based on achieving certainty of the savings….", which was echoed at 246 ("The basis was the certainty in savings that would be provided…") and 284, quoting Mr. Kelleher's evidence on behalf of North Wales ("...the proposal to activate A19 was made because this was the only way in which the Force could reduce police officer numbers with certainty."); and Mr. Milton's evidence (298) for

South Wales that "..the use of A19 provides a considerable degree of budgetary certainty in relation to officer numbers which voluntary retirement, by its very nature, simply does not."

28. Mr Cavanagh QC was right to say that on the basis of this evidence there was an overwhelming case factually that part of the aim was to achieve certainty of reduction in budgetary expense, and right to comment that there was no other way of achieving this than by use of A19. (He was also obviously right to criticise the Tribunal's view that it was unrealistic to treat the saving obtained by the compulsory application of A19 as being the total salary saving from all officers who retired as soon as they reached ⅔ APP: it was, even if a considerable part of the savings could have been achieved by officers volunteering to accept retirement at that stage as so many did).

29. This was allied with his reliance on the legal principles expressed in the case of **Land Registry v Benson.** The Land Registry had an urgent need to cut costs, in particular those of staffing, and obtained for that purpose Treasury approval to spend £50m from its reserves to encourage voluntary redundancy or early retirement. Not every application would be accepted automatically: one criterion for selecting between applicants was how much it would cost to release them. Five employees applied for early retirement. They were aged between 50 and 54 and were relatively more expensive to admit to the scheme than others not in that age bracket, though that was not the only reason for their non-admission. The finding in their favour by the Tribunal that they had suffered unjustifiable age discrimination was overturned on appeal to the Appeal Tribunal, presided over by Underhill J (President). As in the case before me, justification was the only issue. The Tribunal had found that no satisfactory basis of selection other than that adopted was possible, but instead of concluding that that resolved the matter, it asked whether there was a real need to select between applicants *at all* (it held there was not)

and then went on to decide that the Registry should simply have avoided the problem of discrimination by releasing everyone who applied under the scheme, albeit this would have cost more. On Appeal, the EAT held that, like any business, the Registry was entitled to make decisions about the allocation of its own resources; and the reasoning of the Tribunal insofar as it held that there was no "real need" to select, and that it could have devoted more resources to achieving its aim, was flawed. Thus, at paragraph 37, Underhill P said:

> **"The essence of the Tribunal's reasoning was that the Appellant had not demonstrated a "real need" to limit its spending on the Scheme to £12m – or, to put it another way, to limit its spending on all three schemes to £50m. It held that it had not done so because it had not shown that payment of the additional £19.7m was "unaffordable". By that it evidently meant that the employer had not shown that the funds were absolutely unavailable, in the sense that they could not be paid without insolvency: it pointed out that theemployer's reserves far exceeded that amount (albeit that Treasury approval was needed to spend them) and that later in the same year, in the ATP, it contemplated spending a far greater figure. In our view, to apply a test of unaffordability in that sense is to fall into the error of treating the language of "real need", or "reasonable needs", as Balcombe LJ put it in Hampson, as connoting a requirement of absolute necessity. It is well established that that is not the case: see the judgments of the Court of Appeal in Barry v Midland Bank plc ([1999] ICR 319, at p. 336 A-B and in Cadman v Health and Safety Executive [2005] ICR 1546, and of Elias J in this Tribunal in Chief Constable of West Midlands Police v Blackburn [2008] ICR 505 (above), paras. 17-21 (pp. 509-510). In Cadman Maurice Kay LJ said, at para. 31 (p. 1559 B-C):**
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> > **"The test does not require the employer to establish that the measure complained of was "necessary" in the sense of being the only course open to him. That is plain from Barry. … The difference between "necessary" and "reasonably necessary" is a significant one …"**
>
> **The effect of that principle, applied to a case like the present, seems to us to be that an employer's decision about how to allocate his resources, and specifically his financial resources, should constitute a "real need" – or, to revert to the language of aim and means, a "legitimate aim" – even if it is shown that he could have afforded to make a different allocation with a lesser impact on the class of employee in question. To say that an employer can only establish justification if he shows that he could not make the payment in question without insolvency is to adopt a test of absolute necessity. The task of the employment tribunal is to accept the employer's legitimate decision as to the allocation of his resources as representing a genuine "need" but to balance it against the impact complained of. This is of course essentially the same point, adjusted to the different formulation of the test, as we make at para. 34 above. If the Tribunal had carried out that exercise it would, we believe,**

> **inevitably have come to the same conclusion as we have reached, on our approach, at para. 35."**

30. At paragraph 39, Underhill P. recognised the support the EAT had gained from the decisions in Barry and Blackburn:

> **"Those are both cases where the employees' essential case, when analysed, was that the employers should have adopted a different scheme (in one case a voluntary redundancy scheme and in the other a scheme of payment for shift-working) than they did, on the basis that such a scheme would have been more favourable for women. In both cases it was held that the only question for the tribunal was whether the measures complained of were justifiable in the context of the scheme actually adopted: what scheme to adopt was a matter for the judgment of the employer. Although the situations with they were concerned, and the details of the reasoning, are not directly comparable, the reasoning is at least congruent with our belief that the Tribunal in the present case should have accepted the £12m (or £50m) limit as representing a legitimate aim, or real need, while weighing it against its discriminatory impact."**

31. In the present appeal, the Forces chose to reduce manpower as an essential part of their strategy to provide efficient policing. Certainty of reduction of numbers and consequent savings was a central aspect of that strategy. There was no evidence to the contrary, and much to support this. No other conclusion was open to the Tribunal.

32. I accept Mr Cavanagh QC's argument that if the principles in **Benson** and **Blackburn** were applied the Tribunal could not have decided for itself upon another scheme which the Forces should have adopted to secure the aim they wished to achieve, but should have respected the one they chose, and rather than criticise the scheme simply have asked whether the measures complained of were justifiable in the context of the scheme actually adopted.

33. Some assistance is also provided by the decision of King J. sitting in the Administrative Court in **The Police Superintendents Association of England and Wales & Ors v The Chief Constable of Bedfordshire Police** [2013] EWHC 2173 (Admin). He rejected a challenge that

A19 permitted only the retirement of individual officers on grounds particular to the efficiency of that office, and held that it was concerned with the wider efficiency of the Force as a whole, saying at paragraph 23:

> "… **In principle it confers a general discretionary power on Chief Constables to require officers who fall within its scope to retire on wider efficiency grounds. I would accept that its statutory purpose must be as contended for by the defendant, namely to facilitate the general interests of the efficiency of the force by the compulsory retirement of police officers but with the legislative intent that it should be used only in respect of officers who have the financial 'cushion' (of a healthy 2/3rds pension) to cope with the loss of post. It is in fact the only legal 'tool' currently available to a Chief Constable to reduce the numbers of officers in his force in the general interests of efficiency. I accept that any such reduction must be 'in the general interests of efficiency' and not simply to achieve budget cuts or to 'balance the budget'. However 'general interests of efficiency' must in principle be capable of extending to the question of how to accommodate the need for a police force to live within its means. …To quote [Mr Cavanagh QC's] written Speaking Note at paras 13 and 14:**
>
>> **'13. If the Chief Constable makes the judgment that it will be in the general interests of efficiency to reduce the number of officers in the force, then A19 is the only legal "tool" he can use to give effect to this decision. This may mean that it is not in the general interests of efficiency to retain any of the officers who qualify under A19 (1).**
>>
>> **14. Such a situation may arise, as here, where the cuts imposed upon the Force mean that difficult decisions have to be made about where the cuts should fall in order to maintain and improve the efficient provision of a police service. The Chief Constable has to make efficiency decisions based on the financial and other resources available to him. He has to decide how to do more with less. If the Chief Constable makes the judgment that it would not be in the general interests of efficiency to reduce further the police staff complement or to make further inroads into property and equipment etc, he may determine that it will not be in the general interests of efficiency to retain the police officers who qualify under A19 (1). Put bluntly, it is more efficient, going further, to provide the police service with a smaller number of officers than it is to make further cuts in staffing or in other areas.'**

This places emphasis on the nature of the scheme adopted by Bedfordshire Police, which parallels that in the case of the Forces considered in the appeal before me; that efficiency includes manpower reduction in order to save cost; that such efficiency may be achieved by the enforced retirement of a cohort of officers; and that the only tool available to secure such efficiency is that provided by A19.

34. Accordingly, I accept that certainty was part of the aim (or, alternatively, an essential part of the means of achieving the aim); and that it was not for the Tribunal to substitute a scheme other than that adopted by the Forces to achieve that aim, but that it was, rather, for it to consider whether the application of A19 was reasonably necessary and appropriate to do so, balancing the importance of achieving the aim against the adverse impact which the measures adopted had upon those affected.

35. The parties were at odds before the Tribunal in asserting whether the use of A19 was the application of a provision, a criterion or a practice. The respective positions reflected the argument of the Forces (who contended for a "provision") that the discriminatory element of the PCP arose from statute, by contrast with the position of the officers, who maintained that the question was one of the practices of the Forces in adopting that provision. The conclusion of the Tribunal at paragraph 66: "We do not accept that discriminatory impact arises only from Regulation A19 itself: it also results from the practice that the Forces adopted as to its application" is erroneous if by it the Tribunal meant to suggest that the practice of utilising A19 was in itself, and separately from Regulation A19, discriminatory: see the concession which Mr Gilroy made, referred to above. (That said, I think it is in general unhelpful to analyse Section 19 of the **Equality Act 2010** as if it were critical whether that which produces discrimination is a "provision" on the one hand, a "criterion" on the other, or a "practice" on the next: the question for the Tribunal is whether apparent discrimination results from something which might properly be described by any or all of those labels, and if so whether it can be justified). Though I do not accept the literal meaning of the last sentence of paragraph 66, just quoted, I think that the point which the Tribunal was making was simply that there was no obligation in law upon the Forces to make use of the power available under A19. Each had a choice whether

to do so or not. Absent a decision of a Force to use A19 in its particular circumstances, it could cause no discriminatory impact. Given the paragraphs immediately following 66, in which the Tribunal considered the effect of utilising A19 to dismiss a cohort of officers, I think that the Tribunal was speaking of an impact which might be different from that which would apply if Regulation A19 was used in the case of an individual officer, as it regularly had been before the recent financial crisis. Insofar as it is necessary for my decision, therefore, I adopt the arguments of Mr Gilroy and Mr Skelt as to this: what potentially caused discrimination here was the adoption by each Force of A19. That said, what was discriminatory was inherent in the terms of A19 itself, in that it could only be applied to those officers who had served long enough (i.e. 30 years) to be in receipt of ⅔ APP.

36. The third ground spoken to by Mr Cavanagh QC - that the ET imposed too high a standard of scrutiny in its evaluation of objective justification – arises from this point. Mr Cavanagh relies upon the authorities which make it clear that if a rule such as that inserted in A19 by Parliament is justified it is not necessary to go on to justify the application of that rule in individual cases. He cites the Supreme Court in **Seldon v Clarkson, Wright and Jaques** [2012] UKSC 16, [2012] ICR 716 at paragraph 64:-

> **"Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule as opposed to a series of responses to particular individual circumstances is itself an important element in the justification. It is what gives it predictability and consistency, which is itself an important virtue."**

Baroness Hale went on to observe that if it is justified to have a general rule, its existence will usually justify the treatment which results from it. A19 is a general rule: the fact that Police Forces are not obliged to use it to require officers to retire but have a discretion whether to do so does not in Mr. Cavanagh's submission detract from the fact that it is the social policy objectives set out in A19 which need to be justified, rather than the use by the Forces of A19 in

particular cases. Moreover, since the decision to impose the ⅔ APP condition was a decision of Parliament, this should have led to a different and less strict standard of scrutiny from that which would have applied had an individual employer adopted an indirectly discriminatory rule (see **Seldon** at paragraphs 28, 50(2), 50(7) and especially, paragraph 46). I agree.

37. Further, in paragraph 67, the Tribunal thought that introducing a policy whereby all A19 officers would be required to retire added substantially to the discriminatory impact of A19 generally. It thought this required objective justification. Insofar as the Tribunal was suggesting that this required separate justification from the discrimination caused by adopting A19, it is plainly wrong: however, though it seems more likely it was saying that the standard of scrutiny should be greater because of this factor, I do not accept this either. As the **Bedfordshire** case demonstrates, A19 is applicable generally to a number of officers if the occasion arises for such use: it is not intended to cover the same territory as would dismissals for conduct or inability to continue in post, which are necessarily individual. The impact of A19 in respect of any one officer is no greater because other officers also are subject to the same rule. Indirect discrimination is generally aimed at remedying group disadvantage. In the present case, the disadvantage is only to the group who would not have retired were it not for A19 being applied to them. Since the substantial majority of officers (Tribunal judgment paragraph 68) would have retired in any event on reaching ⅔ APP, the impact is limited numerically to a small part of the cohort to whom A19 was applied. In deciding that a policy of applying A19 to all "adds substantially to the discriminatory impact of A19 generally", the Tribunal appears to be looking not at the smaller group which actually was affected adversely, but at a larger group to whom the requirement also applied, which was not. The principle it applied followed a line of reasoning which might be expressed as being that what affects one individual adversely has double the adverse discriminatory effect if it affects a second person in

the same way. In my view, the adverse effects of a discriminatory rule cannot be assessed by crude mathematics of this kind. The right not to be discriminated against is an individual right, even if it is to be determined by looking to see whether other members of the group of which the individual is part have also been affected. The likely effects on an individual affected by a potentially discriminatory practice are what have to be brought into balance against the importance of the object to be achieved.

38. At paragraph 69 the Tribunal thought that part of the discriminatory impact was to remove nearly all of one group of officers at a considerably younger age than that which Parliament had fixed for default retirement, thus running contrary to the social policy of encouraging a proper range of ages within the workforce. It commented that the adoption of such a policy required justification. This goes beyond the discriminatory impact in respect of one individual officer, to consider the systemic effect of what was proposed. The Tribunal appeared to consider some special justification of this to be necessary. I doubt that this is so in the case of the adoption of A19, for I accept that that which is discriminatory about it was determined by Parliament, which made a deliberate choice to restrict compulsory retirement to those who would have a financial cushion to alleviate its worst impact if they did not desire it. That specific social policy, standing against the general policy of promoting a wide age range of those in employment, was not considered as such by the Tribunal at paragraph 69, nor did it specify what the particular relevant benefits of a "proper" range of ages within the workforce would be in the present case which would be lost by the application of A19.

39. In the event, I am persuaded by Mr Cavanagh's submissions that the Employment Tribunal imposed too high a standard of scrutiny when evaluating objective justification.

40. In deciding whether the means adopted (applying A19) were proportionate, the Tribunal considered not just the aim (discussed above) which the Forces actually had, but also the "social policy objective" of the provision. It thought (in paragraph 63) that A19 was one of three provisions ensuring a social policy objective that police officers should have security of tenure with only limited exceptions. In its discussion at paragraphs 63 and 64 it did not consider the social policy reason for restricting retirement on efficiency grounds to those who had obtained ⅔ APP. Yet this was the critical part. It seems self-evident that the policy was to limit the application of efficiency retirement to those who were in the best position financially to bear it. If A19 were to be considered on its own to require separate justification, this policy would clearly provide it: see **Palacios de la Villa** [2009] ICR 111 paragraphs 68 – 71, in which the European Court of Justice upheld the entitlement of a Member State to provide for a compulsory retirement age; and **Rosenbladt v Oellerking Gebäudereinigungsgesellschaft GmbH** [2011] IRLR 51 in which the national legislation in issue was based not only on a specific age but also took account of the fact that those subject to retirement at that age had some financial compensation for their loss, since at the end of their working life, caused by the application of the retirement age, they then had a replacement income in the form of a retirement pension.

41. I consider also that Mr Cavanagh is right in his contention that the Tribunal focussed impermissibly on the decision making process which the Forces adopted in deciding to utilise A19. When considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same

reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a Tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted. But the fact that there may be such an impact does not convert a Tribunal's task from determining if the measure in fact taken can be justified before it, objectively, into one of deciding whether the alleged discriminator was unconsidering or irrational in its approach. Case law is all one way on this: see **Seldon v Clarkson Wright & Jacques** [2012] UKSC 16; [2012] ICR 716 at paragraph 60 per Lady Hale: the aim "need not have been articulated or even realised at the time when the measure was first adopted", and per Lord Hope at paragraph 76: "..it does not matter if [the decision maker] said nothing about this at the time or if they did not apply their minds to the issue at all"; echoing the Court of Appeal's reasoning in **Health and Safety Executive v Cadman** [2005] ICR 1546 at para. 28. Moreover, this approach coincides with that taken to determining proportionality in applying the European Convention on Human Rights and Fundamental Freedoms, an approach which is applicable in discrimination law as it is in the territory of Human Rights (**Crime Reduction Initiatives v Lawrence** UKEAT/0319/13/DA, 17th. February 2014). Thus in **R (SB) v Denbigh High School** [2007] AC 100 the House of Lords rejected the approach of the Court of Appeal (which was that the

school should have asked itself a series of questions before determining on a ban on the wearing of the jilbab), and held that what mattered in any case was the practical outcome, not the quality of the decision-making process which led to it (see especially per Lord Bingham at paragraph 31). **Belfast City Council v Miss Behavin' Ltd** [2007] UKHL 19 further endorsed this.

42. The principle was not disputed before me. However, though he acknowledged it in theory, Mr. Gilroy's oral argument repeatedly kept shading into criticism of the way in which the Forces had reached their respective decisions. To the extent that it did so I wholly reject it. Paragraph 43 of his written skeleton argument exemplifies the point: he there argued that the Tribunal was:

> **"...patently entitled to conclude (1) that there was a failure by the Forces sufficiently to appreciate that the use of A19 involved indirect discrimination; (2) that it had erroneously been considered that once legitimate aims had been established the matter needed little further consideration; (3) that Leading Counsel's Opinion** [which the Forces had obtained from Mr. Cavanagh in advance of their use of A19 to achieve compulsory staff reductions] **was largely regarded as being tantamount to a "green light" to use A19 without further, and (4) that all of these factors inevitably, and for good reason, impacted on the Forces' ability to prove justification"**

Assuming the Tribunal's conclusion to which he referred was accepted by him to be a factor in its decision – and if not, why would it be "entitled" in the context to conclude as it did? – this demonstrates four matters which were in principle wholly irrelevant, yet which the Tribunal had taken into consideration. Neither the argument, nor the validity of the Tribunal's conclusion, could be rescued by the opening words of Mr Gilroy's paragraph 43, asserting that the Tribunal "did not confuse outcome with process". The paragraph was all about the latter. The Tribunal adopted an erroneous approach.

43. Given, then, that the legal issue whether the means adopted were proportionate (i.e. appropriate and reasonably necessary) to achieving that aim is to be resolved by considering outcome, not process, the focus is on what happened rather than why it occurred.

44. None of the supposed alternatives set out at paragraph 21 could deliver the certainty which was a necessary part of the Forces' approach for the reasons given at paragraph 26.

45. Had the policy been a blanket policy of excluding any officer from possibility of retention, then, in my view, it would have arguably not have been justified as such, for it would permit of no exception, however much exception was deserved. That, however, is not this case: as the Tribunal recognised the process did admit of exceptions, and I understood from what I was told during the hearing that the "A19 approach" was not so universal as to have permitted of none in practice, though there had been few.

Conclusions

46. In conclusion, the Tribunal was in error of law. Though the Tribunal was right to conclude that discrimination potentially occurred when the Forces chose to use A19, it did not focus upon the fact that what was discriminatory was inherent in A19 itself, and that there was nothing inherently age discriminatory in the practice of the Forces independently of that within the terms of A19 itself. The evidence before it required the Tribunal to hold that certainty of achieving the necessary efficiencies was an essential part of the aim or means, and that there was no other way in which the aim could be achieved. It fell into error by failing to apply the principles in **Benson** and **Blackburn**, and to enquire whether the adoption of A19 was a reasonably necessary means of achieving the aim of the Force's scheme: it was not for it to manufacture a different scheme. It wrongly concentrated on the process, and reasoning, adopted

by the Forces when deciding to utilise A19, rather than enquiring whether at the date of the hearing before the Tribunal the use of A19 was proportionate (and hence justified, objectively). It applied too stringent a standard of scrutiny, and did so in part because it failed to engage with the fact that Parliament had chosen to make A19 in the terms it did, wrongly thought A19 was a provision intended to provide security of tenure (which it demonstrably did not, since it allowed for the opposite), and failed to analyse the reasons of social policy which underpinned the restriction of the use of A19 to those who had an immediate pension entitlement. It wrongly put forward as alternative but less discriminatory means of achieving the same object three matters two of which were entirely speculative, and none of which offered the necessary certainty. The appeal succeeds.

47. Since the evidence before the Tribunal was all one way as to the need for the legitimately sought economies and efficiencies to be certain, and no other less discriminatory means of achieving them had or has been identified, this is not a case in which remission is appropriate. I can see no tenable argument for holding use of A19 to be anything other than appropriate and reasonably necessary. The appeal is allowed. The decision of the Tribunal is reversed. The claims (by each claimant against each relevant Force) are dismissed.

Post-script

48. The case proceeded before the Tribunal, and before me, as one of indirect discrimination. For the reasons I gave earlier, though I have loyally determined the appeal on that basis, I doubt it to be correct, and given the nature of the case should say something as to my reasoning in case it should hereafter be of importance.

49. The classic case of such discrimination arises where an apparently neutral criterion affects a number of people sharing a protected characteristic to an extent which is disproportionate to the way it affects others who do not have the same characteristic. The criterion here was to have achieved ⅔ APP. This was not age-neutral, for no officer could achieve it unless that officer had first served for 30 years. Since the earliest age of entry to a Force is 18, no-one under 48 could have had the criterion applied to them. Accordingly, application of the criterion inevitably distinguished between those under 48 and those over 48; those under 48 could not be retired by application of A19, whereas, depending on length of service, those over 48 could be. Where a criterion inevitably distinguishes between individuals on the basis of age (as, for instance, did the requirement for free entry to a swimming pool based on pensionable age, though condemned in **James v Eastleigh** [1990] 2 AC751 for being discrimination on the ground of sex) to apply it is to discriminate directly; it is where a criterion disproportionately, though not inevitably, applies to people of a particular age group that the discrimination is indirect. Age is not an easy protected characteristic to analyse, since no-one stays the same age from day to day, and to define people as being of the same "age group" is necessary in order to comprehend the discrimination which (subject only to justification) it is sought to eliminate. However, where it is clear that a large cohort simply was excluded by application of an age-related criterion, applied as a threshold provision, that seems to me to constitute direct discrimination against either the group excluded by falling below the threshold, or the group of others (above the threshold) who are defined by not being so excluded. Though it may be said that those over 48 are not all, nor inevitably, included in the group of those subject to A19, since not all may have served for long enough, it is entirely permissible to see the group constituted by those over the age of 48 as being at risk of inclusion, whereas those under 48 could not be. This is a difference entirely and directly defined by age. It leads me to think that the discrimination here would properly have been identified as direct.

50. A threshold provision such as that in question here cannot easily fall foul of section 19. That is because section 19(2) defines a PCP as discriminatory if "A applies or would apply it to persons with whom B does not share the characteristic…". There is no question in a threshold case such as the present of the Forces applying the criterion to anyone under the age of 48, since it simply could not do so. Thus if any comparison were to be drawn for the purposes of determining if there had been indirect discrimination it would have to be between those over the age of 48: yet this was not the comparison which I understand was envisaged in the present case.

51. Given that two leading counsel, and a highly experienced junior, joined in advancing a case as to indirect discrimination, I advance these views only tentatively, and they have formed no part of my reasoning. They only serve to tell others who face similar circumstances that they should not necessarily assume their case is one of indirect rather than direct discrimination, and may wish to argue the point out fully, as it has not been before me.