Appeal No. UKEAT/0152/14/DM
UKEAT/0153/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 January 2015
Judgment handed down on 5 February 2015

Before

THE HONOURABLE MR JUSTICE LEWIS

MS V BRANNEY

MR G LEWIS

UKEAT/0152/14/DM

MRS J BRAITHWAITE AND 11 OTHERS — APPELLANTS

HCL INSURANCE BPO SERVICES LIMITED — RESPONDENT

UKEAT/0153/14/DM

MS F EDIE AND 15 OTHERS — APPELLANTS

HCL INSURANCE BPO SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

UKEAT/0152/14/DM For the Appellants	No appearance or representation by or on behalf of the Appellants
UKEAT/0153/14/DM For the Appellants	MR JEFFREY JUPP (of Counsel) Instructed by: Messrs Levenes Solicitors 150 Minories London EC3N 1LS
For the Respondent	MR BEN COOPER (of Counsel) Instructed by: Blake Morgan LLP New Kings Court Tollgate Chandler's Ford Eastleigh SO53 3LG

SUMMARY

AGE DISCRIMINATION

This is an appeal against a decision of the tribunal dismissing a claim for indirect age discrimination. Over time, a number of employees from different companies had had their employment transferred to the Respondent employer. As a result, its employees had different terms and conditions in relation to matters such as working hours, annual leave, entitlement to private health care, carers' leave, and potentially, entitlement to redundancy. The Respondent was facing continuing losses and sought to address those losses by requiring employees to agree new terms and conditions or be dismissed. That requirement put older employees at a particular disadvantage as employees within the 38 to 64 year age range were more likely to lose their existing contractual rights The tribunal found that the requirement to enter a new contract was a provision, criterion or practice ("PCP") but also held, however, that the PCP was objectively justified and dismissed the claim.

The Respondent cross-appealed the finding that a change of terms and conditions could amount to a PCP. The Appellants appealed against the finding that the PCP was objectively justified. The Employment Appeal Tribunal held that the employment tribunal was entitled to find that the requirement that, in order to remain employed, the Appellants had to agree to a new contract with new terms and conditions or be dismissed was a PCP. The tribunal was entitled to find that the PCP was objectively justified. The Respondent had a legitimate aim, namely reducing staff costs to ensure its future viability and to have in place a market competitive, non-discriminatory set of terms and conditions. In considering the issue of objective justification, the tribunal had properly understood the task that it had to carry out and had carried out the task properly. It did consider the effect of the changes upon the affected employees and balanced the needs of the

Respondent against those changes. It did have regard to the alternatives proposed by the Appellants. It was entitled to conclude that those alternatives would not achieve the Respondent's legitimate aim and the PCP was objectively justified as there were no practicable alternative to the changes proposed by the Respondent and its changes were proportionate. Further, the tribunal had not made a perverse finding of fact nor had it misunderstood that it was for the Respondent to show that the PCP was objectively justified.

THE HONOURABLE MR JUSTICE LEWIS

INTRODUCTION

1. These are two appeals against a decision of the employment tribunal, Employment Judge Burgher, Mr Dugmore and Ms Cooper, dismissing claims for indirect age discrimination. There is also a cross-appeal by the Respondent employer against one aspect of the decision.

2. The two appeals involve former employees of the Respondent, HCL Insurance BPO Services Limited. The Appellants in the first appeal comprise Mrs Fiona Edie and 15 others. They have been represented by counsel at this appeal. The Appellants in the second appeal comprises Mrs Jacqueline Braithwaite and eleven others. They were not represented at the hearing and did not make separate submissions but relied upon the arguments made on behalf of Mrs Edie and others in the first appeal as the issues that arise are common to both cases. The Appellants contend that the Respondent had applied a provisions, criterion or practice (a "PCP") to them which was indirectly discriminatory on the grounds of age within the meaning of 19 of the **Equality Act 2010** ("the 2010 Act").

3. In brief, all the Appellants were formerly employed by a company called Liberata UK Ltd. ("Liberata"). That company's undertaking, comprising the administration of certain types of insurance, was transferred to the Respondent. The contracts of employment of the Appellants, therefore, were treated as being contracts made with the Respondent pursuant to the **Transfer of Undertakings (Protection of Employees) Regulations 2006** ("the Regulations"). As a result, the Respondent's employees had different terms and conditions. The Respondent was experiencing losses. It decided, following consultation, to introduce a single set of terms for all employees that would not provide entitlement to certain benefits. Employees were

required to agree the new terms or be dismissed. Some of the Appellants declined to agree to the new terms and conditions and were dismissed on 15 June 2011. Others did agree to the new terms and conditions and were re-engaged on those terms.

4. The tribunal held that the Respondent had applied a PCP to the Appellants and other employees, namely that if they wished to remain employed by the Respondent, they were required to enter into a new contract with effect from 16 June 2011 under which they would not have contractual entitlements to private health insurance, carer days and enhanced redundancy payments and in which their working hours would be 37 hours per week and annual leave would be 25 days a year. That put older workers at a particular disadvantage as they were the employees who had built up the greater entitlements by virtue of longer service. The tribunal found, however, that the introduction of the new terms was a proportionate means of achieving the legitimate aim which was to reduce staff costs to ensure the Respondent's future viability and to have in place market competitive, non discriminatory terms and conditions.

5. The Respondent cross-appeals the finding that it applied a PCP. The Respondent contends that a change in substantive terms and conditions is not capable of amounting to a PCP within the meaning of section 19 of the **2010 Act** but rather, the new terms and conditions needed themselves to put employees at a particular disadvantage. Here the new terms and conditions applied equally to all employees and did not put any employee at a particular disadvantage.

6. The Appellants appeal the finding that the PCP was objectively justified. The principal contention of the Appellants is that the tribunal failed to conduct a sufficiently rigorous and critical analysis of the issue of justification. There were five specific grounds of appeal. They

included contentions that the tribunal had failed to compare the impact of the PCP on the affected employees with the importance of the legitimate aim to the Respondent and had failed to consider whether the PCP was reasonably necessary as it had not analysed alternatives advanced by the Appellants as a means of achieving the legitimate aim. The Appellants contended further that the tribunal failed to consider whether the PCP was a proportionate means of achieving the legitimate aim given that it involved the removal of benefits from the affected employees and the use of those benefits to subsidise increases in benefits to other employees. The Appellants allege that the tribunal made a perverse finding of fact in holding that the Respondent had carried out a balancing of its needs against the discriminatory effect of the changes when it had not in fact done so. Finally the Appellants allege that the tribunal did not apply the correct burden of proof and failed to approach the issue on the basis that it was for the Respondent to establish that the PCP was objectively justified.

7. The Employment Appeal Tribunal had the benefit of clear, thorough written and oral submissions from counsel, Mr Jupp for the Appellants in the first appeal and Mr Cooper for the Respondent. We are grateful for the considerable assistance they provided.

THE LEGISLATION

8. Section 39(2) of the **2010 Act** provides that an employer must not discriminate against an employee by, amongst other things, subjecting him or her to a detriment or dismissing him or her. Section 19 of the **2010 Act** deals with the definition of indirect discrimination and is in the following terms:

> **"Section 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—

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation."

THE DECISION OF THE TRIBUNAL

The Identification of the Issues

9. As the appeal involves criticism of the tribunal's reasoning, it is necessary to consider its decision in detail. The tribunal began by identifying the issues in the claim. The Appellants claimed that they had been dismissed for a reason connected with the transfer of their employment to the Respondent in September 2008 and that their dismissal was unfair. Both of those claims were dismissed and there is no appeal against those findings.

10. The Appellants also claimed that they had been subject to indirect age discrimination. They contended that the Respondent had applied a PCP, variously described as the decision to harmonise the terms and conditions of employment or a requirement that, to remain in employment, the employees had to agree to enter into new contracts of employment with different terms and conditions. The Appellants and the Respondent agreed that, if the requirement that they enter a new contract of employment was a PCP, then it put the

Appellants, who were all in the 45 to 64 age range (save for one), at a particular disadvantage when compared with younger employees, as older employees had acquired contractual entitlements to annual leave, working hours and carers' leave which they would cease to enjoy under the new contract. The Appellants also contended, but the Respondent disputed, that there was disparate impact in relation to enhanced redundancy payments.

11. The tribunal noted at paragraph 8 of its decision that the Respondent was contending that, if there was a PCP, it was objectively justified. At paragraph 8.7 of its decision, the tribunal records the Respondent's submission as follows:

> **"The Respondent asserts that there were legitimate aims principally to achieve a viable business by reducing staff costs to an affordable level through direct cost savings, productivity savings and cost avoidance. A secondary aim was to introduce a more equitable and fair rewards system removing existing potential discrimination; in particular potential unlawful age discrimination arising from service related benefits and/or historic benefits now only available to longer serving employees."**

12. The tribunal then summarises the arguments of the Respondent and the Appellants, noting, at paragraph 8.13, the following:

> **"The Claimants contend that alternatives could have been considered which would not have undermined any legitimate aims, such as seeking voluntary redundancies, implementing the measures after redundancy, exercising and delaying any pay increase, reducing rather than eliminating the benefits and also reducing salary levels so as to share the pain, staggering the implementation with the existing terms or reducing over 3 years, or an approach based on the number of people made redundant."**

The Facts

13. The tribunal then set out in full the facts that it found. The essential facts are these. The Respondent was a wholly owned subsidiary of another company which was, in turn, the wholly owned subsidiary of another company, namely HCL Technologies Limited ("the parent company"). The parent company was a profitable company listed on the stock market in India with a turnover of over a billion pounds. The Respondent provided services to life insurance and pensions business relating to the processing of what is known as closed book business. That

is the administration of insurance policies that are no longer sold but where there are existing policies in place and premiums continue to be paid in relation to the existing policies and they require administration. The consequence was that the income generated by such closed book policies reduced year on year. The Respondent had five main customers for whom it provided these services.

14. In terms of its workforce, between April 2001, and 1 September 2008, there had been a series of transfers of employees employed by different companies. Employees were transferred from companies called Save & Prosper (in 2001), Barclays (in November 2002) and Woolwich (in 2003) to a company originally called Adepta but which subsequently changed its name to Liberata LP & I. The business of Liberata LP & I and its employees' contracts of employment were, in turn, transferred to Liberata in 2003. Employees were transferred from a company called Countrywide/Chesnara to Liberata. On 1 September 2008, the Appellant's contracts of employment with Liberata were transferred to the Respondent.

15. On each transfer, the contract of employment of the employees concerned was treated as if it had been made with the transferee company. The result was that the different groups of employees who transferred, ultimately, to the Respondent had significantly different terms from each other and from the original employees of the Respondent. As the tribunal noted in paragraph 36 of its decision:

> **"There was a significant difference between the terms and conditions provided by the legacy employers. In particular legacy Barclays and Save & Prosper employees had an arguable entitlement to enhanced redundancy and carer days. They also had a lower working week of 35 hours and longer holiday entitlement amounting to 27 days. This was to be contrasted with Liberata and HCL legacy employees who were entitled to a maximum of 25 days holiday and were required to work between 37 and 40 hours a week with no entitlement to enhanced redundancy or carer days."**

16. The Respondent was confident that its business model would result in an improvement to the financial performance of its business. The parent company was prepared to underwrite any losses incurred by the Respondent in the short term for over £10 million. As the tribunal found at paragraph 38 of its decision:

> **"In November 2009 there was an economic downturn following the fall of Lehman Brothers and other UK banks and the Respondent was being asked to renegotiate contacts and decrease the service charges it required. We also find that at this time the Respondent was experiencing difficulty in securing new business over and above the dwindling income provided by closed book business."**

17. A review of staff costs was undertaken in early 2010 and that disclosed that staff remuneration as a percentage of revenue was ranging between 92% and 99% on a monthly basis. There were also predictions that revenue was to decline for a number of reasons.

18. A review of terms and conditions of employees showed that some employees who had originally been employed by Adepta and Barclays had certain terms and conditions which were very costly to the Respondent. The Respondent's senior management believed that these terms were generous and outside industry norms and that the redundancy entitlement of some employees might potentially be age discriminatory in so far as the entitlement was based on length of service. The senior management team proposed changes to the terms and conditions of employees in order to "provide a more equitable and fair reward system, and potential savings in order to maintain financial sustainability" and the tribunal found that those were the reasons for the proposed change: see paragraph 44 of the decision. In May 2010, proposals for change were presented to staff and the Respondent informed them that losses were being incurred by the Respondent and that changes to terms and conditions may have to take place to address that.

19. As the tribunal records, the financial position was then discovered to be worse than anticipated. On 21 May 2010, it was identified that the annual loss being incurred by the Respondent was in the region of £4 million not £2.3 million. Discussions took place about reviewing terms and conditions to provide potential savings of between £1 million and £2 million per annum. As the tribunal records at paragraph 47 of its decision:

> **"Further discussions then took place. The management information for May 2010 showed that remuneration as a percentage of revenue was 115%. We accept that the Respondent believed that there was an urgent need to take action on staff costs. The financial situation did not improve and by July 2010 the proposal to make changes to terms and conditions was authorised to be implemented. The aim was to stabilise the business with the intention of growing it in the medium term. This included identifying roles for outsourcing to India."**

20. Changes were proposed to a number of terms and conditions (although not at that stage to redundancy, hours of work, flexible working or notice periods). The different terms and conditions were then benchmarked against financial services industry. As the tribunal found at paragraph 49:

> **"Ms Gawthorpe then arranged for the differing terms and conditions to be benchmarked against financial services industry data. Data from Watson Wyatt was used from the benchmarking exercise. Following this the Respondent decided that it was not appropriate to maintain the benefits that it provided to staff across the organisation. However, it was decided not to reduce staff base salaries as it was thought that this would be demoralising and that it may have had an impact on the ability of the Respondent to retain and recruit key staff. In order to achieve the desired savings changes to the following terms were identified for consideration."**

21. Changes were proposed to terms and conditions relating to 10 matters, including holidays, hours of work and enhanced redundancy. There then followed a period of extensive consultation with the employees. As the tribunal observed at paragraph 53:

> **"During the consultation process the Respondent maintained that there were no redundancies proposed but that it could not rule out redundancies in future, whether as a result of outsourcing contracts to India or otherwise. We find that the Employee Forum representatives, and the Claimants, were well aware of this. This was a significant concern for legacy Adepta and Barclays employees who could potentially lose out, in some cases up to £60,000, if they were made redundant after the proposed changes were implemented."**

22. The tribunal records that the Respondent was requested to consider a voluntary redundancy policy. The Respondent did not have such a policy as there was a need to retain staff with certain skills.

23. Following the conclusion of the consultation period, 6 of the proposed changes were altered to address some of the concerns raised. Staff were then informed of the arrangements for them to be given notice of termination of their existing contracts and re-engagement on new terms and conditions. The deadline for staff to agree to re-engagement on new terms and conditions was originally 6 April 2011 but this was extended to 13 April 2011. On 15 June 2011, all of the existing contracts of employment came to an end. Those employees who accepted the new terms and conditions continued their employment on those terms. Those who did not accept the new terms and conditions had their employment terminated on that date.

24. The tribunal then dealt with, and rejected the claim that the dismissal was for a reason connected with the transfer. It then dealt with and rejected the claim that the dismissal was unfair. In that context, the question was whether the dismissal was unfair or unreasonable (a different issue from the question of objective justification that would arise on the claim for indirect discrimination). At paragraph 79, the tribunal found that it was not unfair or unreasonable for the Respondent to seek to implement a more equitable and competitive set of terms and conditions for all the workforce, and was "impressed by the Respondent's decision not to reduce any employee's basic salary" and noted that some of the changes (such as those to redundancy and sick pay entitlement) involved contingent loss, that is benefits that were payable only if certain contingencies (such as redundancy or sickness) materialised.

25. In considering the fairness of the dismissals, the tribunal found at paragraphs 81 to 84 that:

> **"81. In respect of not considering alternatives to the changing terms and conditions it is clear from the evidence we have assessed that there were concessions made during the consultation process. 6 of the 8 proposals were changed to accommodate issues raised by the Employee Forum.**
>
> **82. The main alternative put forward by the Claimants was to phase the changes so as to have less of an immediate impact on them, in particular relating to redundancy. This would have been administratively challenging and would have maintained contingent costs that the Respondent was seeking to remove. We have found that the Respondent was running at an annual loss and we cannot say it was outside the band of reasonable responses for it to act as it did. There may have been a number of other ways to proceed but we do not conclude that what the Respondent actually did was unfair.**
>
> **83. It was suggested that there was no requirement for the Respondent to make immediate changes as it had a profitable parent company that could underwrite short term losses. Again we do not conclude that it was unreasonable for the Respondent to act as it did. There was no guarantee that the parent company would have been prepared to subsidise the Respondent for any further unmanaged losses than it had incurred. In this context the losses being underwritten at that time had already exceeded the initial £10 million projections of the amount of subsidy anticipated at the time of the transfer.**
>
> **84. Given our conclusions above the Claimants' unfair dismissal claims fail and are dismissed."**

The Indirect Age Discrimination Claim

26. The tribunal then dealt with the claim for indirect age discrimination. The tribunal discussed the various PCPs alleged which concerned the harmonisation of employment terms and conditions which involved removing carer days, entitlement to private health care, increasing the hours of work by 2 hours a week, reducing annual leave to 25 days a year and, save in the case of two named claimants, removing enhanced redundancy entitlement: see paragraphs 86 and 87 of the decision. The tribunal then identified the PCP that it considered had been applied in the following terms:

> **"88. The PCP criterion that applied to all of the Respondent's employees was that if they wished to remain employed by the Respondent, they were required to enter into a new contract with effect from 16 June 2011 under which would not have contractual entitlement to private health insurance, carer days, and enhanced redundancy payments and in which their working hours would be 37 hours per week and annual leave would be 25 days a year."**

27. They considered and rejected the Respondent's arguments, based on the decision in **ABN Amro Mangement Ltd v Royal Bank of Scotland** (UKEAT) 0266/09DM) that a change

in terms and conditions that was not itself discriminatory could not amount to an indirectly discriminatory PCP. That is the subject of the Respondent's cross-appeal.

28. The tribunal noted that disparate impact was accepted in relation to the 45 to 64 age bracket save in relation to redundancy, and then found that disparate impact was established in relation to redundancy and, further that the impact extended to the 38 to 65 age range. That finding is not challenged.

29. The tribunal then considered the issue of justification. They set out the relevant paragraphs of **HM Land Registry v Benson** [2012] ICR 627 and paragraphs 19 to the middle of paragraph 23 of the decision of Baroness Hale in the Supreme Court in **Chief Constable of West Yorkshire v Homer** [2012] ICR 704. The passages identified include the following:

> **"As the Court of Appeal held in *Hardy & Hansons v Lax* [2005] EWCA Civ 846, [2005] ICR 1565 [31.32] it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking against the discriminatory effects of the requirement."**
>
> **And**
>
> **"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"**

30. Against that background, the tribunal identified the legitimate aim at paragraph 97 of its decision in the following terms:

> **"We conclude that the Respondent had a legitimate aim, for the purposes of section 19(2)(d) of the Equality Act 2010, which was to reduce staff costs to ensure its future viability and to have in place market competitive, non discriminatory terms and conditions."**

31. The tribunal considered the argument that an aim could not be legitimate if it was based on cost reasons alone and concluded that the Respondent's objective was not cost alone as "[s]aving costs was an inevitable consequence of the aim to ensure its future viability with

market competitive non-discriminatory terms and conditions." (paragraph 99 of its decision). The tribunal then turned to the question of proportionality and said this:

> **"100. When considering whether the steps taken by the Respondent were proportionate we assessed whether the changes to the terms went further than was necessary to achieve the aim. Whilst there may have been other ways of proceeding we question whether the other ways would have addressed the legitimate aim. We conclude that what the Respondent did was proportionate following a balancing of real needs of the Respondent against the discriminatory effects of the changes.**
>
> **101. The Claimants contented that the Respondent should have considered less discriminatory steps of achieving the legitimate aim such as securing extra funding from the parent company, phasing in changes, seeking voluntary redundancies or reducing rather that eliminating changes.**
>
> **102. When considering the different steps proposed by the Claimant we do not conclude that they would have addressed the Respondent's legitimate aim at all. The proposals suggested by the Claimant would have delayed or avoided changes and thereby compounded the Respondent's ongoing losses. It would have continued non competitive and discriminatory terms (in relation to redundancy). We accept Mr Cooper's submissions that the changes made by the Respondent were to achieve the legitimate aim. We conclude that it was proportionate for the Respondent to implement the changes in the way it did. The changes were carefully planned and implemented."**

32. In those circumstances, the tribunal concluded that the claim for indirect discrimination failed.

THE ISSUES

33. Against that background, the following issues arise:

(1) first, on the Respondent's cross-appeal, did the tribunal err in concluding that a change to terms and conditions of employment was not capable of constituting a PCP for the purposes of section 19 of the **2010 Act**?;

(2) on the Appellants' appeal, did the tribunal err by failing to conduct a sufficiently rigorous and critical analysis of the issue of justification and in particular, did the tribunal:

(a) fail to compare the impact of the PCP on the affected employees as against the importance of the Respondent legitimate aim (ground 1)?;

(b) fail to consider whether it was proportionate to seek to achieve the legitimate aim by the wholesale removal of benefits from the affected employees and the use of that removal to subsidise effective increases to other employees (ground 2)?;

(c) fail to consider whether the imposition of the PCP was reasonably necessary and, in particular, fail to consider alternative proposals, the effect on employees and the factual background (including the resources of the parent company) (ground 3)?;

(d) make a finding of fact that was perverse, namely that the Respondent had carried out a balancing exercise of needs against the discriminatory effect of the changes (ground 4)?; and

(e) fail to approach the issue on the basis that it was for the Respondent to show that the PCP was objectively justified and therefore failed to apply the correct burden of proof (ground 5)?

THE FIRST ISSUE – THE PCP

34. The Respondent contends that the tribunal was wrong to find that there was a PCP for the purposes of section 19 of the **2010 Act**. Mr Cooper, for the Respondent, submits that a change in substantive terms cannot itself amount to a PCP unless the new substantive terms themselves give rise to a particular disadvantage. Mr Cooper submitted that the new terms in the present case applied to all employees and did not themselves put any particular employee at a particular disadvantage. The issue of disadvantage only arose by considering the position of certain employees before the change was made, and then comparing that with the position of those employees after the change. Only if the ingredient of change was built in, submitted Mr Cooper, would any question of disadvantage arise. He submitted that a change in terms and

conditions could not amount to a PCP within the meaning of section 19 of the **2010 Act**. He submitted that that conclusion followed from three considerations relating to the wording of section 19 of the **2010 Act**. First, the section required that the PCP was the cause of the disadvantage – it, the PCP, must put the person and others at a particular disadvantage. Secondly, section 19 used the present tense and required a comparison at a particular point in time. That did not permit of the situation which, it was submitted arose here, where it was necessary to look at the position of the employees before the change and after in order to identify any employee who was put a disadvantage. Thirdly, he submitted that the phrase "provision or criterion" was looking at the substantive arrangements that resulted from the change, not the change itself and "practice" should be construed accordingly.

35. Finally, Mr Cooper submitted that that conclusion was reinforced by the decision in **ABN Amro Mangement Ltd v Royal Bank of Scotland** (UKEAT/0266/09DM). The case concerned the operation of a discretionary policy for determining who would be paid a bonus. The case involved the merger of two units within ABN Amro. The merging of the two units would involve redundancies. That process was undertaken in two stages. The most senior posts were considered first and any consequential redundancies effected mostly in late 2007 and 2008. At that stage, the discretionary bonus policy provided for a pro rata bonus payment up to the date of departure. The second stage of the merger process involved more junior (and younger) staff and that was done and redundancies made, some time after April 2008. By the time the second stage of the merger process was undertaken, the discretionary policy on bonuses had been changed on 2 April 2008 so that a pro rata bonus would only be paid in exceptional circumstances. The claimant contended that because of the tiered approach to redundancy, with senior managers being considered first and prior to 2 April 2008 and the change in the policy, and junior managers after that date, that meant younger employees

suffered more from the change. The only PCP identified was the change in the discretionary bonus policy. Underhill J., sitting in the Employment Appeal Tribunal, held that the change did not amount to a PCP within the meaning of section 19 of the **2010 Act**. His reasons were as follows:

> **"26 The rival contentions raise the question of what is the correct analysis where an employer introduces a change in his employment practice, and the workers to whom the earlier practice applied have a different age profile from those dealt with under the new practice. …. In the present case those in the advantaged group are ex-employees (or at least employees under notice of termination) But it would not be impossible to construct an example where both groups were in employment. It is important however in all such cases to appreciate that the two groups do not exist at the same time. There is no moment at which some employees are treated one way and some another: both before the change-date and after the change-date everyone is treated the same. The difference in treatment complained of is only established by looking from one side of the change-date to the other. This is not, therefore, a case of the kind sometimes encountered where, at a given date, employees A and B may be treated differently because of some temporal criterion such as date of first employment. On the contrary, the difference in treatment complained of may have occurred at widely different times, and it is indeed unclear how far back, or forward, from the change-date it is necessary to go in order to determine the composition of the two groups.**
>
> **"27 It is difficult to analyse such a situation in terms of reg. 3(1)(b). It is artificial and unnatural to describe the change from one substantive PCP to another as itself constituting a policy or criterion. To make the same point another way, what is "applied" to the claimant in such a case is not the change itself but the new substantive policy brought about by the change; and unless that policy is itself discriminatory reg. 3 is not engaged. I do not think that this difficulty can be got around by relying on the word "practice" as opposed to "policy" or "criterion": no doubt "practice" is a wider word, which has the effect of extending the scope of the definition of indirect discrimination, but it is nevertheless of the same general character as "policy" and "criterion", and the points made above seem to me to apply equally. Likewise, I do not see how the mere existence of a state of affairs under which a group to which the claimant belongs is disadvantaged compared to a different group can be described as the "application" of a PCP: it may be the *result* of the application of a PCP, but that is another matter. Another way of putting the point would be to say that the fact that different practices applied at the relevant times is a material difference in the circumstances of the two groups."**

Discussion

36. The position here was that there were employees employed by the Respondent on different terms and conditions. Some employees had a contractual right to work 35 hours a week and take 30 days holiday a year. They also had what were described as contingent rights to private health care, carers' leave and enhanced redundancy payments. Properly analysed those were existing entitlements under the contract of employment to benefits on the occurring of certain events. Other employees had different terms and conditions.

37. The Respondent required employees to agree to the new terms and conditions or be dismissed. That was a provision or practice applied to the employees. If they wished to remain in employment, they had to agree to new terms and conditions. That provision or practice did put certain employees within a particular age range at a particular disadvantage. They had been contractually obliged to work 35 hours, and were entitled to 30 days holiday. To remain in employment, they had to agree to the new terms or conditions or be dismissed and that put them at a particular disadvantage as they would then be contractually obliged to work 37 hours and would only be entitled to 25 days holiday. Their existing contractual entitlement to private health care, carer's leave and enhanced redundancy entitlement upon the occurring of the relevant contingency was removed. The provision or practice was also applied to other employees who did not fall within the relevant age range and they were not put at any particular disadvantage by agreeing to the new terms and conditions because they were not entitled to work 35 hours a week or entitled to 30 days holiday. Nor did they have existing contractual rights to benefits contingent on the occurring of certain events.

38. Applying the language of section 19 of the **2010 Act**:

(1) there was a PCP within the meaning of section 19(1) of the **2010 Act**, namely the requirement that, if employees wished to remain employed by the Respondent, they were required to enter into a new contract with effect from 16 June 2011 under which they would not have contractual entitlement to private health insurance, carer days, and enhanced redundancy payments, and in which their working hours would be 37 hours per week and annual leave would be 25 days a year;

(2) the Respondent applied that PCP to persons who did not share the relevant characteristic of the other employees, that is they were not within the same age band

as the other employees, thus satisfying the requirements of section 19(2)(a) of the **2010 Act**;

(3) the Respondent applied it to each of the Appellants, and to other persons who shared the characteristic, that is they fell within the same age range, and it put or would put them at a particular disadvantage when compared with the persons not in that age band – the affected employees became contractually obliged to work longer hours, receive less holiday and ceased to possess other contractual rights to contingent benefits whereas the employees in the different age band were not put at those disadvantages, thus satisfying section 19(2)(b) and (c) of the **2010 Act**;

(4) consequently, the PCP would be discriminatory unless objectively justified in accordance with section 19(2)(d) of the **2010 Act**.

39. Furthermore, this case is distinguishable on the facts from the decision in **ABN Amro**. There, there was one policy (the discretionary bonus policy) which applied to all employees up until 2 April 208. Thereafter, there was a different bonus policy applicable again to all employees. There was no time at which some employees were treated differently from others. The difference in treatment was established solely by looking from one side of the change-date to the other. The claimant who was dealt with at a time when the new policy was in place was seeking to compare himself with what happened at a different time when a different policy was in place. It was in those circumstances, that the Employment Appeal Tribunal concluded that a change of policy itself could not amount to a PCP within the meaning of section 19 of the **2010 Act**.

40. The present case is different on the facts. The PCP that was being applied was a requirement that employees agree to new terms and conditions or be dismissed. That did put

certain employees at a disadvantage because they had existing contractual rights which were different from those enjoyed by other employees. Thus, the affected group of employees would see a change in their contractual hours or work (increasing from 35 to 37 hours a week) and a reduction in their contractual holiday entitlement (from 30 days to 25 days). They would lose certain contractual rights to contingent benefits. Other employees did not have those contractual rights and would not be at a particular disadvantage by being required to agree new terms and conditions or be dismissed.

41. For those reasons, we consider that the tribunal was entitled to conclude that the requirement that the employees, if they wished to remain employed by the Respondent, were required to enter into a new contract with effect from 16 June 2011 with the changes identified, was a PCP within the meaning of section 19(1) of the **2010 Act**. For those reasons, the Respondent's cross-appeal is dismissed.

THE SECOND ISSUE - THE TREATMENT OF OBJECTIVE JUSTIFICATION

42. Mr Jupp, on behalf of the Appellants, identified the central issue underlying the grounds of appeal, as being whether the tribunal conducted a sufficiently rigorous and critical analysis of the issue of justification. He submitted that the tribunal did not demonstrate that it understood the nature of the task upon which it was engaged and did not carry out a critical evaluation of the issue of justification. Mr Jupp reminded us of the approach required by the Court of Appeal in **Allonby v Accrington College** [2001] ICR 1189 and **Hardy & Hansons plc v Lax** [2005] ICR 1565.

The Correct Approach

43. In the **Allonby** case, the requirement or condition was that a person had to be employed under a contract for full-time work or a contract which conferred proportionate benefit to a full-time contract in order for the contract not to be terminated or not renewed. The claimant could not satisfy that requirement. Paragraph 20 of the judgment sets out the reasoning of the tribunal in that case. The two purposes of the requirement were to save money and to introduce control over the employment of part-time employees. The tribunal recited the evidence that it had heard and said this:

> **"The tribunal recognised that it was not for the tribunal to say that it preferred some other route. The tribunal needed to make an objective assessment of whether the decision taken by the college was justifiable irrespective of the sex of the person or persons to whom it applied. Whilst it appeared from the statistics which were available that the decision affected more women than men the tribunal were reminded that any decision taken for sound business reasons would inevitably affect one group more than another group of people be they men, women, part-timers or other categories. Bearing these issues in mind the tribunal concluded that the decision was justifiable and whilst it may not have been the only solution to the college's problems or even one which would yield the desired results it was taken after a proper analysis of the problems …"**

44. The question was whether that was sufficient consideration of the issue of objective justification. Before addressing that issue, Sedley L.J. observed at paragraph 22 that:

> **"Before looking again at the employment tribunal's reasoning it is necessary to remember, as this court has more than once said, that it is not appropriate to expect an analysis of every fact and argument with reasons for accepting or rejecting them …..; that a tribunal's reasons are not to be construed like a statute or a deed; and that "What matters is whether the decision under appeal was a permissible option": ….. This said, there is no point in giving reasons unless they make it possible, at the very least, for parties, advisers and appellate courts to see whether the tribunal has correctly understood the law, has addressed the right questions and has reached its conclusions by permissible means: ….. Beyond this point the nature of the issues and the evidence will call for more or less in the way of explicit findings.**

45. Sedley L.J. then considered the adequacy of the reasoning and said the following:

> **"26 In my judgment, the employment tribunal has failed to apply the scrutiny which the law requires when a discriminatory condition is said to be justifiable. Moreover, such reasons as it gives do not stand up in law.**
>
> **"27 The major error, which by itself vitiates the decision, is that nowhere, either in terms or in substance, did the tribunal seek to weigh the justification against its discriminatory effect. On the contrary, by accepting that "any decision taken for sound business reasons would inevitably affect one group more than another group" it fell into the same error as the appeal tribunal in the *Brook* case [1992] IRLR 478 and the *Enderby* case [1991] ICR 382 and disabled itself from making the comparison.**

> **"28 Secondly, the tribunal accepted uncritically the college's reasons for the dismissals. They did not, for example, ask the obvious question why departments could not be prevented from overspending on part-time hourly-paid teachers without dismissing them. They did not consider other fairly obvious measures short of dismissal which had been canvassed and which could well have matched the anticipated saving of £13,000 a year. In consequence they made no attempt to evaluate objectively whether the dismissals were reasonably necessary—a test which, while of course not demanding indispensability, requires proof of a real need.**
>
> **"29 In this situation it is not enough that the tribunal should have posed, as they did, the statutory question "whether the decision taken by the college was justifiable irrespective of the sex of the person or persons to whom it applied". In what are extended reasons running to 15 closely-typed pages, there has to be some evidence that the tribunal understood the process by which a now formidable body of authority requires the task of answering the question to be carried out, and some evidence that it has in fact carried it out. Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter. There is no sign of this process in the tribunal's extended reasons. In particular there is no recognition that if the aim of dismissal was itself discriminatory (as the applicant contended it was, since it was to deny part-time workers, a predominantly female group, benefits which Parliament had legislated to give them) it could never afford justification."**

46. Gage L.J. also considered that the decision of the tribunal was flawed (see paragraphs 70 to 71). Ward L.J. also considered that there was no sufficiently cogent explanation of what the objective justification was and, consequently, it was not possible to be sure that the tribunal had directed itself in accordance with the approach outlined by Sedley L.J. (see paragraph 85 of the judgment).

47. In the **Hardy & Hanson** case, the relevant passage is at paragraphs 33 to 34 in the following terms:

> **"33 The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* [2001] ICR 1189 and in *Cadman* [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman*, the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.**
>
> **"34 The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to**

> **scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."**

48. In applying that approach, the Court of Appeal was satisfied that the tribunal had correctly carried out the task. They noted, amongst other factors, that the relevant factors relating to justification were identified in the tribunal's decision when they recorded the employer's submissions which was a strong indication that they were in the mind of the tribunal.

49. We accept that the appropriate test is that identified in paragraphs 29 of **Allonby** and paragraphs 33 and 34 of **Hardy & Hansons**. We bear in mind the obligations both upon the employment tribunal and the obligation on the Employment Appeal Tribunal itself which are referred to in paragraph 34 of **Hardy & Hansons**. The question is whether the employment tribunal understood the task that it had to perform and whether there is sufficient evidence that it carried out that task. Before turning to the specific complaints made on behalf of the Appellants as to the particular respects in which it is said that the tribunal failed to carry out the task, we consider first whether the tribunal did correctly understand the task that it was obliged to perform.

Did the Tribunal understand the task that it was engaged upon and did it adopt the correct approach?

50. The tribunal began by identifying the relevant statutory provision, section 19(2)(d) of the **2010 Act**, and the relevant passages from the decision of the Court of Appeal in **Benson** [2012] ICR 627 and the Supreme Court in **Chief Constable of West Yorkshire v Homer** [2012] ICR 704 which set out the approach to be adopted the application of that statutory

provision. We accept that the fact that a tribunal has set out the relevant passages from the case law would not necessarily, and in all cases, demonstrate clear understanding of the relevant approach (nor, conversely, would the absence of specific reference to statutory provisions or case law necessarily mean that a tribunal had not adopted the correct approach if it is clear that, in substance, it has identified and applied the relevant legal principles). However, the fact that the tribunal has identified the correct statutory provisions, the correct case law and the correct passages identifying the relevant approach to be adopted to the task in hand is a very strong indication that a tribunal has properly understood the approach it is to take.

51. Furthermore, the structure of the tribunal's decision reinforces the fact that it understood the exercise it was engaged upon and adopted the correct approach. It began by identifying the legitimate aim of the Respondent. It then considered whether the measures taken to achieve that aim that were proportionate. It considered whether the action taken would achieve the legitimate aim. It considered whether the action taken was reasonably necessary to achieve that aim. It considered whether the measures were proportionate balancing the real needs of the Respondent against the effect of the changes on the affected employees. In our judgment, it is clear that the tribunal did understand the task that it was engaged in when considering whether the PCP was objectively justified. We consider next the specific grounds of appeal where it is contended that the tribunal failed to carry out the task.

Ground 1 and Ground 3

52. It is convenient to consider grounds 1 and 3 together. In relation to ground 1, the Appellants contend, correctly, that part of the assessment of whether the PCP can be objectively justified depends upon a comparison of the impact of the PCP upon the affected employees as against the importance of the aim of the employer: see paragraph 24 of the judgment of

Baroness Hale in **Chief Constable of West Yorkshire v Homer** [2012] ICR 704. Mr Jupp, on behalf of the Appellants, submits that that paragraph is not cited by the tribunal and there is no indication that the tribunal did assess the impact on the affected employees as compared with the importance of legitimate aim of the Respondent.

53. In relation to ground 3, the Appellants contend that the tribunal considered that the alternative proposals proposed by them would have delayed or avoided the changes, without an adequate consideration of the effect of the alternative proposals and without regard to the factual background which included the fact that there was no time scale for the achievement of the legitimate aim, the profits of the parent company, the importance of the Respondent to the parent company and the fact that a significant cause of the Respondent's financial difficulties were because of the initial costs of integrating the Respondent with the parent company.

54. First, it is necessary to read the decision of the tribunal fairly and as a whole. Secondly, in the present case, it is clear from the tribunal's description of the issues and its finding of facts that the tribunal knew what the effect of the changes would be upon the employees and knew what the Respondent's aim was. In relation to the affected employees, it knew that the effect of the changes would be to increase the working hours by 2 hours a week and reduce annual leave to 25 days a year, remove carer days, entitlement to private health care, and (save for two employees) remove enhanced redundancy payments. In relation to redundancy, the tribunal knew that employees could potentially be significantly adversely affected "in some cases up to £60,000 if they were made redundant after the proposed changes were implemented" (see paragraphs 8, 34 and 53 of the decision).

55. The tribunal knew the financial position of the Respondent and knew it was worsening. By 21 May 2010, the annual loss being incurred was in the region of £4 million (not the £2.3 million anticipated) and that employee remuneration as a percentage of revenue was 115% (see paragraphs 46 and 47). It knew that the Respondent considered that there was an "urgent need to take action on staff costs" (paragraph 47 of its decision). They knew that there was no guarantee that the parent company would be prepared to subsidise the Respondent further and it had already underwritten losses by more than the initially anticipated £10 million (see paragraph 83 in the discussion of the unfair dismissal claim).

56. The tribunal knew the alternatives proposed by the employees. Those had been the subject of consultation between employees and the Respondent prior to the imposition of the PCP and the tribunal heard evidence on the proposed alternatives. The effect of the main alternatives, that is phasing of the changes so as to have less of an immediate impact on the employees, had been considered in the discussion of the claim for unfair dismissal. The effect would be to have maintained contingent costs that the Respondent was seeking to remove (see paragraph 82 of the decision).

57. Against that background, the tribunal identified the legitimate aim as:

> **"to reduce staff costs to ensure its future viability and to have in place market competitive, non-discriminatory terms and conditions."**

58. It is, as a minimum, a legitimate aim for a business to seek to break even year-on year. Similarly, it is legitimate for a business to make decisions about the allocation of resources: see **HM Land Registry v Benson** [2012] ICR 627 at paragraph 34.

59. Against that background, the tribunal did, in our judgment, consider the impact upon the affected employees and compare that against the importance of the aim. They knew the impact on the employees. They knew the real needs of the Respondent given its financial situation. The tribunal expressly balanced "the real needs of the Respondent against the discriminatory effects of the change": see paragraph 100 of the decision. We accept that it may have been preferable to set out the balance in more detail in the section on justification or to refer back to its earlier findings. We are, however, satisfied that the tribunal did have a real appreciation of the impact of the proposed changes on the employees and the real needs of the employer and compared, and balanced those needs. Ground 1 is therefore not established.

60. Ground 3 contends that the tribunal had not carried out any or any proper analysis of a number of factors in considering whether the measure was reasonably necessary for the achievement of the Respondent's legitimate aim. The tribunal received evidence on, and were well aware of the alternatives proposed by the Appellants. They were summarised in paragraph 8.13 of the decision. The tribunal referred again to the Appellants' contentions in paragraph 101 of its decision where it noted the essential contentions including the phasing in of changes, securing extra funding from the parent company, seeking voluntary redundancies or reducing rather than eliminating changes. The tribunal had also identified the consequences of the Appellant's proposed alternatives when it addressed the question of unfair dismissal as appears from paragraphs 82 and 83 of its decision.

61. Dealing briefly with the specific submissions made in relation to the alternatives, the tribunal was entitled to consider that phasing in changes, or reducing the changes, would delay the achieving of the legitimate aim of reducing staff costs to secure future viability and would have compounded the losses and continued in place conditions which were not market

competitive and were potentially discriminatory. As for securing extra funding, ensuring that a business breaks even year on year and making decisions on the allocation of resources are legitimate aims: see **Benson** [2012] ICR 627 at paragraph 34. The parent company had already underwritten losses in excess of the £10 million originally anticipated. The tribunal was entitled to conclude, in those circumstances, that seeking further subsidies, thereby enabling the Respondent to extend the time scale for addressing the Respondent's losses, would not meet the legitimate aim of the Respondent of reducing staff costs to secure its future viability. Seeking voluntary redundancies would not address the legitimate aim of the Respondent. The Respondent did not have a need for fewer employees; its concern was to reduce the unit cost per employee (as remuneration costs had, as the tribunal noted, reached 115% of revenue). The legitimate aim, as the tribunal noted, was to reduce staff costs to ensure its future viability and to have in place, market competitive, non-discriminatory terms and conditions.

62. In the circumstances, the tribunal did deal adequately with proposed alternatives and explained why the imposition of the PCP was necessary to enable the Respondent to meet its legitimate aim. The tribunal considered the alternative proposals suggested by the Appellants but concluded, as it was entitled to on the evidence before it, that those would not address the legitimate aim of reducing the Respondent's continuing losses and it would have meant continuing the existing, non-competitive terms of employment. As the Appellants recognise, their alternative proposals were, essentially, designed to achieve the Respondent's aim but over a longer period of time than that envisaged by the Respondent. The tribunal was entitled to conclude, as it did, that that would not involve achieving the legitimate aim of the Respondent. The tribunal was entitled to conclude that the requirement to accept new terms and conditions in order to remain in employment was necessary to achieve the Respondent's legitimate aim and there was no other reasonable or practicable way of achieving the aim.

Ground 2

63. The second ground of appeal contends that the tribunal failed to address whether the PCP was proportionate as it did not address the question of whether what is described as the wholescale removal of benefits from the affected employees and the use of that removal to subsidise effective increases to other employees was not proportionate. The reference to increases for other employees comes about in this way. The changes involved fixing the hours per week at 37. For the majority, that involved either increasing the weekly working hours from 35 to 37, or maintaining them at 37 hours. There were, however, approximately 40 former Liberata employees and 100 employed under a different contract who were required to work 40 hours a week and who moved to 37 hours a week. One set of employees had terms which allowed some to take 20 days and some 25 days holiday a year. The move to 25 days holiday a year for all would benefit some of the employees in that group.

64. The tribunal was aware of, and had received evidence on, the difference in terms. It referred, for example, to the employees who were required to work up to 40 hours a week and a maximum of 25 days holiday in paragraph 35 of its decision. The conclusion of the tribunal was there was no practicable or reasonable way of achieving the aim of the Respondent of reducing staff costs to secure viability and to have in place, market competitive, non-discriminatory terms without imposing the requirement that employees enter into a single set of terms even though that would benefit a number of employees to some degree. The tribunal considered that the PCP was proportionate as it was proportionate to implement the changes in the way that the Respondent did.

65. We are satisfied that the tribunal were well aware of the impact of the changes proposed and considered that the PCP was proportionate as it was both appropriate and necessary for the

Respondent to make the changes in the way it did. In any event, as was recognised at paragraph 22 in **Allonby**, "it is not appropriate to expect an analysis of every fact and argument with reasons for accepting or rejecting them". The aim is to enable the parties, their advisers and the appellate body to see whether the tribunal has understood the law, addressed the right question and had reached its conclusions by permissible means (see paragraphs 2 and 70 in **Allonby**). In the present case, it is clear why the tribunal reached the conclusions that it did on the question of justification and that it understood and properly applied the relevant the law. An absence of any reference in its conclusions to the comparatively small number of employees who benefited in respect of the change in weekly working hours or holiday leave does not amount to an error of a failure or reasoning on the part of the tribunal.

Ground 4

66. The fourth ground of appeal is that the tribunal made a critical finding of fact that is said to be perverse. It is said that, in paragraph 100 of its reasoning, the sentence including the words "what the Respondent did was proportionate following a balancing of real needs of the Respondent against the discriminatory effect of the changes " meant that the Respondent had carried out such a balancing exercise. It is said that that was perverse as the Respondent had not carried out such an exercise.

67. Paragraph 100, and the decision, must be read fairly and as a whole. It is clear, in our judgment, that the tribunal is describing in paragraph 100 the balancing exercise that it, the tribunal, has carried out, and is not referring to a balancing exercise said to have been carried out by the Respondent. We reach that conclusion for these reasons. First, in the preceding paragraphs the tribunal has set out the relevant law, including the quotation stating that it is not enough for the employer to consider the PCP justified as the "tribunal itself has to weigh the

real needs of the undertaking, against the discriminatory effects of the requirement". Secondly, at paragraph 100, the tribunal begins by saying that when considering whether the steps taken were proportionate "we assessed", that is the tribunal itself assessed, whether the changes went further than is necessary. Read in context therefore, we are satisfied that the tribunal, in paragraph 100, was describing the balancing of the needs of the Respondent against the discriminatory effects of the changes that it, the tribunal, had carried out. There was therefore no perverse finding of fact that the Respondent had carried out such an exercise.

Ground 5

68. Finally, the Appellants contend that the tribunal did not apply the correct burden of proof on the issue of justification and that it can be inferred that the tribunal did not approach the issue of justification on the basis that the Respondent had to establish this. At paragraph 96 of its decision, the tribunal set out a citation from **Chief Constable of West Yorkshire v Homer** [2012] ICR 704 which expressly says that a "provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim." Thus the tribunal began by identifying the relevant law and identifying the fact that the burden lay upon the Respondent. Paragraphs 97 to 102, then applies that by considering what is the legitimate aim and considering whether what the Respondent did was proportionate. In our judgment, the tribunal identified and applied the correct burden of proof.

Ancillary Matters

69. Mr Cooper, on behalf of the Respondent, submitted that the imposition of the PCP was objectively justified by reason of the need to avoid potentially discriminatory conditions as between the different groups of employees. In our judgment, the tribunal found that the legitimate aim in the present case was the need to reduce staff costs to ensure future viability

and, in that context, to have in place market competitive, non-discriminatory terms. It would not be appropriate, on the facts of this case, to consider the potentially complex questions of when an employer may or must respond to the emergence of age discriminatory conditions, nor what the appropriate remedy is to address that issue. Furthermore, in the light of our findings above, it is not necessary to address this issue.

CONCLUSION

70. The tribunal correctly concluded in the present case that the Respondent had applied a provision, criterion or practice within the meaning of section 19 of the **2010 Act** when it required employees, if they wished to remain employed by the Respondent, to enter into a new contact of employment with effect from 16 June 2011 under which they would not have any contractual entitlement to private health care, carer days or enhanced redundancy payments and in which their working hours would be 37 hours a week with 25 days annual leave. The cross-appeal is therefore dismissed.

71. The tribunal did carry out a critical evaluation of whether the PCP was objectively justified. It properly identified the legitimate aim of the Respondent which was to reduce staff costs to ensure its future viability and to have in place market competitive, non-discriminatory terms and conditions. The tribunal was aware of the effects of the PCP on the employees and balanced the needs of the Respondent against the effect of the changes on the employees. It was aware of the alternatives proposed by the Appellants but was entitled to conclude that those alternatives would not enable the Respondent to achieve its legitimate aim. The decision of the tribunal was not perverse, it was adequately reasoned and the tribunal properly understood the law including that it was for the Respondent to show that the PCP was proportionate in that it

was both appropriate and necessary. The grounds of appeal are, therefore, not established and the appeal is dismissed.