EMPLOYMENT TRIBUNALS

Claimant: Mr R Wagener

Respondents:
1. Commissioners for Her Majesty's Revenue & Customs
2. HM Treasury

Heard at: Liverpool **On:** 24 June 2019

Before: Employment Judge Horne

REPRESENTATION:

Claimant: In person
Respondent: Mr R Moretto, counsel

Written reasons were requested orally at the hearing. Accordingly, the following reasons are provided:

REASONS

Introduction

1. The claimant is a civil servant employed by the first respondent ("HMRC"). By a claim form presented on 1 November 2018, he complained of indirect age discrimination by HMRC contrary to sections 19 and 39 of the Equality Act 2010 ("EqA"). He also complained that HM Treasury indirectly discriminated against him, although he has never been employed by the Treasury. There has since been correspondence clarifying the statutory basis upon which HM Treasury would be liable for such discrimination, but that does not matter for the purpose of this judgment. Both respondents are said to have discriminated against the claimant in the same way.

Purpose of this preliminary hearing

2. At a case management hearing on 28 January 2019, the parties agreed that there should be a preliminary hearing in public. One of the purposes of the

hearing was to consider whether or not the claim against HMRC should be struck out on the ground that it had no reasonable prospect of success. A further purpose of the preliminary hearing was to determine whether or not the claim had been presented within the statutory time limit and, if not, whether it would be just and equitable for the time limit to be extended.

3. During the course of the preliminary hearing, it became clear that the evidence on the just and equitable extension issue would be complicated. The claimant sought to rely on the content of advice given to him by solicitors and by an ACAS conciliation officer. The respondent's position was that the claimant had waived privilege in all the advice he had received in respect of the proposed claim. The claimant did not agree. Rather than adjudicate on this dispute, I decided to consider the arguments in relation to the strike-out application first and to revisit the question of time limits if the claim was not struck out. Neither party objected to this course.

Basis of the claim

<u>Background</u>

4. The claimant was born on 30 April 1961 and is now 58 years old. His role within HMRC is a relatively senior position and falls at Grade 6 within HMRC's pay structures. He was promoted to the role on 2 January 2013 and has remained at that grade ever since.

5. Not all Grade 6 managers are paid the same. Their salaries fall within a pay band whose minimum and maximum salary are determined from year to year. There is no contractual right to progression within the salary band. Rather, each Grade 6 manager's salary is increased by a pay award which takes effect on 1 June each year. The claimant's salary has increased since 2013, but, owing to public sector pay restraints, the size of his annual pay awards has been such that he has virtually no chance of reaching the maximum salary by the time he expects to retire. It is his case that the slow rate of pay progression is indirectly discriminatory.

<u>PCPs</u>

6. During the lifetime of this claim the claimant has identified a number of provisions, criteria or practice (PCPs) which, he says, have the discriminatory effect. In his claim form, he sought to define the PCP as "the regular practices relating to progression pay". During the preliminary hearing on 28 January 2018, I asked the claimant what it was about those practices that put his age group at a disadvantage. The claimant said it was "the slow speed of progression".

7. In my written case management order sent to the parties on 1 February 2019, I expressed the view that the PCP ought to be recast as "the practice of making small annual pay awards over a given number of years." By letter sent the following day, the claimant indicated that this formulation of the PCP did not accurately capture what he had claimed. Under the heading, "PCP", the claimant's letter of 2 February 2019 stated, with bold type added by me:

   > "My claim was and is that it is the **slow-down** in moving staff from the minimum to maximum pay that gives rise to indirect discrimination here", in particular the fact that this takes a lot longer than the 5-year exemption…"

8. From the words, "slow-down", it appeared that claimant might be arguing that it was the deceleration of pay progression (or the change from larger pay awards to smaller pay awards) that caused the disadvantage. At today's hearing, however, the claimant confirmed that this was not his case. He relies on the constantly slow rate of pay progression from the date of his appointment to the present day.

<u>Age group</u>

9. The claimant belongs to a group of Grade 6 officers who, because of their age at the time of appointment to the grade, have no reasonable prospect of reaching the maximum salary before they retire. It has always been his case that this group is an "age group" within the meaning of section 5 of EqA.

10. At various points the claimant has put forward differing forms of words to capture this essential point. In the claim form the claimant defined his age group by contrasting his position with that of two categories of Grade 6 colleagues:

    "

    (a) Peers in my current age group who were promoted at a younger age than me…and

    (b) Younger colleagues who were promoted at the same time as me…"

11. The defining characteristic of the first category was their age at the time of promotion. The second characteristic was defined by being younger than the claimant, but also by reference to the date of their promotion.

12. In my case management order, I made the following observation about the claimant's formulation:

    "The next point to be clarified is the relevant age group. Despite being invited to do so, the claimant has not yet defined the relevant age group by reference to an age or range of ages… It will only be when the claimant defines the relevant age group as required by section 5 of EqA that a tribunal can assess whether the PCP created a group disadvantage or not."

13. The claimant's letter of 2 February 2019 engaged directly with this comment:

    "I claim to be a member of a single age group, which suffers from two disadvantages. These disadvantages arise from comparisons with colleagues who were promoted at a different age from my age group, either (a) at the same time or (b) at a significantly earlier time."

14. In a further letter dated 25 February 2019, the claimant stated:

    "I define my age group as being, 'Grade 6s who were promoted at an age that gives them no realistic chance of attaining the maximum pay for their grade."

15. The claimant by letter of 6 April 2019 and at today's hearing stood by his 25 February 2019 formulation of the age group to which he belonged.

16. The claimant's skeleton argument at paragraph 92 sought to break down the age group into three "sub-divisions". These sub-categories were drawn up on the basis of the claimant's calculation that "it would take just over 10 years to move from the minimum to the maximum Grade 6 salary". The sub-divisions are:

    "

(a) Normal retirement age 60 – disadvantaged if promoted on/after the age of 49;

(b) Normal retirement age 65 – disadvantaged if promoted on/after the age of 54;

(c) Normal retirement age 67 – disadvantaged if promoted on/after the age of 56.”

17. At today’s hearing I invited the claimant to imagine a situation in which I rejected his definition of an age group. In that eventuality, I asked him, would he seek to fall back on a differently-defined age group? Would he, for example, argue in the alternative that he belonged to an age group defined by reference to an age or range of ages at the time the PCP was applied to him? The claimant was quite clear that he did not wish to pursue such an argument. His claim stands or falls on the basis of the age group that he has defined and no other.

Evidence and submissions

18. I considered documents in an agreed bundle and in a supplemental bundle provided by the claimant. I did not read every page: rather, I focused my attention on those pages that had been drawn to my attention by the parties in their oral submissions.

19. I also read the claimant’s witness statement and proposed statement of agreed facts. For the purposes of this hearing, I assumed that the facts stated in those documents would be found to be true.

20. I read clear and helpful written submissions from both the claimant and from Mr Moretto for HMRC. They supplemented the written material with oral arguments that were equally clear and attractive.

Facts

21. It is not my task in a hearing such as this to make any contentious findings of fact. What follows is my understanding of the agreed facts, combined with facts that I have assumed, in the claimant’s favour, to be true.

22. Much of the background has been taken from a statement of agreed facts which appears in Annex 1 to the judgment of Simler P in *McNeil v. Revenue & Customs Commrs* [2018] ICR 1529. Neither party to this case suggests that any of the facts are incorrect. I have reproduced the agreed facts so far as they appear to me to be relevant:

“HMRC's Pay System – Background

1. HM Treasury has overall responsibility for the Government's public sector pay policy, which includes defining the overall parameters for Civil Service pay and budget for all government departments. Each year, HM Treasury publishes Civil Service Pay Guidance. …

2. Pay for delegated grades (AA to Grade 6) has been delegated to Government departments since 1996. In line with public sector pay policy, and therefore operating within the pay guidance set by HM Treasury, HMRC submits a pay remit proposal in relation to these grades to its Minister, which for HMRC is the Treasury Minister. Following approval of the total spending allocation, and under collective bargaining, HMRC

negotiates the pay settlement with the two Departmental Trade Unions (collectively referred to in this statement as the 'DTUS')…

3. HMRC was formed in April 2005 by the merger of two separate Government departments, Inland Revenue ('IR') and HM Customs and Excise ('C&E'). Following negotiations with the DTUS, a set of pay and other terms and conditions was implemented for staff in the new department. The new terms and conditions aligned the pay and grading systems of the former departments. They also involved an "assimilation exercise" in 2006 based upon the length of past satisfactory performance in the current grade. Further details about this assimilation exercise are given below.

Pre-merger pay structures

4. Prior to the merger in 2005, IR and C&E had separate delegated pay arrangements aligned with their own business needs, considering a range of factors including grading, location, staffing levels and business priorities.

Inland Revenue pay structure

5. As at April 2005 IR was the bigger department with approximately 77,000 people, compared to 24,000 in C&E …

6. IR's pre-merger grading structure mirrored the traditional Civil Service structure though the grades had different names. For example, … Grade 6 was Band B1.

HMRC's post-merger pay structure

20. A new set of pay, grading, terms and conditions were required for the newly merged HMRC as the former departments arrangements were so different, especially for C&E staff who would move from an eleven banded structure back to a traditional seven banded one. Transitional arrangements also had to be put in place.

22. Since 2005, the merged department has had seven grades below the Senior Civil Service, which reflects the traditional Civil Service grading structure … Each of the seven grades has a London and a National pay band .. with the London pay band being on average 15% higher owing to the associated costs of living in London. Each pay band has a minimum and a maximum rate of pay, with no set points (such as milestones, or incremental increases) in between…

23. HMRC does not have contractual pay progression; movement up through the pay range for each grade is by annual pay awards, payable on 1 June. The value of these annual pay awards is not guaranteed, and varies each year, impacting on the rate at which a person's pay will increase during their time in grade.

24. HMRC operates a performance management system, where people receive an annual rating based on their performance at 31 March. Up to March 2013, the ratings were Top; Good; Improvement Needed and Poor Performance. Since 2005, the consolidated value of the pay award for both Top and Good performance was the same, so people progressed at the same rate if they joined on the same day and remained in the same grade and pay location…. A person with an

Improvement Needed mark received a lower award and those managed under Poor performance did not receive an award.

25. In April 2013, HMRC modified its performance management system, and the ratings are now Exceeded, Achieved, Must Improve and Poor Performance. The pay policy has not changed as a result, as both performance management systems have many similarities, although currently the value of the consolidated pay award is the same for Exceeded, Achieved and Must Improve performance.

26. HMRC employed 64,515 people as at 31 January 2015, of whom …1,262 (2% of the total workforce) were at … Grade 6, being the two grades relevant to this case. … For Grade 6, 718 were in the National pay band … as at 31 January 2015.

27. Between 1 April 2005 and 31 January 2015, HMRC reduced its total workforce by 40,155 from 104,670 to 64,515. However, during this period… the number of Grade 6 staff also increased from 1,225 to 1,262 (i.e. by 3%).

<u>HMRC pay awards</u>

28. Historically, pay awards were agreed with HM Treasury as a multi-year settlement, often covering three years at a time. This practise ceased following the public sector pay freeze (see below), so pay awards are now settled on an annual basis. To be eligible for a pay award, a person must have been in post on 1 June of the settlement year, and have completed at least 91 days paid reckonable service in the appraisal year ending 31 March, with a performance mark of Top, Good or Improvement Needed….

...

<u>2008/09 to 2010/11 Settlement (pages 1064-1073)</u>

38. By 2008, pay band lengths had decreased from a combined IR/CE average of 38% (pre-merger) down to 23% …

39. In 2008, the overall pay settlement from 1 June 2008 to 31 May 2011 was 2.4% for each of the three years, and in 2008/09 pay offer HMRC announced that for the 2009/10 and 2010/11 pay awards, greater priority would be given to progression and further range shortening … In 2008/09, the minima for all grades increased by 3% by 4.1% on average for 2009/10, and by 4.6% on average for 2010/11. The settlement was agreed by the trade union.

<u>2011/12 to 2012/13 settlement (pages 1081-1087)</u>

40. The Government announced a two year pay freeze for public sector workforces from 2011 for those earning above £21,000 per annum, which included all … Grade 6s. The immediate pay freeze applied to all organisations and departments in the Civil Service that had not entered into legally binding pay agreements. As HMRC had already agreed a pay settlement for 2010, the pay freeze took effect from June 2011 for staff in grades AA to Grade 6…

41. …Following the Government's Spending Review published in October 2010, in the 2011 Autumn Statement the Chancellor of the Exchequer

announced that pay awards for the public sector would average 1% for the two years following the pay freeze – 2013/14 … This was later extended to three years, i.e. to 2015/16, in the 2013 Budget …

2013/14 settlement

42. For the 2013 pay award, which averaged 1%, the value of the award paid to people at the pay range maximum for all grades was 0.70%. Awards greater than 1% were paid to people below the maximum, which would provide them with some movement towards the maximum … The maximum was frozen. The award was implemented following discussion and consultation with DTUS, rather than negotiation, as they do not have a mandate to negotiate pay settlements below 3%.

2014/15 settlement

43. For the 2014 pay award, which again averaged 1%, the value of the award paid to people at the pay range maximum was 0.50% for Grade 7s and 6s, and 0.55% for other grades. Awards greater than 1% were paid to people below the maximum to provide them with some movement towards the maximum (see pages 1153 and 1168). The maximum of the pay range was frozen and the pay range minimum increased. For the first time, people on the 2013 minimum received the increase to the new minimum and then received the pay award. In previous years, the new minimum was applied after the pay award. As in the previous year, the award was implemented following discussion and consultation with DTUS rather than negotiation.

2015/16 settlement

...

45. The 1% average pay award applicable to the public sector workforce in 2013/14 and 2014/15 was extended to three years in the 2013 Budget …so it was also applied to HMRC's pay award for 2015/2016.

46. HMRC increased the pay range maximum for all grades by 0.5% in recognition of the fact that individuals on maximum had not received a consolidated pay increase for five years, since 2010.

47. The remainder of the sum available was used to pay awards of greater than 1% to individuals who were below maximum, to provide movement towards pay range maximum for each grade... As in 2014, the minimum grade increase was applied before individual pay awards were added to ensure progression within grade.

48. As in the previous year the award was implemented following discussion and consultation with DTUS."

23. I do not have corresponding figures for the pay awards across Grade 6 for 2016-2017, 2017-2018 or 2018-2019. I can, however, fairly confidently reconstruct the general pay awards from the claimant's own pay figures and the general methodology that was used from 2008 to 2016. It appears that salaries (except those at the extreme ends of the band) were increased by 1% per year from 2013 to 2017. The pay award effective from 1 June 2018 resulted in an increase of 2.33%.

24. Throughout his time in grade, the claimant has undertaken the full duties of a Grade 6 officer with five or more years of experience. He has been assessed against this standard in the annual evaluation of his performance. Every year, from 2013 to 2018, he has been awarded ratings of either "Exceeded" or "Achieved". He has therefore been eligible for the full consolidated pay award.

25. The claimant's own pay from 2013 to 2017 increased in line with the following table:

Year	Claimant's pay (£)	Grade 6 minimum (£)	Grade 6 maximum (£)
2013	58,192	57,573	67,325
2014	59,082	58,149	67,325
2015	59,626	58,935	67,662
2016	60,223	59,532	68,259
2017	60,774	60,127	68,810

26. It will be seen that, even if the 2018 pay award of 2.33 is replicated for 2019 and 2020, the claimant will still be several thousand pounds short of the maximum Grade 6 salary by the time he reaches the age of 60.

27. The claimant is a member of the Civil Service Pension Scheme. Under the rules of the claimant's particular scheme, he can retire at age 60 without any actuarial reduction in his pension. For convenience, I will refer to this age as being his "normal retirement age". For various reasons, he has a settled intention to retire at that age. Not all Grade 6 officers have that option. Many are in schemes that provide for a retirement age of 65 or 67.

28. Statistics produced by HMRC show that many Grade 6 officers are of the same or similar age to the claimant and receive higher salaries than he does. There are younger Grade 6 colleagues who receive lower salaries than the claimant's salary. I am not aware of any analysis of those statistics that shows whether people of the claimant's current age have, in general, higher or lower salaries than the claimant does. Nor (as far as I am aware) has there been any analysis of pay and age within the subset of Grade 6 officers who share the claimant's normal retirement age.

29. On 4 January 2018, the claimant made a request in writing to HMRC to increase his pay to the maximum pay for his grade with effect from 7 January 2018. His rationale was that he had taken up post as a Grade 6 five years earlier on 7 January 2013. He alleged that failure to meet his request would amount to illegal indirect age discrimination, unless it was shown that there was a business need to refuse his request or that doing so was a proportionate means of achieving a legitimate aim.

30. The claimant's request was refused in writing by HMRC on 7 February 2018.

31. The claimant commenced early conciliation with ACAS in relation to HMRC on 13 April 2018 and was issued with a certificate on 13 May 2018. He began an internal grievance against HMRC on 2 May 2018. A Decision Maker rejected his grievance on 6 July 2018. He appealed against the decision and a final adverse decision was communicated to him on 6 August 2018.

32. The June 2018 pay award was announced in August 2018. The respondent's case is that it was placed onto the HMRC intranet on 1 August 2018, but the claimant's position was that the announcement was actually made the following day in a group e-mail.

Relevant law

Striking out claims

33. Rule 37 of the Employment Tribunal Rules of Procedure 2013 gives the tribunal the power to strike out a claim on the ground that it has no reasonable prospect of success.

34. There is a strong public interest in discrimination claims being determined on their merits after hearing the evidence. Tribunals should be very slow to strike out a claim in which the facts are in dispute. The proper forum for determining the facts is the final hearing. These propositions are clear from the well-known cases of *Anyanwu & another v South Bank Students Union* [2001] ICR 391 and *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126. But the rule is not an absolute one. In a constructive unfair dismissal complaint, the question of whether striking out is appropriate or not involves a consideration of the nature of the issues and the facts that can realistically be disputed: *Kaur v. Leeds Teaching Hospitals NHS Trust* [2019] ICR. In my view, the same can be said of discrimination cases, provided that proper regard is had to the importance of leaving factual disputes to the final hearing. Where the claim has no reasonable prospects of success even on the claimant's version of the facts taken at its highest, there is no reason in principle why it should not be struck out.

Indirect discrimination

35. Section 19 of EqA provides, relevantly and with my emphasis:

    (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 put, or would put, B at that disadvantage…

36. Age is one of the relevant protected characteristics.

PCP

37. The Equality and Human Rights Commission's *Code of Practice on Employment (2011)* states, at paragraph 4.5:

    "The phrase, 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, prerequisites, qualifications or provisions."

38. The need for flexibility when defining a PCP was emphasised in *United First Partners Research v. Carreras* [2018] EWCA Civ 323. As HHJ Eady QC put it when that case was decided by the EAT:

    "the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted."

39. Nevertheless there are limits. A change from one set of redundancy terms to a less generous one was held not to be a PCP in *ABN AMRO Management Services Ltd v. Hogben* UKEAT/0266/09. At paragraph 27, Underhill P observed:

    "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, [indirect discrimination] is not engaged."

<u>Indirect age discrimination and service-related pay</u>

40. Schedule 9 of EqA at paragraph 10 provides:

    (1) It is not an age contravention for a person (A) to put a person (B) at a disadvantage when compared with another (C), in relation to the provision of a benefit, facility or service in so far as the disadvantage is because B has a shorter period of service than C.

    (2) If B's period of service exceeds 5 years, A may rely on sub-paragraph (1) only if A reasonably believes that doing so fulfils a business need.

    (3) A person's period of service is whichever of the following A chooses—

    (a) the period for which the person has been working for A at or above a level (assessed by reference to the demands made on the person) that A reasonably regards as appropriate for the purposes of this paragraph…

41. Paragraph 14.20 of the *Code* explains the effect of this exemption:

    "In many cases, employers require a certain length of service before increasing or awarding a benefit, such as pay increments, holiday entitlement, access to company cars or financial advice. On the face of it, such rules could amount to indirect age discrimination because older workers are more likely to have completed the length of service than younger workers. However, the Act provides a specific exception for benefits based on five years' service or less."

42. Since I announced the oral reasons in this case, the Employment Appeal Tribunal published its judgment in *Heskett v. Secretary of State for Justice* UKEAT 0149/18. As the following paragraphs of the judgment show, the case proceeded

on the footing that a slow pace of progression towards the top of a salary band tended to put younger workers, rather than older workers, at a disadvantage:

> "5. Following the financial crisis in 2008, the Government announced a policy limiting pay increases across the public sector. As a result, the previous policy of a Probation Officer progressing 3 pay points within the very long scale applicable each year, it was reduced to progressing just one pay point per year. The effect was that it would take someone joining the scale towards the bottom 23 years to progress to the top, rather than just 7 or 8 years as had previously been the case. Older employees close to or at the top of the band would earn significantly more in salary and accrue greater pension benefits than those lower down the band, for as long as the policy persisted. As the Tribunal commented, at para 61 of the reasons, by 2015 the difference between the salary which the Claimant would have earned had the new policy not been implemented and that based on the former 3 points per year was about £5,000 per annum. He did the same work and has the same skills as the older employees who were fortunate to have accrued sufficient progression under the old scheme to progress to the top of the new one.
>
> 6. The Tribunal held that this progression policy was *prima facie* discriminatory in favouring employees over the age of 50 as against younger employees. Its reasoning is set out in detail in the written reasons, but as these findings are not the subject of the appeal it is not necessary to set them out in this judgment."

<u>Age group – background law</u>

43. Section 5 of EqA provides:

(1) In relation to the protected characteristic of age-

(a) A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;

(b) A reference to persons who share a protected characteristic is a reference to persons of the same age group.

(2) A reference to an age group is a reference to **a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.**

44. The *Code* offers helpful guidance on what is meant by an "age group":

"

2.4 An age group can mean people of the same age or people of a range of ages. Age groups can be wide (for example, "people under 50"; "under-18s"). They can also be quite narrow (for example, "people in their mid-40s"; "people born in 1952"). Age groups may also be relative (for example, "older than me" or "older than us").

…

2.6 There is some flexibility in the definition of a person's age group. For example, a 40 year old could be described as belonging to various age groups, including "40 year olds"; "under 50s"; "35 to 45 year olds";

"over 25s" or "middle-aged". Similarly, a 16-year old could be seen as belonging to groups that include: "children"; "teenagers"; "under 50s"; "under 25s"; "over 14s" or "16 year olds".

Example:

A female worker aged 25 could be viewed as sharing the protected characteristic of age with a number of different age groups. These might include "25 year olds"; "the under 30s"; "the over 20s" and "younger workers".

Example:

A man of 86 could be said to share the protected characteristic of age with the following age groups: "86 year olds"; "over 80s"; "over 65s"; "pensioners"; "senior citizens"; "older people"; and "the elderly"

2.7 Where it is necessary to compare the situation of a person belonging to a particular age group with others, the Act does not specify the age group with which comparison should be made. It could be everyone outside the person's age group, but in many cases the choice o comparator age group will be more specific; this will often be led by the context and circumstances….

Example:

In the first example above, the 25 year old woman might compare herself to the "over 25s", or "over 35s", or "older workers". She could also compare herself to "under 25s" or "18 year olds".

45. What is noteworthy about these provisions of the *Code* is that all the examples of age groups are defined by reference to an age (or descriptor of age) at the time of belonging to the age group. There is no example of an age group defined by reference to an age on the happening of a certain event.

46. A good deal of time in oral argument was spent discussing the decision of the Supreme Court in *Chief Constable of West Yorkshire Police v. Homer* [2012] ICR 704. In order to understand the relevance of this case to the legal issue at hand, it is necessary to set out the facts in more detail than would otherwise be desirable. Mr Homer was employed by the police authority as a legal adviser. When he was 61 years old, a new grading structure was introduced, which meant that he would need a law degree as a pre-requisite of being admitted to the highest pay grade. Because of his age he had no realistic chance of obtaining such a degree before he reached the normal retirement age of 65. According to paragraph 11 of the judgment, "The employment tribunal found that the appropriate age group was people aged 60 to 65, who would not be able to obtain a law degree before they retired". On appeal to the Supreme Court, counsel for the police authority argued that, in order to test whether the requirement for a law degree put people of Mr Homer's age group at a particular disadvantage compared to persons outside his age group, the circumstances of the comparator group must include the circumstances that put Mr Homer's group at a disadvantage. The police authority's approach would have required Mr Homer to compare himself with others who were nearing the end of their employment for different reasons, such as family circumstances. That argument was rejected by the majority of the Supreme Court Justices. In the leading judgment, Baroness Hale stated at paragraph 13:

"This argument involves taking the particular disadvantage which is suffered by a particular age group for a reason which is related to their age and equating it with a similar disadvantage which is suffered by others but for a completely different reason unrelated to their age. If it were translated into other contexts it would have alarming consequences for the law of discrimination generally. Take, for example, a requirement that employees in a particular job must have a beard. This puts women at a particular disadvantage because very few of them are able to grow a beard. But the argument leaves sex out of account and says that it is the inability to grow a beard which puts women at a particular disadvantage and so they must be compared with other people who for whatever reason, whether it be illness or immaturity, are unable to grow a beard."

47. Her judgment continued at paragraph 17:

"Put simply, the reason for the disadvantage was that people in this age group did not have time to acquire a law degree. And the reason why they did not have time to acquire a law degree was that they were soon to reach the age of retirement".

<u>Can an age group be defined by reference to age on the happening of an event?</u>

48. The claimant argues that an age group can be defined by reference to a person's age at the happening of a particular event. Quite rightly the claimant has identified this argument as an area of fundamental disagreement between himself and the respondents. He has a number of strands to his argument.

48.1. First, the claimant reminds me of the language of section 5 of EqA. Had Parliament intended that age groups should be defined by reference only to current age, it would have said so.

48.2. Second, he relies on *Homer.* In Mr Homer's case, he argues, the age group was not actually people aged 60 to 65, but "people who would not be able to obtain a law degree before they retired". He draws support for this proposition from what may be assumed to be some of the unreported facts of Mr Homer's case. There may well have been legal advisers of Mr Homer's age who already had a law degree. If Mr Homer's age group had merely been 60- to 65-year-olds, the graduates would have to be included in the age group. The advantage to the graduates would cancel out the disadvantage to people like Mr Homer who did not have a degree. Conversely, he argues, it is not fanciful to suggest that there were legal advisers under the age of 60 who, because of their relative youth, had had fewer years of adulthood in which to study for a degree. They would have been disadvantaged by the PCP, negating the argument that it was the group aged between 60 and 65 who were at a particular disadvantage. The fact that Mr Homer won impliedly means that his age group must have been defined by reference to retirement age and their age prior to starting to study for a degree.

48.3. The claimant's third argument is based on the need to avoid gaps in equality protection. He gives two examples to illustrate the same point, but one will suffice. An employer discriminates against employees who passed their driving test before a certain age. Unless those employees' age group could be defined by reference to age at the time of the driving test, their claims would fail.

49. I disagree with the claimant's analysis. In my view, an age group must be defined by reference to the current age (or ages) of its members. By "current age", I mean their age (or ages) at the point in time at which membership of the group becomes relevant for the purposes of EqA. In an indirect discrimination complaint, the age group will be defined by reference to age (or a range of ages) at the time when the PCP is applied, or would be applied, to the age group. Here are my reasons:

    49.1. It seems intuitively wrong for a claimant in an age discrimination case to be able to compare himself with people who are the same age as him. Yet that is what the claimant's formulation expressly sets out to do.

    49.2. All the examples of age groups in the *Code* are defined by reference to age, or an age descriptor, at the time of membership of the group. None of them refers to age upon the happening of some event.

    49.3. It is recognised by the *Code* that pay progression within a salary band generally works to the advantage of older employees. Where progression from the minimum to the maximum was very slow, as in *Heskett,* it was the under-50s age group that was put to the particular disadvantage. This was because it is well known that older employees are more likely to have the benefit of past increments or pay awards within a salary band. The claimant's definition seeks to turn that conventional understanding of age disadvantage on its head. By defining an age group by reference to age at the time of appointment, what the claimant is effectively doing is cherry-picking the aspects of older age that are particularly disadvantageous (namely limited time left until expected retirement), whilst neutralising a powerful age-related factor (namely the likelihood of having acquired more previous pay awards in grade) that would put people of the same age at a considerable advantage over their younger colleagues.

    49.4. It is not surprising that the word "current" does not appear in section 5. In my view, the phrase, "by reference to age" more naturally means "by reference to current age" than "by reference to age including age on the happening of a particular event". This interpretation is reinforced by examination of the sections of EqA defining other protected characteristics. Age is not the only protected characteristic that changes over time. For example, whilst a person may be permanently disabled from birth, many disabled persons cease to be disabled through treatment and many non-disabled persons acquire a disability later in life. Section 6 does not use the word, "current", but it is well established that the question of whether or not a person meets the definition of disability falls to be assessed at the time of the alleged discrimination. There is an exception for people who have had a disability in the past, but that exception is specifically carved out in section 6(4). Another protected characteristic is nationality. Section 9 of EqA assumes that "nationality" means "current nationality". Otherwise, there would be no need for "national origin" to be included separately within the definition.

    49.5. *Homer* does not advance the claimant's case. As Lady Hale observed at paragraph 11, the tribunal found that the age group was persons aged 60 to 65. The additional words in paragraph 11 "who would not be able to obtain a law degree before they retired" is a summary of the disadvantage caused to the age group, not the age group itself. If there is any room for doubt, the

judgment of the Court of Appeal ([2010] EWCA Civ 419) at paragraph 20 shows precisely how the age group was defined by the tribunal. This definition also accords with the headnote of the Supreme Court case in the Industrial Cases Reports. Paragraph 17 of Lady Hale's judgment makes clear that the existence of a retirement age and the length of time that it would take to get a degree were the reasons why the age group (60 to 65) was put at a disadvantage.

49.6. I do not know whether the additional facts suggested by the claimant in relation to *Homer* are correct or not. But even if they were true, they would not necessarily have stopped Mr Homer from proving that the 60- to 65-year-old age group suffered a particular disadvantage. The presence of some disadvantaged people in the comparator group does not prevent the existence of a group disadvantage. For example, a restriction on part-time working may well adversely affect some men who have sole responsibility for their children's care. Nevertheless, women as a group are still likely to be disadvantaged by the restriction when compared to men, because, in general, the proportion of women with childcare responsibilities is higher than the proportion of men with those responsibilities. In similar vein, Mr Homer's age group could still be put at a particular disadvantage even if Mr Homer had a law graduate colleague of the same age, or if he had younger colleagues without degrees.

49.7. Defining age groups by reference to current age does not leave the gaps in equality legislation that the claimant fears it does. I have considered the claimant's example of an employer who discriminates against employees who took their driving test before a certain age. (For the sake of argument, we may imagine that age to be 35.) The aggrieved employees' remedy lies in a complaint of direct discrimination. They have been treated less favourably than others because of age. For the purposes of direct discrimination it is not necessary for the victim to have the protected characteristic at the time of the less favourable treatment. The aggrieved drivers are being less favourably treated at this moment in time because they *belonged* to the under-35s age group at the time they took their driving tests. But the age group is still under-35s and does not need to be defined any differently.

<u>Can an age group be defined by reference to disadvantage?</u>

50. In fact, the claimant's formulation of his age group goes beyond, "Persons aged X at the time of appointment". It expressly defines the group by reference to the disadvantage that the group suffers. The defining characteristic of the purported age group is the inability to the reach maximum salary before retirement.

51. In my view, an age group cannot come within section 5 of EqA if it is defined by the disadvantage that it experiences.

52. Group disadvantage is established by identifying a pool of people who are affected by a PCP (for better or for worse), then examining how the claimant's chosen age group fares in comparison with the remainder of the pool. Formulating an age group is a means of *testing* whether a disadvantage exists or not. If the age group is defined by the disadvantage, there would be no need for any comparison with anyone else in the pool.

53. Just as disadvantages caused by the PCP should be left out of account when defining the comparator group (as in *Homer*), so should they also be left out when defining the group of persons who share the protected characteristic.

54. The facts of this case illustrate the problem. Let us take an example from one of the claimant's subdivisions within the alleged age group. A manager has been appointed at age 54 to Grade 6 on the minimum salary for the grade. For the sake of argument, let us suppose that she was appointed in 2014. It is now 2019 and she is 59 years old. She has to work another 6 years before eligibility for an unreduced pension. We do not know what her annual pay awards will be during those 6 years. A change in government, or an improvement in the national finances, might lead to a general policy of higher public sector pay. Depending on the size of her future awards, our notional manager may or may not reach the maximum salary for the grade before she retires. So at this point in time it is impossible to know whether she belongs to the claimant's age group or not. Or, to put it another way, the question of whether she shares the claimant's protected characteristic depends on what her employer will do in the future. It seems very unlikely that Parliament would have intended for a person's protected characteristic to be defined in this way.

Conclusions – strike-out

PCP

55. In my view, it is arguable that the slow speed of pay progression within a salary band, measured over time, is capable of being a PCP.

56. I remain of the view that the PCP is actually the size of the pay awards, rather than speed of progression, since it is the pay awards themselves that determine how fast or slowly a Grade 6 officer's salary increases from year to year. It is easier to see an overarching PCP spanning several years where pay progression over the years is governed by a single policy (such as the contractual progression of one increment per year in *Heskett*).

57. Nevertheless I would not have struck out the claim merely because the claimant has described the PCP in the way he has. It is arguable that a PCP can consist of a series of actions with a cumulative effect. Slow speed of pay progression, implemented by a series of small annual pay awards, is something that is capable of being applied equally to different groups but to have a disparate effect on one group compared to another.

58. The respondent argues that the claimant's formulation of the PCP, which includes the words, "slow-down", suggest that the claimant is relying on a PCP which actually consists of moving from one PCP to another PCP. As Mr Moretto correctly argues, that approach would be contrary to *Hogben.* But that is not what the claimant is doing here. He does not complain about the *change* in the speed of progression, but the fact that, taken over a number of years, the progression is so slow.

Age group

59. It follows from the above discussion that the disadvantaged group, as identified by the claimant, is not an age group within the meaning of section 5 of EqA. In the definition of the age group, the only reference to age is a reference to age on the happening of an event, such as appointment to Grade 6. Moreover, it is expressly defined by reference to the disadvantage that the group will face.

60. Despite having been given every opportunity and encouragement to do so, the claimant has not sought to argue that he belongs to any differently-defined age group. He has not, for example, argued that the PCP disadvantages over-50s, or over-55s, or even people within a certain number of years of being able to claim their pension without actuarial reduction.

61. This is not a case where there is any reasonable prospect of a tribunal substituting its own definition of an age group for the one offered by the claimant. The claimant has been quite insistent about the case he advances and on which he asks the tribunal to adjudicate. It would not be appropriate for the tribunal to make a different case for him.

Prospects

62. If this claim were to proceed to a final hearing, it would inevitably fail because the alleged disadvantaged group is not an age group. There is no group disadvantage and therefore no indirect discrimination.

63. I did not need to resolve any disputes of fact in order to reach this conclusion. Taking the claimant's version of the facts at its highest, the claim has no reasonable prospect of success. I therefore strike it out.

Time limit

64. I did not determine the question of whether or not the claim was presented within the statutory time limit. Had I not struck out the claim I would have left that question to be determined at the final hearing, together with the issue of whether it would be just and equitable for the time limit to be extended.

65. I remind myself of my conclusion that it was reasonably arguable that there was a PCP of slow speed of pay progression. In my view it is also arguable that the PCP was applied to the claimant, not just on the occasion of the annual pay awards, but also when the annual pay award was used as the reason for refusing the claimant's request to have his salary increased to the maximum. That refusal was initially communicated to the claimant on 7 February 2018 and then upheld on 6 July 2018 in the grievance outcome and on 6 August 2018 when the claimant's appeal failed. It is, in my view, arguable that on each of those occasions, the PCP was separately applied to the claimant. Whether this is the correct analysis or not is something that falls to be determined at the final hearing once the tribunal has heard the evidence.

66. There is a further argument to be made on the claimant's behalf that the PCP was applied to the claimant on a further occasion in August 2018 when the annual pay award was announced. Whether it occurred on 1 August 2018 (which would mean that the claim was a day late) or 2 August 2018 (which would mean that it was presented within the time limit) is a matter for the final hearing.

67. Needless to say, these matters only fall to be considered if I am held to be wrong in my decision to strike out the claim.

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Employment Judge Horne

Date: 2 July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 July 2019

FOR THE TRIBUNAL OFFICE

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