EMPLOYMENT TRIBUNALS

Claimant: **Ms J Elliot**

Respondent: **Parliamentary and Health Service Ombudsman**

Heard at: **London Central** **On: 22 – 23 September 2019**

Before: **Employment Judge Emery**
Ms T Breslin
Ms M Jaffe

Representation:
Claimant: In Person
Respondent: Mr J Arnold (Counsel)

JUDGMENT

1. The claim of direct age discrimination succeeds.

2. A one-day Hearing shall be listed to determine Remedy.

RESERVED REASONS

The Issues

1. The claimant's employment ended on 30 November 2017 on her "Voluntary Exit" (VE) from the respondent under the terms of the Civil Service Compensation Scheme (CSCS). At the date of her VE the claimant had 15.33 years' service. She was 64 years old and, being over 60, she was entitled to her civil service pension on termination of employment. Because she was entitled to receive her pension, the terms of the CSCS capped her VE payment at 6 months' pay (which we have named "the Pension Age

Cap"). For the claimant this amounted to £21,375.50. An employee leaving on a VE with the same length of service and salary but aged under 58 years 9 months of age would have received an uncapped VE "Standard Tariff" payment of 15.33 months' pay, £54,629.37.

2. The respondent accepts that in operating a Pension Age Cap it treated the claimant less favourably because of her age. It argues that it was justified in doing so because of the following legitimate aim, as set out in the CSCS documentation (page 46), and summarised in the Notice of Appearance (page 22 paragraph 27):

> *"To provide a proportionate financial cushion to those who lose their jobs. There is less need for that financial cushion when an employee is able draw a pension during the time they are looking for new employment".*

3. The claimant does not accept that this is a legitimate aim or that it was the respondent's actual aim. The claimant contends that the aim of the CSCS as implemented in this VE was to cut costs, and this is not a lawful aim. She also argues that the applicable CSCS scheme (the 2010 scheme) was imposed without the agreement of her Trade Union the PCS.

4. The respondent says that operating a Pension Age Cap was a proportionate means of achieving its legitimate aim. It says that in determining that the Pension Age Cap is proportionate, the following factors should be considered:

    a. Many financial responsibilities decrease with age, for example over 60s are less likely to have dependent children or be making mortgage payments.

    b. Given the number or potentially eligible employees, the CSCS must have clear, consistent and administratively straightforward eligibility criteria, or clear Bright Lines, and a lack of Bright Lines would lead to individualised assessments, added cost, complexity and increased inaccuracy.

    c. The CSCS terms recognise the availability of a pension aged 60 costing 21.1% of payroll – paid at public expense. There is less of a need for a financial cushion on redundancy if a pension is payable.

    d. To put an employee aged 50 year old in the same position as the claimant, i.e. in receipt of the same pension as the claimant, but taking this pension at age 50, this comparator would have to spend £117k to purchase the same pension entitlement.

e. The taper stops the 'cliff edge' – meaning that staff members would receive a reducing VE payment between the ages of 58 years 9 months and 60.

f. The median retirement age in the civil service is 62; 30% of retirees are over aged 63 and 17% over 65.

g. If there was not a reduced lump sum for those over pension age, there would be an incentive for staff to wait until pension age to obtain a Standard Tariff payment plus their pension and pension lump sum.

h. The cost cannot be unlimited.

5. The claimant contends that these factors assume that people choose to retire at or around age 60 and assume that there is less financial need for a Standard Tariff VE payment for staff aged 60 and over. These she argues are wrong assumptions. She argues that the financial detriment to her and to others in a similar position to her is significant such that the means are not justified or reasonable. Further, she asserts that the cost of providing a Standard Tariff VE payment to eligible employees over 60 years old is not significant particularly given savings elsewhere, that some of the respondent's arguments are wrong on the evidence, for example there are increasing caring responsibilities for over 60s, contrary to the respondent's arguments.

6. The Tribunal therefore considered the following issues, to be determined on the facts and careful consideration of the legal issues set out below:

   a. Is the respondent's aim as it states? If yes,

   b. Is the respondent's aim legitimate?

   c. Is operating the Pension Age Cap a proportionate means of achieving this legitimate aim?

Witnesses

7. We heard evidence from the claimant, and for the respondent from Mr Stephen James, the respondent's Interim HR Director and Mr Peter Spain, Head of Pensions Technical at the Cabinet Office. The Tribunal found all witnesses consistent and honest in their evidence. Prior to hearing the evidence, the Tribunal read all witness statements and the documents referred to in the statements.

8. This judgment does not recite all of the evidence heard by the Tribunal, instead it confines its findings to the evidence relevant to the issues. This

judgment incorporates quotes from the Tribunal's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

9. The Tribunal gives thanks to the claimant and to Mr Arnold for their careful and courteous conduct of the hearing.

Findings of Fact

10. The claimant's continuous employment with the Civil Service commenced in 2002. She was seconded to the respondent in 2004 and transferred permanently in April 2009. In March 2017, the respondent sought volunteers from its Investigator team for Voluntary Exit (VE). The rationale for seeking VE volunteers was that the respondent was undergoing a significant restructure, this was in part a consequence of restructuring proposals which had been developed over a period of several years, and in part because of significant budget savings of 25% imposed on it by Government and known about since October 2015. The restructure - entitled 'Reshaping the Organisation' - required a significant reduction in the number of Investigators, 27 down to 12, plus the relocation of some of the remaining Investigator roles from London to Manchester.

11. The restructure was contemplated for several years. We accepted the respondent's arguments that the reasons for the restructure was not solely on grounds of cost, that there were legitimate operational benefits for restructuring. We accepted that a significant impetus for the restructure occurring as and when it did was the cuts imposed on the respondent, but we accepted in particular that the respondent genuinely considered there were operational benefits from relocating Investigator posts from London to Manchester, and that a restructure and VE programme would have occurred within a similar timescale even if there had not been such significant costs savings. The extensive arguments of the claimant on the issues of cost and of the rationale behind the redundancies were not, we considered, relevant to the issues in her claim, which was solely concerned with the lawfulness of the Pension Age Cap.

12. The respondent does not have a default retirement age. The claimant was a member of the 'Classic' Civil Service Pension Scheme, meaning she could retire and take a pension from age 60 without actuarial reduction. She could also choose to work post-60 and continue to accrue pension contributions, and this is what she had done.

13. The VE proposals were tabled to employees when the claimant was 63 years old. At the date of her redundancy the claimant's intention was to work for approximately two more years full-time, then two years part-time. When reducing to part-time work she would have been entitled to take her pension,

also continuing to accrue employer and employee pension contributions, thus increasing her pension when she eventually retired.

14. A significant reason why the claimant needed to carry on working was because she felt she could not afford to retire. Her adult son continued to live with her, having been unwell and then completing a degree; whilst an adult he was at times economically dependent on her. She also had caring commitments towards older relatives.

15. The claimant expressed an interest in the VE scheme. As the respondent's documentation makes clear, an employee will only be accepted for VE if their role is potentially at risk. The claimant's aim was to find out if her role was at risk; it was and hence her application for VE was accepted. Had she not applied for VE the claimant considered that she would likely have been made compulsorily redundant shortly thereafter. On her mind was the fact that on a compulsory redundancy she would receive her contractual 3 months' notice of dismissal as opposed to 6 months' notice under the VE scheme. Apart from the additional income, this could affect her last date of employment and potentially the amount of her pension.

16. The CSCS VE scheme entitlements are recorded at page 47zi.

Standard Tariff:	1 month's pay per year of service
Cap for those above pension age:	6 months' pay (the Pension Age Cap)
Cap for those below pension age:	21 months' pay

17. The Scheme allowed for three other potentially relevant elements:

    a. Tapering would apply for those aged 58 years 9 months and over, losing one month from the Standard Tariff for each month of employment to age 60.

    b. The Standard Tariff could be reduced to statutory redundancy, or increased to up to twice the Standard Tariff (subject to the 21 months' maximum), the latter requiring Cabinet Office approval. There was no such discretion to increase (or decrease) the Pension Age Cap. We heard evidence that the Standard Tariff had been increased in previous redundancy rounds, Cabinet Office approval having been sought and received. We accepted the respondent's evidence that no such application was made to the Cabinet Office in this redundancy round, at least in part because this would run contrary to what was now a factor for this VE proposal, achieving budget cuts.

    c. If receiving VE aged 50+, employees could opt to purchase the actuarial reduction in their pensions, meaning that they could take their full pension aged 50 or over on taking VE. The respondent has in past

redundancy rounds paid the difference between the VE payment and the actuarial cost of funding an unreduced pension. We accepted the respondent's evidence that it has not offered to assist employees by buying out the actuarial reduction in this redundancy round for the same reasons set out at (b).

18. The respondent's position was that Civil Service Trade Unions had agreed with the CSCS VE payment scheme and the terms on which VE payments would be made in this VE/redundancy round. The claimant accepted that there had been no objection to the use of VE in this redundancy exercise, but she argued that her union, the PCS, the largest union with more civil service members than the other civil service unions combined, objected to the 2010 CSCS *"across the board"*; she understood that this was an issue with the CSCS as a whole, rather than just the retirement/redundancy provisions. The respondent did not dispute this, instead arguing that the other 6 civil service unions had agreed the CSCS. We accepted that the PCS had formally objected to the terms of the 2010 CSCS and in fact had mounted a judicial review against the Scheme. We also noted there did not appear to have been any formal objection by Unions to the use of the VE scheme or the Pension Age Cap in this VE programme.

19. The claimant's employment ended on 30 November 2017. She was aged 64 and had 15 years 122 (15.33) days service. She received a Pension Age Cap VE payment of six months' salary – £21,375.50. Her employment income prior to VE was £42,469. She started taking her pension of £12,895. She received a pension lump sum of £38,685.

20. Since her redundancy, the claimant has sought work but has been unable to get a job. We saw some of the documentation referencing her search for work. The claimant considers that the main reason why she has been unable to get a job is because of her age. The respondent disputed this, saying that the claimant was not disadvantaged on the basis of her age, Mr Arnold arguing that while age may be a disadvantage for manual workers, the age of 64 was not a disadvantage when applying for an intellectual type role. The claimant disagreed, citing her unsuccessful search for work in comparison to the ease with which many of her younger colleagues had secured a job.

21. The claimant's evidence, which we accepted and which was self-evident on the terms of the CSCS, was that younger colleagues with less service than her left with bigger VE lump sums on the Standard Tariff. Several managed to secure alternative employment during their notice period; one who left with a year's salary VE payment obtained a job as an NHS complaints officer – the respondent agreed that he was not required to work all of his notice so he could commence his new role. Another colleague referenced using the lump sum to pay off her mortgage as she had obtained a new role. Another got a job immediately with a local authority. The claimant's evidence was

that the respondent's justification for the CSCS scheme – to provide less to those who have the additional resource of a pension and pension lump sum – was not appropriate, because younger employees with similar experience and capabilities accepting VE would be far more likely than her gain another job. The claimant argued that the scheme *"was not rational in the real world"*.

22. The evidence presented suggested that the claimant's age was a disadvantage in her search for work compared to her younger colleagues who accepted VE. We considered that it was likely that many employers may feel justified in not employing even an experienced and competent 64-year old in an Investigator role for reasons including new-starter training costs vs. the likely length of service. We concluded that aged 64 the claimant would realistically have a small and rapidly diminishing opportunity to secure alternative employment. We asked whether it was possible to find out the number of new starters with the respondent or within the civil service aged 64 and over, but we were not provided with this statistic.

23. Mr Arnold's case to the claimant was that because she would take her pension, an uncapped VE payment would have been a windfall to her, which was prevented by the Pension Age Cap. The claimant rejected this characterisation, arguing that her unplanned loss of employment income and then a smaller pension on retirement meant she suffered significant losses, that she equally needed the "cushion" of an uncapped VE payment.

24. Had the claimant's plans come to fruition she would have continued to work for the respondent to (say) November 2019 full-time, earning two years' salary, £84,938, followed by two years at (say) 50% fte, earning £42,469. She would have also received a CSCS pension during her part-time employment.

25. Considering her actual vs planned income to chosen retirement age, including receipt of her pension lump sum, the operation of the Pension Age Cap has significantly adversely affected the claimant.

    From: £166,092 (4 years employment earnings plus pension lump sum);

    To: £111,640 (VE payment plus 4 years pension plus pension lump sum).

    Approx. loss: £54,452 PLUS loss of pension payable during part-time employment

26. There are other factors. While receiving less income over 4 years, the claimant has had an accelerated receipt of her pension lump sum, conversely she no longer has the prospect of this payment at her planned retirement age. She has also lost the larger pension payable on longer service. Note that

this calculation excludes receipt of state retirement pension, which the claimant was entitled to receive under either scenario.

27. The respondent pointed to statistical evidence which it said supported its arguments on proportionality, including the 2011 Census which shows that the over 60s were far less likely to live with dependent children than the under 60s. The statistics shows that there were nearly 950,000 families with dependent children where the 'head of household) was aged between 50-64, and 43,500 where head of household is aged 65-74. We were not shown statistics for age 60 and over, but we accepted that these statistics showed that there was a significant reduction in the likelihood of living with children when aged 60 and over.

28. However we also noted that wider societal trends show an increasing number of children being born to parents who are well into their 40s, and that the likelihood of 60 year olds having dependent or semi-dependent children (for example in training or education) is increasing. We considered that on a conservative estimate, based on the Census statistics, there may be over 200,000 households aged over 60 with dependent children in England and Wales (page 520).

29. The respondent disputed that it was reasonable for it to consider supporting or part-supporting adult offspring as a relevant factor in its assessment of proportionate means, characterising this as a lifestyle choice. We did not agree with this characterisation, we considered that there is evidence of a demonstrable increase in adults continuing to live or returning to live with parent(s), this is often at a financial cost to the parent and is rarely a completely voluntary choice for parent or their children.

30. The respondent also pointed to Census 2011 statistics which show that there is an increase in outright home ownership with age. We also noted that the statistics show 34% of households with head of household aged 65-74 do not own their home outright. We accepted that mortgage costs may lower over time (for example on a repayment mortgage), however the fact is that over a third of homeowners aged 65 and over will be paying mortgage costs.

31. We also noted that the respondent's assessment did not appear to take into account the increasing proportion of private renters in society, whose rent will likely not decrease on retirement. Mr Spain accepted that private renting was an issue which could be considered, but that the *"basic proposition"* had to be that a person in receipt of a high benefit pension, coupled with the fact that relatively small numbers work beyond 60 suggests that the design of the scheme is not unfair. He said that it was sensible to look at such factors including financial responsibility for rent and then consider whether the design of the scheme *"looks particularly unfair"*.

32. The claimant also made the case that removing the Pension Age Cap would be a *"small scale exercise"* because there would not be many individuals who would fall into this category – only 8% of approximately 481,000 civil servants are aged over 60 (page 176). The respondent's case is that 21% of 60-64 year olds leave on a paid exit (page 407). The Tribunal's very rough estimate (bearing in mind that we did not have statistics for employees 65 and over who may leave on paid exit, or the number aged 60-64 who receive VE or equivalent compared to individually negotiated agreements), is that over 5,000 civil servants are directly affected by the Pension Age Cap.

33. The claimant also argued that the savings occasioned by the move to Manchester was sufficient reason to pay Standard Tariff and that the respondent did not use all its budget in this redundancy scheme. The respondent says that it exceeded its budget for redundancy payments. We accepted that it was not reasonable for an employer to be required to offset savings made on a relocation to make additional redundancy payments; we also accepted the respondent's evidence that it's redundancy budget was fully used in this redundancy exercise.

34. The respondent also argued that Bright Line rules must reasonably apply: the employer could not consider all individual circumstances; instead a policy decision was required which would provide predictability, consistency and rules that are easily understood and administratively workable, that individualised assessments of financial circumstances would lead to complexity – there were 38 individuals in this VE exercise. The claimant accepted this point in part, also arguing that the general Bright Lines policy could be to pay the Standard Tariff to all – providing consistency and predictability, simple to administrate and with easily understood rules. She also argued that when she applied to the VE scheme she had to provide significant information on her personal circumstances, and she did not accept that an individualised assessment would be a significant issue.

35. The claimant's view was that the emphasis should not be on her personal financial situation; instead she should be entitled to the Standard Tariff as compensation for the loss of her job, that the same was the case for significant numbers of employees over 60 who also faced financial difficulties. She argued that document 380 (produced by the Carers Trust) showed that significant numbers over aged 60 faced financial difficulties – that "*carers aged 60-64 may experience some of the greatest financial difficulty*"; page 379 states there are 1.8m carers aged 60 and over; that 20% of population in 60-64 are carers compared to 12% of the overall population. She argued that with the state pension age moving to 66/67 many individuals over 60 may have several years of living on a small work pension which is not sufficient to live on. Mr Spain said he was not familiar with any evidence which suggested the respondent considered taking into account factors such as caring responsibilities. Mr Spain argued that the statistics presented by

the claimant were not helpful as they did not reference whether the 20% of 60-64 year old carers were in work or not.

36. Mr Spain also said that there was a comparatively generous pension and, while he accepted that some staff may not be able to afford to retire at 60, overall civil service staff voluntarily retire in their early 60s. Generally, the Bright Lines policy considered what was more likely to be the case, while also considering the circumstances of those who can't afford to retire. Mr Spain did accept that that he had no knowledge of what was taken into account in analysing the Bright Lines and the other proportional means factors when the Pension Age Cap was implemented.

37. The claimant argued that younger employees receiving VE would have a further period of time to build up their pension to their actual date of retirement. The respondent disputed this characterisation, making the case that the claimant has already banked the same working time in building up her pension. The claimant's answer, which we accepted, was that a younger colleague with the same length of service accepting VE would, if they obtained another role they would be earning income as well as receiving an employment income. The claimant by contrast had little chance to obtain a new job.

38. A significant argument of the claimant was that the Pension Age Cap was implemented for costs grounds. The respondent generally accepted that cost was a factor in necessitating redundancies, and that costs could be a factor in determining who to make redundant *"along with many others"*.

39. No witness of the respondent was able to say what the rationale was behind the fact that the Standard Tariff could be increased to 2x, but there was no discretion to increase the Pension Age Cap.

Submissions

40. The parties handed up detailed written submissions – the claimant at the outset of the case and the respondent on the 3rd morning of the hearing.

'Comparators'

41. During the course of the evidence and in submissions we considered the different financial position of four comparators with the same length of service and salary. In doing so we acknowledged that this was not to assess whether there was difference in treatment based on age (which had been accepted), but was to determine the disparate impact of the Pension Age Cap on the claimant (if any) and in particular to assess whether the means adopted to achieve the respondent's legitimate aim was proportionate.

42. Comparator 1: aged 50 years 1 month of, same length of service and salary as the claimant who receives an uncapped VE payment of £54,629 based on 15.33 years' service. The respondent's case is that to put comparator 1 in the same position as the claimant, comparator 1 must take her civil service pension on her VE. Comparator 1 can take an actuarially reduced pension at 50, or she can choose to purchase the pension's actuarial reduction. To put herself in exactly the same position as the claimant (but for the protected characteristic) the respondent says that comparator 1 must purchase the actuarial reduction, as this will put her in the same pension position as the claimant (i.e. the same lump sum and annual pension, taken at 50). This would cost comparator 1 £117,474. The claimant rejected comparator 1 arguing that their circumstances are not comparable, for example comparator 1 is in a better position to get a new job, and there is no requirement for this comparator to purchase the actuarial reduction.

43. Comparator 2: aged 58 years & 9 months and receives an uncapped VE payment of £54,629. Comparator 2 has to wait a further 15 months before she can take her full pension. To purchase the actuarial reduction to enable her to take the same pension as the claimant at VE would cost her £17,240. The respondent's argument was that this comparator would have the same prospects as gaining alternative employment as the claimant. The claimant says this comparator is better off than her, gaining the same pension 15 months early, plus the balance of the VE payment, £37,389.

44. Comparator 3: aged under 50: will get the uncapped VE payment of £54,629, but has no financial cushion of a pension.

45. Comparator 4: The claimant's chosen comparator. This comparator is aged 50 with the same length of service and salary who is selected for VE but who does not take their pension until 60. Comparator 4 receives the £54,629 Standard Tariff VE payment. While she does not have the financial cushion of a pension, she has the chance of earning additional income and accruing additional pension contributions and she can take her civil service pension on reaching age 60. The respondent disagrees that this is the correct comparator, as the claimant has already banked the additional years of earnings via employment between ages 50 to 64, there is no guarantee that a comparator aged 50 could get a new role – this was an "assumption of a risk".

<u>The claimant's written and verbal submissions</u>

46. The claimant's verbal closing was succinct. There was no windfall for her; the appropriate comparison was with an employee aged (say) just over 50 with the same length of service; such a comparator would receive a much greater lump sum and would have a far better prospect of getting a new job.

47. Her written submission deals with several issues, not all of which the tribunal considered to be relevant. The claimant's first argument is that the although the CSCS provides for a difference in treatment, this is not a legal requirement, and the claimant's less favourable treatment was 'arbitrary and capricious,' and therefore could not be justified. The claimant argued that the respondent has compensated staff outside of the scheme rules in the past, why not for her and staff in a similar position? Secondly, the claimant argued that relocating outside of London could not form part of a legitimate aim because it was a cost cutting exercise only; also the primary aim of the Pension Age Cap is cost-cutting. She pointed to the documentation which justified capping severance payments to save costs. Thirdly, the Pension Age Cap was not justified, in particular the respondent had autonomy to change the compensation it paid, and there were less discriminatory options it could have taken. Fourthly, the Pension Age Cap was not justified as necessary and/or proportionate – in particular there was a severe discriminatory impact on her, and the respondent (or the Cabinet Office) have failed to properly consider information which would show the 'particularly severe impact' of the Pension Age Cap on her and others like her.

48. During the case the claimant referred on several occasions to *Heron v Sefton MBC [2012] UKEAT*, in particular the following quote at paragraph 25: "It is notorious that men and women over 60 remain in large and increasing numbers of the active labour force and may well require income from earnings to maintain their standard of living…"; that the idea that that drawing a pension can alone justify a difference in treatment "will not do".

49. The claimant referenced *McCloud* arguing that the respondent had not shown that it had pursued a legitimate aim, instead the respondent had applied the CSCS Pension Age Cap without considering if it was required, or justified. The respondent's equality impact assessment failed to account for the Pension Age Cap. The respondent failed to explore the possibility of varying the VE scheme, in particular it had failed to consider whether there were any less discriminatory ways of pursuing its aim; this is despite having compensated employees outside of the CSCS scheme rules in the past and having significant financial flexibility in how it made payments.

50. The claimant argued that two 2011 Employment Tribunal decisions relied on by the respondent, *Budgen v Ministry of Justice 2203353/2011 and Smith v Department for Business Innovation & Skills2203949/2011* did not consider appropriate evidence, that some of the information provided by the civil service in these cases was inaccurate and out of date, and the Tribunal did not properly consider the adverse impact of a pension age cap or the difficulties older employees may have in obtaining work. The claimant points to the small numbers affected by the Pension Age Cap – for example the fact that only 8.3% of the civil service workforce were aged over 60, that reducing number of employees in the Classic Pension scheme with a pension age of

60, and of these only a small percentage will leave under a VE scheme or similar. She argued that the Pension Age cap in fact makes employees over 60 more vulnerable to redundancy as they are cheaper to make redundant at a time of life when they will find it harder to obtain other employment. The age of 60 is arbitrary and capricious. The claimant pointed to high housing costs for many over 60, and the fact that many are carers and may have dependent or semi-dependent children, as she did. She argued that a significant number of people aged over 60 suffer from financial hardship. She argued that there appears to have been no review of the CSCS despite, for example, the default retirement age changing. She argued that the numbers affected aged over 60 who leave on exit schemes 'would be almost negligible' – that the public benefit of operating the CSCS Pension Age cap is far outweighed by the severe discriminatory impact on scheme members such as her.

The Respondent's written and verbal submissions

51. Mr Arnold's verbal submission dealt first with the claimant's submissions. He did not accept that carers aged 60-64 would suffer greater financial difficulty, the Carer's Trust document suggested at best that they 'may' suffer greater financial difficulties. It is not for the employer to provide care support. The uncapped VE payment is needed for younger employees because they do not have an alternative income stream such as a pension. Mr Arnold did not accept that 'comparator 4' was the most appropriate comparator, because if comparator 4 did not purchase their annuity and take an early pension they ran the risk of having to wait 10 years before they could access this income stream, potentially having no income in the meantime. He did not accept that comparator 4 was, aged 51, in the same position financially (length of service and accrued pension), and had the opportunity to gain another job and accrue a further pension. The issue for him was that comparator 4 was deferring their pension, which was a financial risk as they may be unemployed thereafter, which justified a Standard Tariff payment.

52. Mr Arnold accepted that comparator 2 and 3 were better off, but that this was acceptable because of the broad margin of appreciation they have, and because the respondent was justified in operating broad, Bright Lines rules.

53. On the case of *Heron v Sefton MBC [2012] UKEAT* relied on by the claimant, and in particular paragraph 25 "notorious" Mr Arnold argued that this remark was *obiter,* that the evidence was not clear and there was no case law on this issue.

54. In his written submissions, Mr Arnold makes the following points:

    a. Most people pass through different age groups, meaning advantage at one stage may be offset by detriments at another.

b. A structured approach must be taken to considering whether objective justification is established. The tribunal must ascertain whether there is a legitimate aim, and must then consider whether the means adopted to achieve that aim are appropriate and reasonably necessary.

c. It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and make its own assessment of whether the former outweigh the latter;

d. Bright Line rules provide 'benefit and legitimacy', and the adoption of a general rule as opposed to responses to individual circumstances, provide predictability and consistency, "… an important virtue"

e. Generally it's not necessary to take into account individual circumstances of each person to whom the rule is applied.

f. Considering *Lockwood v DWP [2014] ICR 1257*, paragraph 18, the provision of a proportionate financial cushion to provide for those being made redundant to move to employment and/or receipt of a pension can be a legitimate aim.

g. In considering justification, tapering provisions may be appropriate.

h. It will generally be legitimate to take into account the fact that an employee will be entitled to receipt of a pension when considering the legitimacy of a tapering provision for redundancy payment.

i. An ECJ case *(Odar v Baxter Deutschland GMBH [2013] 2 CMLR 13 ECJ)* says that not providing additional compensation to those who would be in receipt of replacement income was a legitimate aim.

j. Cost alone cannot provide justification, however in an overall determination of the scheme, the respondent is entitled to take into account the availability of money and its competing needs to spend that money.

k. In drawing up schemes dealing with different age grounds it is legitimate to take into account the differing financial needs of people at different stages of their life.

l. Even if there is a less discriminatory means of achieving the legitimate aim, it does not mean that a justification defence cannot be made out but it is a factor to be taken into account in the overall assessment of whether the PCP is reasonably necessary and a

proportionate way of achieving the legitimate aims pursued *(Kapenova v DoH [2014] ICR 884 EAT).*

m. Retrospective justification can be relied on, even if not articulated or realised at the time (*Seldon*).

55. Legitimate aim: "it is a matter of common sense" that there is less need for a financial cushion when the employee can also draw their pension when seeking work. As stated in *Loxley v BAE Systems Land Management Systems (Munitions & Ordinance) Ltd [2008] ICR 1348 EAT*, "one of the purposes of a redundancy scheme … is to cushion workers from the effects of losing their income. This is not required, or at least to the same extent, where pensions are paid."

56. The aim relied on is clearly legitimate (*Loxley, Lockwood*); there is no rational basis for excluding pension entitlement.

57. Not providing additional compensation to those who would be in receipt of replacement income is a legitimate aim *(Odar)*.

58. The respondent, as an emanation of the state, as such it has broad discretion to choose to pursue a particular aim in employment and social policy (*Odar* applied).

59. Proportionality - appropriateness:

a. It is appropriate to take into account the different financial position, including receipt of pensions, of employees accepting VE in fixing the level of redundancy payment (*Loxley* and *Odar*).

b. Those retiring before 60 are likely to be worse off than those retiring above 60 (more commitments, and/or reduced pension). It's appropriate to take this into account by reducing the VE payment to staff "*retiring* over 60" (our emphasis).

c. The claimant is not considering like-with-like. She is only considering the VE payment rather than the whole package on exit, and in particular is disregarding the financial cushion provided by her unreduced pension.

d. To disregard the fact that this is an exit with a pension prevents a proper analysis that the Pension Age Cap is a proportional means of achieving a legitimate aim.

60. Proportionality - reasonably necessary:

a. The Pension Age Cap was reasonably necessary to achieve the legitimate aim – a proportionate financial cushion to those to leave their jobs, bearing in mind that there is less need for that cushion if drawing a pension. To pay an uncapped VE payment would

- Provide a windfall to the claimant compared to comparator 1 and
- Provide for an age discrimination claim from younger employees who receive the same VE payment as the claimant but who would have to buy out their actuarial reduction to retire

61. Broad discretion: the respondent is a state emanation, so it has broad discretion in defining measures to implement their aim.

62. Bright Lines Rules: there is a benefit and legitimacy to Bright Line rules, it gives predictability and consistency, rules which are easily understood and administratively workable and individualised assessments would be too complex. The fact that the claimant is choosing to support her adult child is irrelevant given Bright Line times.

63. There a reduction in financial commitments for older workers, their mortgage will be smaller or repaid, and the fact majority of 60-64 year olds do not have caring responsibilities.

64. Tapering is relevant to justification (*Loxley*) and this scheme had tapering.

65. Budget – there are finite and competing demands on resources; compensation cannot be unlimited and there must be a fair and rational allocation; the cap at 60 proportionately achieves this allocation

66. There is no viable alternative; the claimant's suggestion is that the uncapped VE payment should be paid to her would produce discrimination elsewhere for younger employees.

67. There was an agreement with the trade unions.

68. There is a perverse invective, that employees would be encouraged to await pension age to obtain a pension and an uncapped VE payment, this would reduce the flexibility of the scheme to attract a wider range of volunteers.

69. There is no discretion to amend the increased cap.

70. The cases of Budget & Smith are relevant – the stare decisis doctrine.

71. Mr Arnold argued that the case of *Sefton* was not relevant. Paragraph 25 is obiter on the issue of justification because this case had only to do with the

schedule 22 statutory authority defence; in addition, there was no argument on issues set out in *Loxley* and *Odar*.

Relevant Law

72. Equality Act 2010: Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim

73. Council Directive 2000/78 (the Framework Directive)

Article 2 provides:-

> Concept of discrimination
> 1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 .

Article 6 provides:-

> Justification of differences of treatment on grounds of age
> 1. Notwithstanding Article 2(2) , Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Legitimate Aim:

74. We considered the case of *McCloud*, in particular its analysis on how to approach “legitimate aim”. We noted that the respondent is to be “accorded some margin of discretion in relation to both aims and means”, but it is for this Tribunal to determine what the appropriate margin of discretion is. We noted that a legitimate social policy aim (see paragraph xxx below) must have a rational explanation and that the government has a wide discretion in determining its aim. However it must not be, for example, capricious or arbitrary, and it must be capable of being understood.

75. The respondent accepts that the burden of proof is on it to establish justification as a prima facie case of discrimination has been established.

Considering again the test in *McCloud*, we noted that the Tribunal must be satisfied

a. The measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end".

b. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking.

c. The more serious the disparate adverse impact, the more cogent must be the justification for it.

d. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. In analysing the issue of justification, the tribunal must carry out a critical examination and reflect that analysis in its reasoning.

76. *Seldon v Clarkson Wright & Jakes [2012] UKSC 16; [2012] ICR 716* requires an assessment which distinguishes measures pursuing social policy objectives such as employment policy, the labour market or vocational training of a public interest nature from measures particular to the employer's situation such as cost reduction or improving competitiveness. The analysis in *Seldon* identifies several potentially legitimate social policy aims from European jurisprudence, including "cushioning the blow for long serving employees who may find it hard to find new employment if dismissed"; that the "gravity of the effect on the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen."

77. We noted that the *Framework Directive* gives the following (non-exhaustive) examples which could justify a difference in treatment on grounds of age, including dismissal and remuneration conditions for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection, and the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

78. We also considered the *Supplement to the Equalities & Human Rights Commission Employment Code,* noting that legitimate aims should promote inter-generational fairness and may include: rewarding experience; cushioning the blow for long-serving employees who may find it hard to find

new employment if dismissed and facilitating the participation of older workers in the workforce.

Proportionate Means

79. The respondent must show that its decision to impose this particular Pension Age Cap is a proportionate means of achieving the legitimate aim. To summarise the Framework Directive, the respondent must show that the Pension Age Cap is an "appropriate and necessary" means of achieving that aim (*Article 6(1)*). Proportionality has been held to involve a "balancing exercise" between the importance of the legitimate aim pursued and the extent of the discriminatory effect.

80. Considering *Seldon,* the mere fact that a particular aim was capable of being a legitimate aim was only the beginning of the story. Once an aim had been identified, it still had to be asked whether it was legitimate in the particular circumstances of the employment concerned. That required that both the aims and the means be carefully scrutinised by the tribunal to see whether they met the objective and whether there were less discriminatory measures which would do so. To paraphrase Seldon, the means chosen have to be both appropriate and necessary; it is one thing to say that the aim is to provide a proportionate financial cushion to those who lose their jobs and there is less need for that financial cushion if in receipt of civil service pension when seeking work, it is another thing to say that the Pension Age Cap is both appropriate and necessary to achieving this end. “The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are no other, less discriminatory, measures which would do so."

81. In *R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293* the Court of Appeal held that the balancing exercise involves a three-stage test:

    a. Is the objective sufficiently important to justify limiting a fundamental right?
    b. Is the measure rationally connected to the objective?
    c. Are the means chosen no more than is necessary to accomplish the objective?

82. As stated in McCloud, the government has a margin of discretion in relation to both legitimate aims and the means of pursuing these, but the confines of the margin are determined by the courts on a case-by-case basis. *Seldon* states that it is for the Tribunal, according an appropriate margin of discretion, to decide whether it was legitimate in the circumstances of the case.

83. We noted the judgment of the CoA in *Loxle*y, which accepted that preventing a windfall could be a legitimate feature of a redundancy scheme as one of its

purposes was to cushion workers from the effect of losing their income and, the CoA accepted, a cushion was not required "to the same extent" where pensions were paid. The Court considered that it was not in all situations justified for individuals to be *excluded* from a redundancy scheme because they could take their pension; it was however a "highly relevant factor" which an employer could properly consider when determining what redundancy rights, if any, an employee ought to receive. While it may be possible to justify excluding employees from the redundancy scheme, it was necessary to apply the legal test: whether excluding an employee from the redundancy scheme had achieved a legitimate objective and was proportional to any disadvantage suffered.

84. The CoA in *Loxley* also states that it would "manifestly be justified" to have a rule which prevents an employee being better off by receiving a redundancy payment than if they had worked to retirement age; also it is legitimate to seek to ensure that the aims are achieved in an equitable and fair way. The judgment states that while preventing a windfall can be a legitimate feature of a redundancy scheme, consideration needs to be given to employees who are being denied a payment which would not be a windfall in their circumstances; for example those employees who may have wanted to remain in employment and whose redundancy payment would be less than their anticipated earnings. Accordingly, an analysis of the relative value of pension and redundancy entitlements and other income/benefits may require analysis in relevant cases.

85. We noted that *Loxley* suggests that an agreement made with trade unions is a potentially relevant consideration when determining whether treatment was proportionate, that one of the considerations that could properly weigh in the assessment of whether compulsory retirement was justified was that the rules in question had been collectively agreed: "Plainly the imprimatur of the trade union does not render an otherwise unlawful scheme lawful, but any tribunal will rightly attach some significance to the fact that the collective parties have agreed a scheme which they consider to be fair".

Conclusions

86. Was the respondent's legitimate aim as it stated? We concluded that it was and that there was no other significant motive. Budgetary concerns gave urgency to the decision to commence the VE programme, and also led to the decision not to depart from the standard CSCS VE formula. However they played no part in the decision to implement what was under the terms of the CSCS the mandatory Pension Age Cap, the issue of relevance in these proceedings. Many of the claimant's arguments around the legitimate aim were directed at the justifications for making redundancies, rather than the legitimacy of the Pension Age Cap. Information was given to employees by the respondent about the impact of the Pension Age Cap on pension age

employees, and it was apparent that the respondent was open to employees in the q&a materials about its legitimate aim and why it was in place.

87. We concluded that the respondent had relied on the Legitimate Aim – to *provide a proportionate financial cushion to those who lose their jobs. There is less need for that financial cushion when an employee is able draw a pension during the time they are looking for new employment* – in applying the Pension Age Cap.

88. Was this a Legitimate Aim? We concluded that it was. There is significant legal authority to support the proposition that receipt of an occupational pension is a guaranteed source of income which means that there is less need for a financial cushion on redundancy. We noted that the decision to implement this Aim was made by a respondent which has a margin of discretion in its aims, and we considered that this Aim was within a reasonable and appropriate margin of discretion. It is self-evident that a job-seeker who has a guaranteed pension income has less need for the same financial cushion compared to a job-seeker who does not have that guaranteed income.

89. We then carefully considered whether the means adopted, the Pension Age Cap, was a proportionate means of achieving the legitimate aim. We considered it did not, for the reasons set out below.

90. Noting that the factual issue in *Heron* was a failure to make any redundancy payment, we considered also that this case contained relevant guidance. We agreed with the conclusion of the EAT that it is *"notorious"* that men and women remain in large and increasing number members of the active labour force and may well require income from earnings to maintain their standard of living. We also noted the conclusion in *Heron* that *"the idea that the simple fact*" that receipt of pension can justify a difference in treatment *"will not do"*. We noted that *Heron* requires statistical evidence *"to begin to justify*" a difference in treatment. We did not accept the respondent's comments that this statement at paragraph 25 was dicta, it was instead dealing with substantive point of appeal which had been rendered potentially irrelevant by the EAT's findings on the Schedule 22 issue.

91. It is for the respondent to show that its decision to impose this particular Pension Age Cap was a proportionate means of achieving the legitimate aim: was it an "appropriate and necessary" means of achieving that aim?

92. We considered that we were required to engage in a balancing exercise between the importance of the legitimate aim pursued and the extent of the discriminatory effect. It is for the respondent to justify the difference in treatment by reference to local conditions and the circumstances of their employees "looked at as a whole".

93. We considered the comparator evidence. We did not consider that the respondent's analysis of comparators was correct. We were not assessing whether or not there was a difference in treatment for statutory purposes, i.e. where the relevant circumstances of the comparator must be the same or not materially different. Instead, we were examining what we considered to be the real world impact on employees with the same length of service who were made redundant at different ages. We considered that this did not require us to hypothecate a comparator who was *required* to take a full pension at aged 50, spending £117,000 to do so, so as to make her circumstances similar to the claimant. We are instead to consider whether the Pension Age Cap is proportionate on the facts in these proceedings.

94. On a factual analysis we considered that comparators 2 and 4 were the most relevant comparators. This is based on the apparent numbers of those aged 59 taking VE (see *Budgen & Smith* paragraph 40, we adopted this evidence), therefore justifying comparator 2. Comparator 4 was closest to the real world examples given by the claimant of her colleagues' choices on their VE, to which the respondent provided no evidence to the contrary. We considered that there was a lack of real world evidence of comparator 1 ever being a reality; while it may be a life-style choice, it is not a realistic expectation to receive a full pension aged 50, a more realistic scenario is that of comparator 4.

95. Comparator 4 is an employee aged (say) 51 with the same service and experience in the role who received £54,000 on VE. Taking into account the tax free status of part of the redundancy payment, we calculated that such a payment amounted to 16-17 months' net salary. This is a sum which is a cushion against a potentially lengthy period of unemployment. However we also considered that it was far more likely than not that a similarly experienced Investigator aged 51 with a similarly positive and stable work record would have readily transferrable skills into many public, private and voluntary sector roles, that such an Investigator would have good prospects in the job market.

96. We accepted the general proposition that those made redundant before age 60 are likely to be financially worse off, because of the simple fact that under 60s cannot take their full civil service pension. However we considered that the evidence showed a more complex financial situation, as we found:

    1. Many over 60s including the claimant have housing costs – either mortgage or rent – which they may not be able to afford on their civil service pension alone.
    2. A significant proportion of over 60s have caring roles, including the claimant.

3. Many families including the claimant have children continuing or returning to live at home.
4. The rise in the state pension age (although this did not affect the claimant).
5. The claimant's age made it less likely she and others her age could obtain another role, contrarily her younger peers would we considered be more likely to obtain work reasonably quickly.
6. The evidence shows that a statistically significant number of civil servants continue to work beyond the date that they can draw their pension. We considered that the overall evidence we were taken to shows that many need to do so for the kind of financial reasons set out above; this also applies to the claimant.

97. The claimant and those like her who needed to work beyond CSCS pension age were, we considered on the evidence, less likely to gain work. We noted that in our collective experience many employers adopt a retirement age, others choose not to hire staff close to their company's average age of retirement, because of the cost of training and the prospect of only a short length of service. It was the claimant's age at her VE which was, we considered, the main factor for her inability to secure a new job. We considered that a reasonable assessment of proportionality would have considered what evidence there is of whether redundancy post-60 affects job prospects and/or causes significant financial issues.

98. Contrary to the respondent's contention, the evidence was that the claimant could point to several younger employees with less service but greater VE payments who obtained work more or less immediately or who made other lifestyle choices. We considered that in these cases, their VE Standard Tariff payment could reasonably be regarded as a windfall. They could also 'bank' their civil service pension contributions to take an unreduced pension aged 60, whilst gaining some kind of pension if they secured further employment. We accepted that these are only windfalls 'in hindsight' that there would be those who were not able to secure work easily, and for whom the VE payment would turn into a lifeline. We also accepted that any new role may have lesser terms, including pension provision.

99. However the evidence suggested that the 'winners' would more likely than not include employees several years below state pension age, i.e. those who a prospective future employer reasonably believed would provide several years useful service and who was, we considered, more likely than not to gain a new job relatively quickly.

100. In short, it was clear to us that the full-tariff VE payment was a reasonable and proportionate payment to make to those employees below the VE payment taper-age because of the relative risks and gains which can occur on redundancy. We also considered that these were the factors which the

respondent fully considered when designing the full-tariff VE payment scheme.

101. However, the evidence in front of us by way of witness and documentary evidence did not suggest that the respondent had carried out the same kind of thinking in designing the Pension Age Cap: we did not consider that the respondent considered sufficiently the needs of the older employees who needed to carry on working for financial reasons. We did not consider that the respondent had properly considered the available evidence to *"begin to justify"* the claimant's differential treatment.

102. One factor to consider in determining proportionality is tapering. We noted comparator 2 could use £17k of their £54k lump sum to purchase a full pension at 58 years and 9 months, thus placing them in a better position than the claimant – they have a larger VE payment and the same pension at an earlier age. This was, we considered, contrary to the position set out in *Loxley* that it would *"manifestly be justified"* to have a rule which prevents an employee being better off by receiving a redundancy payment than if they had worked to retirement age.

103. The respondent also suggested that equalising the payment to a Standard Tariff would be unfair to the younger employee who could sue for age discrimination as they cannot access their pension, unlike the claimant. The Tribunal rejected this argument, we considered that a situation in which the claimant and a younger comparator received the same Standard Tariff payment would not give rise to a difference in treatment, bar the fact that the claimant also received her pension, which was her entitlement based on her age.

104. We considered whether an uncapped VE payment would have provided a windfall to the claimant. We considered not. Bearing in mind the evidence on the effect on her income, there was over time a significant financial loss to her which she considered unaffordable, in part because she received a Pension Age Cap payment and not an uncapped VE payment. We considered that a significant number of the respondent's staff and the wider civil service would also be potentially adversely affected. We considered that for the claimant and others in her position, the Pension Age Cap payment did not amount to a "proportionate" financial cushion.

105. In reaching this conclusion, we accepted that the respondent has broad discretion to define the measures to implement their aim. However, 'broad' does not equate to unfettered discretion also 'broad' does not mean *limited*. We noted that the majority of the evidence presented by the respondent was post-justification, i.e. we saw no evidence of the rationale at the time. While this is clearly not in itself fatal to the respondent's arguments – such rationalisation is explicitly permitted - we reiterate that we saw little evidence

given to consideration of the potential impact on the claimant and those in similar positions. Indeed, in its case the respondent was on occasion somewhat dismissive, characterising having adult children at home as a lifestyle choice. We found that in fact the impact may be increased housing costs (the extra bedroom), no single-person council-tax discount, etc. The respondent did not appear to consider other societal changes, for example the rising state pension age, or the impact of the rising numbers of life-time renters.

106. We considered that the claimant's analysis of the evidence was more cogent, taking into account that while it may be a minority of over 60s with housing costs (mortgage or rent) or caring obligations, or otherwise a financial need to carry on working, this still amounted to a significant societal impact, also an individual impact on her and, we considered on a significant number of the respondent's employees. The statistics show a significant number of employees who continue to work in the civil service past 60, however the respondent does not appear to have considered the reasons for this or the potential impact on such employees of a Pension Age Cap on VE.

107. We therefore considered that the respondent failed to consider the evidence reasonably available to gauge the impact of the Pension Age Cap. On properly considering the evidence, it was our conclusion that there was a significant adverse impact on the Claimant and those in her position by the operation of the Pension Age Cap, which was far greater an impact in fact than that suggested by the respondent.

108. We fully accepted the respondent's argument that Bright Lines rules were required. We did not accept the claimant's argument that an individualised assessment was not onerous as she already had to provide financial information. For an employer to have to assess whether an employee met criteria for any particular payment is onerous and will give rise to inconsistency and unfairness. There is a benefit and legitimacy to Bright Line rules, it gives predictability and consistency, rules which are easily understood and administratively workable; individualised assessments would be too complex. The question we considered appropriate was whether these were proportionate Bright Line rules.

109. We accepted the respondent's argument that there are finite and competing demands on resources, that compensation cannot be unlimited and there must be a fair and rational allocation of resources. Our concerns, expressed above, was that the allocation of resources had such an impact on the claimant in her circumstances that it was neither fair nor rational.

110. Was there an agreement with the Trade Union? We accepted that the PCS had objected to the CSCS Scheme in 2010 by way of a judicial review and that subsequently it did not accept the VE payment or Pension Age Cap in

negotiations with the civil service (*Budgen & Smith)*. We also accepted that there appeared to have been no formal objection to the Pension Age Cap in this redundancy programme. We found that at best the PCS accepted the Scheme's use in this redundancy exercise, but had never accepted the Pension Age Cap as legitimate, that there was accordingly no formal Union 'agreement' with the PCS on the use of the Pension Age Cap.

111. We did not accept the respondent's contention that there was a perverse incentive to stay on to over 60 if the Pension Age Cap was abolished. In the real world we did not accept that an employee who wished to retire at (say) 60 and could afford to do so, would continue in work in the hope they may be made redundant at some point in the future. Conversely, we considered that there was a perverse incentive to accept redundancy and an uncapped VE payment during the early months of the tapering period, and potentially for one or two years prior to this. We noted the statistic adopted in the *Budgen & Smith* judgment, that in 2012-3 of leavers aged 59, 46% leave on paid exits and 26% on retirement; aged 60, 64% leave on retirement and 21% on paid exits; to age 65 retirees are between 52-56% and paid exits between 21-32% (paragraph 40). This strongly suggests that employees are being incentivised to leave at an earlier age; we can only speculate that one reason may be because of the Pension Age Cap. Additionally, as the facts in this case show, for many younger employees a VE payment amounts to a windfall.

112. We considered the judgment in *Budgen and Smith*, and the respondent's argument of stare decisis. We noted that we saw far more evidence in our case. We also noted that this judgment utilised a variant of comparator 1 in determining its judgment, and for the reasons set out above we do not consider this is the appropriate comparator. We therefore considered it was appropriate to depart from the findings in this judgment.

113. For these reasons we concluded that the discriminatory effect of the Pension Age Cap far outweighed the importance of maintaining this Pension Age Cap. The Pension Age Cap was not, we concluded, appropriate and necessary.

114. In reaching this conclusion, we considered alternatives to the Pension Age Cap, noting that the means to achieve an aim is not necessarily unlawful even if there is a better alternative. We only heard evidence on the claimant's alternative to the Pension Age Cap, which is that the full VE payment should be paid. However, as we have already stated, it is a legitimate aim to pay a lesser sum to take into account a guaranteed pension. We therefore discounted the claimant's argument that this is a more proportionate alternative.

115. While we heard no evidence on any alternative scheme which would not provide such a disproportionate impact on the claimant and others in similar

circumstances, we considered that there was manifest proportionality in a system with clear Bright Lines, which took account of both the length of service of the employee and receipt of the guaranteed pension. Such a scheme should also take into account the impact on younger employees faced with VE, the impact faced by those working past their civil service pension age who need to carry on working but who are less likely to obtain a job, such as the claimant, whilst also taking into account the potential costs impact on the respondent.

116. We concluded that there are two potential schemes which could satisfy these criteria:

    1. A flat-rate percentage reduction to the Standard Tariff VE payment paid on redundancy at age 60 and over.
    2. A stepped percentage reduction to the Standard Tariff VE payment paid on redundancy for each year of employment aged 60 and over.

117. We reached no view on what percentage reductions would best achieve proportionality whilst meeting the legitimate aim. We accept that there may be other Bright Lines schemes which are more proportionate.

118. We conclude that it would be appropriate to hear evidence and submissions on potential schemes at a one-day Remedy Hearing, directions on which will be sent out with this Judgment.

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Employment Judge Emery
Dated: **11 November 2019**

JUDGMENT SENT TO THE PARTIES ON

19 November 2019

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS