EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR R COOMBES	AND	THE DRIVER AND VEHICLE STANDARDS AGENCY (R1) THE CABINET OFFICE (R2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 24TH / 25TH / 26TH / 27TH AUGUST 2020

EMPLOYMENT JUDGE MR P CADNEY MEMBERS: MR H LAUNDER
MS S MAIDMENT

APPEARANCES:-

FOR THE CLAIMANT:- **MR D O'DEMPSEY (COUNSEL)**

FOR THE RESPONDENT:- **MR A TOLLEY Q.C. (COUNSEL)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

The claimant's claim of direct age discrimination is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings a claim of direct age discrimination arising out of the operation of the Civil Service Compensation Scheme ("CSCS"/ "the Scheme") rules by which he received a lump sum payment on his dismissal for ill health. It is not contended that the dismissal was unfair, and it is not in dispute that the scheme is discriminatory (in that the claimant was treated less favourably by reason of his age, but subject to the question of justification) as the amount he received was lower than

it would otherwise have been because of the application of the taper provisions of the Scheme. The only question before the tribunal is whether the admittedly age discriminatory provision is justified.

2. The tribunal has heard evidence from the claimant, Mr Dave Allen (Prospect National Secretary), and on behalf of the respondent from Mr Peter Spain (Head of Pensions Technical and Casework Team Civil Service and Royal Mail Pensions Directorate in the Cabinet Office).

Respondents

3. The claimant was employed by the first and not the second respondent, but both respondents are content that any finding is made against both, as both would be bound by it in any event. There is therefore no submission before us that different considerations apply to the individual respondents.

The Law

4. Specific arguments as to the application of particular authorities and principles are set out in the conclusions. However, the broad structure of the applicable law is not in dispute.

5. The claim is brought pursuant to s13(1) Equality Act 2010: "*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*." The protected characteristic is age, and it is not in dispute that the claimant was treated less favourably within the meaning of s13 because of his age; the amount of the efficiency payment he received being reduced specifically because of his age in that he was dismissed within the three years preceding his sixty fifth birthday. However direct age discrimination is capable of being justified. Section 13(2) provides that: "*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.*"

6. The tribunal has been referred to the following primary authorities as to the general principles to be applied in determining the issues of legitimate aim and proportionality:-

Seldon v Clarkson Wright & Jakes *[2012] UKSC 16, [2012] ICR 716* ***(Seldon)***

MacCulloch v Imperial Chemical Industries plc *[2008] ICR 1334, EAT.* ***(MacCulloch)***

Loxley v BAE Systems Land Systems (Munitions& Ordnance) Ltd *[2008] ICR1348, EAT.* ***(Loxley)***

Kraft Foods UK Ltd v Hastie *[2010] ICR 1355, EAT.* ***(Hastie)***

Lockwood v Department of Work and Pensions *[2013] EWCA Civ 1195, [2014] ICR* ***(Lockwood)***

BAE Systems (Operations) Ltd v McDowell *[2018] ICR 214, EAT.* ***(McDowell)***

R (Elias) v Secretary of State for Defence *[2006] 1WLR 3213* ***(Elias)***

R (W) v Birmingham City Council [2011] *EWHC 1147* ***(W)***

(Other authorities are referred to in both parties' submissions. If and the extent it is necessary to refer to them they will be set out at the appropriate point)

7. The following summary of the relevant law is taken from the Respondents' Opening Note which we accept as broadly accurate (although see paragraph 8 below) and adopt:-

43. The leading authority on the meaning of s 13 (2) EqA (albeit decided under its predecessor statutory provision in the Employment Equality (Age) Regulations 2006) is ***Seldon v Clarkson Wright & Jakes*** *[2012] UKSC 16, [2012] ICR 716. The key principles are as follows:*

(1) The types of aim which are capable of being treated as legitimate are those which involve social policy objectives of a public interest nature, as opposed to purely individual reasons particular to the employer's situation [50(2)].

(2) The aim need not have been articulated, or even realised at the time when the measure was first adopted. It can be a rationalisation after the event [59].

(3) The means chosen to achieve the aim must be both appropriate and reasonably necessary. The means should be carefully scrutinised in the context of the particular business concerned to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so [62].

(4) Where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it [65].

44. ***Seldon*** *was applied by the Court of Appeal in the more recent case of* ***Lord Chancellor v McCloud*** *[2018] EWCA Civ 2844, [2019] ICR 1489. It reiterated the well-known point that the state or the government (if it is the employer) must be accorded some margin of discretion in relation to both aims and means – "governments must be able to govern". But it is of course for the tribunal in any particular case to determine what the appropriate margin is [85].*

47.In summary, the following propositions may be derived from the authorities:

(1) The key question is whether the discriminatory scheme is a proportionate means of achieving a legitimate aim: ***Lockwood*** *[46].*

(2) A summary of the general principles as to justification is as follows– ***MacCulloch****[10]:*

(a) The burden of proof is on the respondent to establish justification.

(b) The measures adopted must correspond to a real need, be appropriate with a view to achieving the objectives pursued and reasonably necessary to that end.

(c) An objective balance should be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification.

(d) It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the measure and make its own assessment as to whether the former outweigh the latter.

(3) In general, tapering provisions may be very readily justified, as necessary to ensure equity between those close to retirement and those in retirement receiving pensions. However, the question whether justification is in fact made will of course depend on the nature of the schemes in question: ***Loxley*** *[39].*

(4) It is relevant to take into account any agreement with trade unions, as well as the fact of the timing at which the employee is entitled to take his pension: ***Loxley*** *[42].*

(5) There is a need for critical appraisal by the Tribunal to ensure that no "traditional assumptions" relating to age have influenced the employer: ***Loxley*** *[43].*

(6) There is, depending on the facts, a potential justification on the basis that employees who lose out under the terms of one scheme because of an age-related provision are sufficiently compensated by reference to their pension entitlement: ***Hastie*** *[11 (b)].*

(7) It is necessary for the Tribunal to focus on the scheme (or schemes) in question as a whole, in order to decide whether it was a proportionate way of achieving a number of different (but all legitimate) aims, some of which may be in tension: ***MacDowell*** *[60]-[65].*

8. For the avoidance of doubt, although we accept that that is a broadly correct summary of the law, as is set out in greater detail below the claimant contends that proposition (7) above is incorrect (at least in the circumstances of this case) in that we should focus exclusively on whether the taper itself is justified, and not whether the scheme as a whole is justified. For the avoidance of doubt and as is set out below we accept that the claimant is correct (again at least in the circumstances of this case) and this is the approach that we have adopted.

9. In addition and amplification of some of the points set out above, we have applied the following fundamental propositions of law derived from the summary and the authorities to the facts:-

i) As set out above in the case of direct age discrimination only social policy/ public interest aims can be legitimate aims and not specific individual aims relevant only to the individual employer. Social policy aims include intergenerational fairness. In addition, it must be specifically legitimate in the particular circumstances of the

employment concerned, and not simply falling within the general scope of a social policy aim. (Seldon)

ii) For the means of achieving the aim to be held to be proportionate the tribunal must carry out a balancing act setting the legitimate aim against the discriminatory treatment and they must appropriate in relation to the age and reasonably necessary in relation to that age group.

iii) We are required to look with particular care at ex post facto justifications for aims or means that were not in the rule makers mind, or for which there is no evidence as to what was in the rule makers mind, at the point at which they were adopted (Seldon).

Facts

10. There is no significant dispute of fact which has any bearing on our conclusions, and we can set out the events relatively briefly.

11. The claimant was employed by the Vehicle and Operator Services Agency (VOSA) as a Vehicle Inspector from 4th October 2009 until his dismissal on 1st February 2019, the decision to dismiss having been made, and notice given on 27th November 2018. The claimant had been off sick since August 2017 and had been unable to return up until the point of his dismissal. From late August 2018 the claimant was represented by his trade union representative Dave Allen, National Secretary of Prospect. There was a formal sickness absence review meeting held on 5th September 2018, followed by another on 15th November 2018 following which the decision to dismiss the claimant was communicated by letter on 27th November 2018. It is not contended that the dismissal was unfair.

12. Given the claimant's lengthy sickness absence one possibility was that he would be eligible for ill health retirement. We have not seen the details of the Ill Health Retirement Scheme, but in outline it is not in dispute that had the claimant been eligible he would on dismissal have been entitled at least to receive his pension without actuarial reduction for early receipt, or perhaps even enhancement. However, an Occupational Health report of 29th August 2018 was not supportive of an application, the view being expressed that it was "*highly unlikely that Mr Coombes would be considered eligible for consideration for ill health retirement*…". As he had no medical support for an application the claimant did not formally submit any application for ill health retirement.

13. The claimant was 64 at the date of his dismissal and was a member of the "Nuvos" pension scheme under which the normal pension age is 65.The claimant's pension entitlement was £6,253.80 at the date of termination, but he elected to commute part into a lump sum of £25,082.02, reducing his annual pension to £4,020.30.

14. As a result of early termination of his employment due to ill health the claimant was also entitled to an "efficiency payment" (full details of the calculation of which are set out in the description of the scheme below) of £17,436.52 which was subject to a taper reduction of 30/36ths giving a final figure of £2,906.07.

The Scheme

15. The tribunal has heard evidence from Peter Spain (Head of Pensions Technical and Casework Team in the Civil Service and Royal Mail Directorate of the Cabinet Office) in respect of the various schemes and the historical background. His evidence is not challenged in this respect and forms the basis of the outline set out below.

16. The respondent operates two overarching pension schemes, The Principle Civil Service Pension Scheme ("PCSPS") and Civil Servants (and others) Pension Scheme ("CSOPS"). Within that framework there are different pension schemes, membership of which depends upon the date employment commenced. As the claimant commenced employment in 2009, he fell within the "Nuvos" Scheme, which is a defined benefit based on career average earnings scheme and which has a normal pension age of 65.

17. In addition to the pension schemes there is the Civil Service Compensation Scheme ("CSCS") which includes provision for making compensation payments to civil servants whose employment is terminated early on a number of grounds including redundancy and ill health. In respect of ill health termination the payments are described as "efficiency payments" ("inefficiency payments" in earlier iterations of the scheme). All the schemes are statutory schemes.

18. It is not necessary to set out the full history of the scheme (although for the avoidance of doubt we accept all of Mr Spain's evidence in respect of it). In outline prior to the establishment of the CSCS in 1995 as a separate scheme, the rules relating to early termination compensation payments were contained within the PCSPS itself. Despite the formal separation since 1995, the schemes are linked in that an employee is only eligible for an efficiency payment under the CSCS until they reach normal pension age under the relevant pension scheme. Once they are over normal pension age within the particular pension scheme they cease to be eligible for a CSCS efficiency payment.

19. The scheme rules have in fact changed little since they were introduced as Flexible Early Severance (FES) payments as part of the PCSPS in 1987/88 following a review in 1983; having been agreed with the relevant trade unions at that point. Specifically, as we understand it, the taper provisions with which we are concerned are identical to those agreed at that point and have not in substance changed since. We have, however, no evidence as to the reasons for the adoption of any of the scheme rules and in particular no evidence as to the reasons for the adoption of a taper provision either in principle or in respect of its length.

20. The FES provisions moved into the CSCS in 1995, although the complete provisions were only transferred in 1998 at which point responsibility for determining the appropriate payment under the scheme was transferred to the employing department. In 2003/4 work began on reform of the CSCS and new scheme rules were proposed. However, they were the subject of a successful application for judicial review by the PCS union in 2010. A new version of the CSCS was laid before

Parliament in December 2010 but involved no changes to the provisions for compensation for efficiency payments and none were proposed by the trade unions.

21. In November 2016 new guidance was issued as to determining the appropriate amount of payment under the scheme. These are not specifically relevant for our purposes as they set out the basis for which compensation under the scheme can be reduced to reflect, for example, the failure of an employee to co-operate in obtaining medical evidence. In this case no such reduction was contemplated or made, and the claimant received 100% of the compensation for which he was eligible.

22. As set out above an employee is eligible for an efficiency payment under the CSCS if they are dismissed before normal pension age in the scheme of which they are a member on the grounds of ill health, but where they do not meet the criteria for ill health retirement. Section 11.4 requires the employing department to consider whether a payment should be made. A decision not to pay or to reduce the payment is permitted under the scheme but is in practice rare. In this case the first respondent concluded that the claimant was entitled to a 100% efficiency payment without reduction. The maximum payment is calculated according to the following formula (nothing turns on the concepts of reckonable or qualifying service for our purposes):-

- Two week's pay for each year of reckonable service during the first five years of qualifying service; plus
- Three weeks' pay for each year ..during the next five years.. ; plus
- Four weeks' pay for each year.. after the first ten years..; plus
- Two weeks' pay for each year of .. service after the fortieth birthday.

23. Applying that formula gave the headline figure of £17,463.52. However, the scheme provides for a taper which reduces the payment by 1/36th per month for the three years prior to normal pension age. This resulted in a reduction of 30/36ths giving a payment of 6/36ths and a final figure of £2906.07.

Legitimate Aim/Proportionality - Evidence

24. The only evidence adduced by the respondents as to its legitimate aims and the proportionality of the taper also comes from Mr Spain. Whilst there is no challenge factually to his evidence the claimant's position (as set out below) is that it fails to establish either. There is no specific evidence before us as to why the taper was originally adopted or that there has ever been any specific reconsideration of it. The evidence of Mr Spain is therefore necessarily an ex post facto assessment of the scheme as a whole, and the taper in particular.

25. The overall purpose of the Scheme "*..is to provide some compensation to employees who are fairly dismissed for ill health, but not medically retired, and who would not otherwise be entitled to compensation for loss of employment. Such compensation seeks, so far as appropriate and reasonable, to bridge the gap between the date of dismissal and the date on which the individual may obtain alternative employment, or otherwise receive their full pension at normal pension age*." The CSCS compensation

should not be viewed in isolation but as part the overall package of termination benefits which includes in particular the right to receive a pension from the normal pension age of the particular scheme. As such normal pension age is central to the scheme as it is the point at which the employee pivots from one set of rights (CSCS benefits) to another (pension), "*The importance of normal pension age is of course that at that point a departing employee is entitled to receive their full annual pension, with the potential for commutation in order to receive a substantial lump sum*." Specifically in relation to the taper he contends that the analysis annexed to his witness statement (see below) "..*shows that the taper operates appropriately to reduce differences in compensation relative to loss at different ages*."

26. The matters summarised above, and in particular "bridging the gap" are described as the "key policy aim". He describes "other aims" as being civil service ethos; workforce planning; administrative workability; and the protection of public funds and budgetary constraints. The rules of the scheme need to be simple, clear and straightforward to administer given that they apply to some 464,000 civil servants, and as such it would be hugely expensive and time consuming to attempt to tailor the efficiency payment to each individual employee by for example, attempting to make some form of individualised assessment of the likelihood of obtaining future employment.

27. In our judgement the distinction between the key aim and other aims is sensible and necessary, at least in the circumstances of this claim, as the other aims relate to the scheme more broadly, whereas it is only the "key aim" that relates specifically to the taper.

Analysis Document

28. Annexed to Mr Spain's witness statement is a document "Analysis of loss and compensation for efficiency exits in the Civil Service by age". The claimant in his closing submissions submits that this document should either be ignored completely or a very least treated with significant caution (however, for the sake of completeness we should note that there was no application before us at any stage that it should be excluded). Firstly, the underlying data from which it has been compiled has not been disclosed to the claimant which necessarily breaches the continuing disclosure obligation. This also prejudices the claimant in that he cannot interrogate the data to test the accuracy of the conclusions, nor subject the data to further analysis. Secondly, and surprisingly given that it was produced specifically for the purposes of this litigation, it does not analyse the specific scheme in question, nor any comparative data based on the claimant's personal circumstances, with the result that it has little bearing on the scheme in issue before us.

29. Whilst we accept that we should exercise caution before placing too much weight on the analysis for the reasons given by the claimant it does in our view provide some useful comparative data. The page "Impact of the Taper" provides a comparison using the Classic pension scheme which has a normal pension age (NPA) of 60 and assumes an annual salary of £30,000 and twenty years of service. This differs from

the actual scheme in this case, the Nuvos scheme which has an NPA of 65 and does not reflect the claimant's actual length of service or salary. It follows automatically that we cannot assume that this necessarily maps across to the specific effect on the claimant with a different NPA and different length of service. However, given that we are concerned with whether the taper can be justified even a hypothetical demonstration of its effect is necessarily useful.

30. The data shows that, making the assumptions set out above, that with the application of the taper income received (pension and lump sum, and efficiency payment) expressed as a percentage of income lost (loss of potential earnings and loss from taking early access) gives a range of 33% (age 60/61) to 43% (age 57) over an age range from fifty five to seventy (the majority fall in the high thirties/low forties). By contrast the same percentages without the taper rise from 39% at fifty-five to 96% at sixty-five and then fall back to the low to mid-eighties from that point until age seventy. Specifically during the period of the taper the percentages fall from 43% to 33% with the taper, but rise from 47% to 67% without it. In very broad terms the disapplication of the taper halves the potential percentage loss.

Actuarial Reduction Buyout Comparison.

31. One of the points made by the respondent is that the proportionality of the taper has to be judged against the purpose of the scheme (the "key aim" described above), which in broad terms is to "bridge the gap" between dismissal and normal pension age. In this context they have provided an actuarial buyout comparison. Unlike the analysis set out above this has been specifically calculated against the sums which the claimant himself would have, and eventually did receive, under the efficiency scheme. They range from £17,948.41 at age 62 to £3546.67 at 64 years 5 months, the age at which the claimant retired. At each point they have compared the amount the claimant would have received as an efficiency payment with the amount necessary to buy out the actuarial reduction, and thus receive a full pension at that age. At each age there is a shortfall which ranges between £300 - £600. The respondent contends that this is significant in that the lump sum received as an efficiency payment at each age broadly matches the amount necessary to obtain a full pension without actuarial reduction and thus puts the employee in a broadly comparable position to that which they would have been had that been the normal pension age. Given that the efficiency payment scheme ends at normal pension age the taper reflects the underling purpose of the scheme. It equally follows that if the claimant is correct and should have been entitled to receive the full payment without any tapering reduction, that at 64 years and five months he could have used part of the efficiency payment to buy out the actuarially reduced pension and be left with a significant lump sum. In the absence of a taper those nearing retirement would therefore obtain a significant benefit in comparison with those retiring after normal retirement age.

Legitimate Aims

32. The respondent submits that it has the following legitimate aims:-

(1) providing appropriate and reasonable compensation to employees who are dismissed on grounds of ill-health but who would not otherwise be legally entitled to any compensation for loss of employment;

(2) bridging the gap between the date of dismissal and the normal pension age, at which date the employee may receive their full pension;

(3) allocating necessarily limited public funds in a fair and equitable manner amongst eligible employees;

(4) appropriately taking into account both length of service and the age at which such service is provided, while maintaining equity as between those close to normal pension age and those at or beyond it, as well as between older and younger employees more generally; and

(5) applying a clear and transparent set of rules in the interests of efficient administration.

Proportionate Means

33. The respondent contends that the taper is a proportionate means of achieving these ends for reasons summarised at paragraph 12 of its opening submissions:-

The Taper is carefully calibrated to reduce the amount of compensation payable in accordance with the proximity of the employee to normal pension age. It is perhaps obvious, although nonetheless worth articulating, that the extent of any loss of opportunity for an employee to continue to receive earnings is bound to be different as between a person aged (say) 62 at the date of dismissal and a person aged 65. The Taper seeks proportionately to take such differences into account by reducing the compensation payable by 1/36 for each additional month of proximity (from age 62 onwards) to normal pension age.

Claimant's Position

34. The claimant challenges both the legitimate aim and proportionate means on a number of grounds. We will start with those aspects of the claimant's submissions which deal specifically with Mr Spain's evidence. A number of legitimate aims are asserted in Mr Spain's witness statement which are not accepted by the claimant. Firstly, he submits (closing submissions para 6.17.1.1) that the taper cannot be justified by reference to the benefits referable to age in other parts of the scheme. This appears to us clearly correct. Secondly (para 6.17.1.2) he submits that the taper cannot be an appropriate means of achieving the aim of bridging the gap if the aim is to bridge the gap between dismissal and normal retirement age (as opposed to normal pension age). This is obviously correct, not least because there is no such age as normal retirement age. However, and as set out above, the respondents' case

is not that the gap to be bridged is between dismissal and normal retirement age, but normal pension age,

35. Thirdly he submits (6.17.1.3 / 6.17.3) that the asserted need to administer the scheme according to clear and simple rules and administrative workability given a workforce of some 464,000 is unsustainable given the evidence that there are on average some 500 – 1,000 efficiency payments per year. He makes the same point (6.17.2) in relation to workforce planning given that ill health dismissal are necessarily unplanned events. Whilst we accept these submissions, they do not appear to us to address the central issues in the case as these "other aims" do not centrally concern the taper in any event.

36. The submissions specifically concerning the taper can be summarised as follows:-

i) The history set out above demonstrates that the taper is a hangover from a scheme that was implemented prior to the introduction of the age discrimination legislation. Even if we had evidence for the reasons for introducing the taper, which we do not, that reasoning would not assist as the decision was taken in an entirely different legislative environment. The respondents themselves have recognised this in their attempts to review the scheme which have not thus far survived judicial review. It follows that the respondents are seeking to advance an ex post facto justification for it which must be analysed with great care and caution (Seldon)

ii) For the reasons set out above the evidence before us relating to the legitimate aims and proportionality derives essentially from the analysis annexed to Mr Spain's witness statement which we should either ignore completely or place very little weight on (for our conclusions as to which see above).

iii) In addition, even if bridging the gap is a legitimate aim there is no evidence that that is the purpose of the taper and/or that it is appropriate or reasonably necessary to achieve that aim; and, even if the aim is legitimate there were less discriminatory methods of achieving that aim and the taper therefore fails the test of proportionality.

iv) That the respondent has failed to comply with the public sector equality duty pursuant to s 149 Equality Act 2010.

Public Sector Equality Duty

S 149 (1) Equality Act 2010

A public authority must, in the exercise of its functions, have due regard to the need to–

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to–

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

37. The starting point of the claimant's submissions concerns the public sector equality duty (PSED). The claimant submits that the respondent has failed "..*to comply with (or even think about) its duties in the exercise of its functions (including maintaining a scheme) to have due regard to the need to achieve the elimination of unlawful discrimination..*" . He relies on *R (Elias) v Secretary of State for Defence [2006] 1WLR 3213,* and in particular para 133 (Mummery LJ) for the proposition that a public sector employer will find it more difficult to justify discrimination if it has not complied with the duty:-

"Thirdly, this court must give effect to section 71 of the 1976 Act, which placed on the Secretary of State a statutory duty which he has failed to perform. I think that this adds to the difficulties of the Secretary of State in now attempting to justify the imposition of the birth link criteria. He has to justify an act of discrimination committed in the carrying out his functions when, in breach of an express duty, he failed even to have due regard to the elimination of that form of unlawful race discrimination. He has to justify something which he did not even consider required any justification. In these circumstances the court should consider with great care the ex post facto justifications advanced at the hearing. I shall return to this point later."

38. The claimant also relies on a passage in the judgment of Arden J to similar effect (para 274*):*

''It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the

mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. It is not possible to take the view that the Secretary of State's non-compliance with that provision was not a very important matter. In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play. I express the hope that those in government will note this point for the future."

39. The claimant submits that if it is correct that compliance with the duty is an "..*integral and important part*.." of fulfilling the aims of anti-discrimination legislation then the failure to do so at least severely circumscribes the capacity to justify admittedly discriminatory provisions.

40. However, in his submissions the claimant goes significantly further to contend that in the absence of complying with the duty "..*the ET must consider that an aim cannot be considered to be legitimate if R has not shown that in maintaining it, it had due regard. In short R cannot rely on an illegally derived aim. If the PSED is not observed the decision to adopt a particular aim (or rely on it in litigation) cannot be considered lawful".* (Skeleton argument para 5.3) Put simply if this submission is correct and the aim is rendered unlawful and not capable of justification by the failure to adhere to the PSED he is bound to succeed.

41. The respondent makes a number of points about the claimant's reliance on the PSED. Firstly (see s156) a failure in the performance of the duty does not confer a cause of action at private law; secondly that the duty is only to have due regard to the need to achieve equality; and that in fact although the application for judicial review succeeded it was held that the Minister had complied with the section 149 PSED duty *(RPCS Union) v Minister for the Cabinet Office [2017] EWHC (admin) para83 -87*). In oral submissions Mr Tolly Q.C. submitted that there is no authority, outside applications for judicial review, in which a failure to comply with the duty has been apparently argued, let alone held to prevent the employer from being able at least to attempt to justify an otherwise discriminatory provision in the Employment Tribunal. To the last point Mr O'Dempsey contends that every good point has to be taken for a first time, and that it is therefore no answer to say that it has not been taken before.

42. Our conclusions are firstly that we accept the claimant's primary factual contention that there is no evidence before us of any compliance with the duty in general in relation to the scheme, and in particular no evidence of consideration of the taper specifically. We accept that as a result we are required to exercise great care in examining any ex post facto justification (Elias), but do not accept the claimant's submission that the failure to comply with the duty automatically renders any aim unlawful. The proposition that an aim is "illegally derived" if the PSED has not been complied with and is necessarily unlawful and therefore unjustifiable is not one that we can identify from the authorities. If an aim is rendered unlawful (whether in adopting or maintaining it) by the failure to comply with the PSED and is therefore not legitimate, reliance on it is not just more difficult than if the PSED was complied with but impossible. However, we have concluded that we are bound to follow the *Elias* formulation and conclude that the aim is capable of being justified albeit that we have to exercise significant care in the assessment of an ex post facto justification in the absence of compliance with the duty. As a consequence, in our judgement the

failure to comply with the PSED adds little to the requirement which applies in any event, to consider any ex post facto justification with great care (Seldon), and it follows that whether by reason of *Elias* or *Seldon* we effectively arrive at the same point.

Less discriminatory means of achieving the aim (Claimant's submissions)

43. The claimant contends that although there is no obligation on him to assert or demonstrate a less discriminatory means of achieving the aims, that there are ways of doing so (skeleton argument para 6.18). These are the use of individualised assessment; the removal of the taper; the use of a longer taper logically linked to the taking of early retirement; or the use of one of the above systems in relation to the Nuvos pension scheme.

44. The individual assessment proposition is effectively that each individual potentially affected by the taper should have the opportunity to appeal so as to argue for the removal or reduction of the taper, for example and as in the case of the claimant, so as to allow him to argue that he intended to work beyond normal retirement age for the particular pension scheme. If the taper were removed for those employees it would not produce a windfall benefit but to the contrary would provide an mechanism for bridging the gap between dismissal and their actual intended retirement age. The claimant points to the fact that the scheme already allows for a reduction of up to 100% of the amount payable based on an assessment of the individuals conduct and poses the question rhetorically of why similar individual consideration cannot equally reduce the amount of the taper. It would effectively be a matching provision allowing the specific consideration of individual circumstances.

45. The second proposition appears to us simply another way of expressing the first in the disapplication of the taper to specific individuals.

46. The third is that there is no logical basis for a three-year taper and that to be proportionate it should be longer and have a specific logical starting point.

Less discriminatory means of achieving the aim (Respondent's submissions)

47. We will deal with the propositions in the reverse order as the third is in our judgement the easiest to resolve whilst the first has caused us most difficulty.

48. In respect of the third the respondents point out that it would in fact be more discriminatory and would therefore require greater justification. For example, a five-year taper would capture more people, and would also result in lower awards to those who would be caught by a three-year taper. In the claimant's case it would have resulted in an award of 6/60ths rather than 6/36ths. Given that his primary position is that the taper should be removed altogether, the proposition that it should lengthened and result in a smaller award is a counter intuitive one. In our judgement this must be correct. In the context of a case in which we are asked to conclude that

the taper provision is unjustifiable the proposition that it ought to be lengthened is essentially untenable.

49. In respect of the first the respondent submits (closing submissions paras 24(6) – (7)) that adopting such a discretion would be "both invidious and Impracticable". It is invidious firstly because it would involve determination of the individual's employment intentions and the prospects of individual employees obtaining employment after termination; and secondly because to it would in essence involve some form of means testing. It is impracticable as it would involve individualised assessment of every tapered reduction, which would result in a reduction in the consistent application and the transparency of the scheme. Fundamentally the assessment of individual circumstances is not the purpose of the scheme. The only factor which is taken into account is proximity to normal pension age precisely because the scheme forms part of an overall package of benefits available to employees. That overall package is not the same after normal pension as it is before it.

50. We confess that we have found this issue a difficult one to resolve. The claimant is clearly right to point out that the scheme already provides for a degree of managerial discretion in the amount to be awarded; and it is not illogical to contend that if there is a discretion to disapply or reduce the amounts received under the scheme in appropriate cases why should there not be a matching managerial discretion to reduce or disapply the taper in appropriate cases. There is however, in our judgement very significant force in the respondent's submissions. Given that there is no challenge in this litigation to the cut-off point of eligibility being normal pension age, and give that there is nothing in the scheme to allow for consideration of individual circumstances or potential losses in the amount paid respect of the period prior to normal pension age why should individual intentions post normal pension age be treated differently?

51. In the end we have concluded that in our judgement the claimant's argument founders on one central point. If the aim of bridging the gap between dismissal and normal pension age is a legitimate aim then it is in our view necessarily not proportionate to require consideration of possible post normal pension age events. The disapplication of the taper would only be appropriate if the aim of the scheme were to bridge the gap between dismissal and retirement age as this would necessarily require consideration of individual circumstances. In the end we have concluded that the respondent is correct and that in reality this is not a less discriminatory method of achieving the legitimate aim, but a means of achieving a completely different aim of compensating employees up until retirement age.

52. It follows that although there is no burden on the claimant, that we are not persuaded that any of the examples given amounts to a less discriminatory method of achieving a legitimate aim.

Overall Conclusions

53. As set out above the respondents rely on five legitimate aims and contend that the taper is a proportionate means of achieving those aims. At the risk of taking too atomistic an approach and/or of impermissibly eliding the two questions we are not persuaded on the evidence before us, that there is a sufficient evidential base in respect either of the aim or proportionality in respect of three of them.

54. The third is "*allocating necessarily limited public funds in a fair and equitable manner amongst eligible employees."* Whilst that as a general proposition may be a legitimate aim we have no evidence, or at least no sufficient evidence in our view to hold that the taper is a proportionate means of achieving that aim. There is no evidence as to the extent to which the costs of the scheme would rise in the absence of any taper and even assuming that it would how that would affect the fair and equitable distribution between employees.

55. The fourth, "*appropriately taking into account both length of service and the age at which such service is provided, while maintaining equity as between those close to normal pension age and those at or beyond it, as well as between older and younger employees more generally;"* in our view poses very considerable conceptual and practical difficulties as it appears to require us to identify as legitimate aspects of the scheme which are based around age and length of service. It is explicitly, at least the claimant's case, that we should only concern ourselves with the taper and not consider other aspects of the scheme which might obviously be open to challenge by groups or individuals disadvantaged by them. One of the difficulties of this case is exemplified by reliance on this as a legitimate aim given that age is central to many aspects of the scheme. Length of service, which is necessarily a proxy for age is in part determinative of the amount of any award, as is service over the age of forty which is necessarily directly age related; and benefits under the scheme cease at normal pension age. Whilst none of those elements of the scheme are challenged in this case it is not at all obvious that they could not be. In our judgement in the absence of us being invited to consider the scheme as a whole, and without submissions or evidence as to it, we should be very slow to accept as a legitimate aim the age-related aspects of the scheme. In addition the claimant is clearly right to assert that a discriminatory element of the scheme which works to his disadvantage in reducing the amount he receives by reason of his age cannot be justified by reference to other potentially discriminatory elements of the scheme which work to his advantage in increasing the amount he receives by reason of his age.

56. For the avoidance of doubt we are not expressing any view as to whether those aspects of the scheme can or cannot be justified (in respect of which we have no evidence or submissions as the issues are not before us) but simply take the view that as we are being invited to assess the justification of the taper in isolation it necessarily cannot be justified by aims which are at least potentially discriminatory.

57. The fifth aim is *"applying a clear and transparent set of rules in the interests of efficient administration*." In our judgement this does not greatly assist the respondent in this case given that the scheme would be equally clear and

transparent if the taper were removed as the claimant contends it should be. It my well be a legitimate aim in respect of the scheme as a whole but does not appear to us to assist in the analysis of the taper in particular, which is the question before us.

58. The first two proposed legitimate aims can in our view be considered together: *(1) providing appropriate and reasonable compensation to employees who are dismissed on grounds of ill-health but who would not otherwise be legally entitled to any compensation for loss of employment; (2) bridging the gap between the date of dismissal and the normal pension age, at which date the employee may receive their full pension.*

59. In our view the first legitimate aim set out above is necessarily legitimate. The CSCS bestows a benefit on employees who would otherwise be dismissed without compensation other than notice pay. In our judgment the aim of assisting employees who are dismissed by force of circumstance and through no fault of their own by the provision of a financial benefit is self-evidently legitimate.

60. The second, "bridging the gap", arises from the fact that entitlement to the benefit ceases at normal pension age. As the respondent points out, and as we accept there is no challenge in this litigation to that aspect of the scheme. In the absence of such a challenge it logically follows that the purpose of such a payment ceases to apply at normal pension age when the employee is able to access the pension benefit provided by the employer. It equally follows in our view that bridging the gap is a legitimate aim.

61. In terms of the requirement that the legitimate aim be a social policy objective we firstly note that other than by reference to the PSED the claimant does not specifically challenge the aims of the scheme. In any event this appears to us to fall squarely within the broad category of intergenerational fairness, not least because it falls within the examples of intergenerational fairness set out in the supplement to the EHRC Employment Code " Cushioning the blow for long-serving employees who may find it hard to find new employment if dismissed."

62. Thus, the question is whether tapering the benefit is a proportionate means of meeting either aim. In our judgement the critical aim is the of bridging the gap. This of itself devolves to two questions. Is a taper in principle proportionate, and if so is this particular taper a proportionate means of achieving the aim of bridging the gap?

63. In terms of the general point we have been referred by the respondent to Loxley v BAE System Land Systems Ltd (EAT) [2008] ICR and in particular paragraph 39 of the judgment of Elias P : *"We recognise that there are many employers who adopt redundancy schemes of this kind. We do not say for one moment that it may not be justified to exclude those who are entitled to immediate benefits from their pension fund from the scope of a redundancy fund. Moreover, in such circumstances tapering provisions of a kind adopted in this case will, we suspect, be very readily justified. They would be necessary to ensure equity as between those close to retirement and those in retirement receiving pensions. However, it is not in our view inevitably and in all cases justified for those entitled to an immediate receipt of a pension to be*

*excluded from the redundancy scheme. Ultimately, it must depend upon the nature of both schemes." (*And see also the comment of Underhill P in Kraft Foods Ltd v Hastie (EAT) [2010 ICR (para119b))

64. In this case, for the reasons set out above the first point identified by Elias P (as he then was) of the justification for excluding those from benefits under the terms of the scheme at post pension age do not arise in this case. However, the second does. The argument summarised in that paragraph encapsulates the respondents' position on proportionality. The existence of a taper is necessary to ensure equity as between those two groups. In our judgement that is correct. If the aim of bridging the gap is legitimate, which in our view it is for the reasons set out above, it is necessarily legitimate to taper the benefits as the temporal gap decreases, to reflect the decreasing losses (essentially for the same reasons as set out at paras 49-51 above).

65. That leaves the question of whether this particular taper is proportionate to the legitimate aim. As is set out in the claimant's submissions a logical starting point might be to begin the taper earlier. However, for the reasons set out above and identified by the respondent that would be more discriminatory (see para 47 above). In our judgement it follows that it would be counter intuitive for us to hold that the taper was not justified because it was insufficiently long. There is no alternative submission that it is in fact too long and should be shorter. Even if there had been the shorter the taper the nearer it approximates to a cliff edge, which is at least in part one of the events a taper seeks to avoid. In our judgement the most significant evidence is that relating to actuarial buy out (see para 30 above.) At each age during the taper period there is broad correspondence between the amount payable as an efficiency payment and the amount need to buy out any actuarial reduction for early receipt. This is our judgement has two consequences. Firstly it helps, as the respondent submits, to demonstrates that the taper is proportionate since it broadly permits the recipient to bridge the gap to normal pension age. Secondly it demonstrates that the claimant's contention that the taper should be disapplied would result in a disproportionate benefit in that an unreduced payment would have allowed him to have used the actuarial buyout provisions to obtain a pension and be left with a windfall benefit. Given that the amount required for an actuarial buy out decreases the nearer the dismissal is to normal pension age any untapered efficiency payment would increase rather than decrease the disparity between those below and those above normal pension age. In our judgement this is the most significant evidence supporting the proposition that the taper is a proportionate means of achieving the aim of bridging the gap.

66. Looked at overall we have reached the following conclusions.

i) We have no evidence as to why the taper was adopted and we are therefore bound to consider the question of justification by reference to ex post facto analysis and arguments. Whilst this is permissible it requires us to consider the issue with great care, whether by reference to *Seldon* or *Elias*.

ii) We are satisfied that the respondent has established two legitimate aims.

iii) We are satisfied that the taper was a proportionate means of achieving the legitimate aim of bridging the gap.

67. For those reasons the claimant's claim must be dismissed.

Judgment entered into Register
And copies sent to the parties on

.....8/12/2020.....
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for Secretary of the Tribunals

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EMPLOYMENT JUDGE

Dated: 25th November 2020