Case Numbers: 3327556/2019, 3327956/2019 and 3301642/2020

EMPLOYMENT TRIBUNALS

Claimants **Respondent**

(1) Dr G Moss
(2) Dr K Smith
(3) Ms J Wassell

v Buckinghamshire New University

Heard at: Watford **On**: 4 and 5 October 2021

Before: Employment Judge Hyams **Members:** Ms S Hamill
Mr A Scott

Representation:

For the claimants: Mr N Toms, of counsel
For the respondent: Ms E Misra, of counsel

RESERVED UNANIMOUS JUDGMENT ON A PRELIMINARY POINT

Assuming that (1) the respondent had a provision, criterion or practice ("PCP") of focussing the redundancy and restructuring which led to the claimants' dismissals on more senior roles/employees, (2) the respondent applied that PCP to all three claimants, (3) the respondent would have applied that PCP to persons who were younger than the claimants, (4) that PCP put members of staff above the age of 55 at a particular disadvantage when compared with members of staff below that age, and (5) that PCP put the claimants at that disadvantage, that PCP was a proportionate means of achieving a legitimate aim.

REASONS

Introduction; the purpose of the hearing of 4 and 5 October 2021

1 The claimants are all former employees of the respondent and were all dismissed in August 2019 following a redundancy exercise. The claimants were all relatively senior members of the academic staff of the respondent and were

all above the age of 60 at the time of their dismissals for redundancy. They have all claimed unfair dismissal and indirect discrimination within the meaning of section 19 of the Equality Act 2010 ("EqA 2010") because of their age. The third claimant, Ms Wassell, also claims direct age and sex discrimination within the meaning of section 13 of the EqA 2010.

2 On 16 June 2020, Employment Judge ("EJ") Alliott, at the invitation of all of the parties, listed a hearing on 4 and 5 October 2021 to determine the following preliminary issue "in relation to the indirect age discrimination claims in all three cases:

4.1 assuming that the respondent had a PCP [i.e. a provision, criterion or practice within the meaning of section 19(1) of the EqA 2010] of focussing the redundancy and restructuring exercise on more senior roles/employees; and

4.2 assuming that the respondent applied that PCP to the claimant; and

4.3 assuming that the respondent applied or would have applied the PCP to persons with whom the claimant does not share the characteristic; and

4.4 assuming that the PCP put persons with whom the claimant shared the characteristic at a particular disadvantage when compared with persons with whom the claimants did not share it; and

4.5 assuming that the PCP put the claimants at that disadvantage;

4.6 if so, can the respondent show the PCP to be a proportionate means of achieving a legitimate aim."

3 On 14 September 2021, the solicitors acting for all three claimants applied on behalf of the first claimant (to whom we refer as Professor Moss because she was, while she was employed by the respondent, Professor of Management and Marketing and who is now an honorary Professor) for the postponement to the main hearing (which is currently listed to take place over 17 days, starting on 25 April 2022) of the determination of the question whether there was a legitimate aim in relation to her (alone). On 29 September 2021, EJ Alliott declined to deal with that application on paper and said that it could be renewed at the start of the hearing on 4 October 2021. It was so renewed, by Mr Toms. After much discussion with both counsel about the impact of the factors discussed in the judgment of Ellenbogen J sitting alone in the Employment Appeal Tribunal ("EAT") in *E v X, L and Z* (UKEAT/0079/20/RN; 9 and 10 December 2020) which indicated to us that it was not open to us to alter EJ Alliott's decision to list the preliminary issue in any way since there was no material change of circumstances since that decision was made, we concluded that we had no choice but to determine the issue as it stood, i.e. by reference to all of the

claimants. However, after we had read the papers and started to hear oral evidence, EJ Hyams said that he doubted the wisdom of the determination of the issue in question as a preliminary one (at all, i.e. in relation to all of the claimants), and he asked Ms Misra whether the respondent was willing to agree to the issue not being determined by us. He did so on the basis that that was the only way in which we could lawfully avoid determining the issue as a preliminary one. Having taken careful instructions, Ms Misra said that the respondent was not willing to agree to that, even though the respondent did not accept that the claimed PCP had been applied as the issue listed for determination assumed.

4 We therefore did the best we could with the question which we were required to determine. In doing so, we had to consider the meaning of the term "the characteristic" in paragraph 4.3 that we have set out in paragraph 2 above. We assumed that it meant the protected characteristic of "age", but the question was, what age? In the circumstances described by us below, we decided that we would assume that the protected characteristic was the age of 55 or above. That issue was, however, not the subject of submissions to us, and we therefore concluded that we would make that assumption and that if either party took issue with the terms of our judgment given on that assumption, then they could apply for a reconsideration of the precise terms of the judgment.

The procedure which we followed and the evidence which we heard

5 We heard oral evidence from Professor Julie McLeod on behalf of the respondent. Professor McLeod was at the time of the claimants' dismissals the respondent's Pro Vice-Chancellor (Education).

6 We took into account a witness statement made by Ms Alexandra Bode-Tunji, who was, at the time of the claimants' dismissals, the respondent's HR Director. She did not give evidence to us. Professor Moss gave oral evidence. However, much of her evidence was not relevant to the issues which we had to consider. We had before us (and it was put before the respondent only a day before the hearing before us, we understood) a witness statement made by the second claimant, Dr Smith, but Ms Misra said that since there was nothing in it which was material to the issue before us, she did not need to cross-examine Dr Smith on its contents.

7 We had before us a bundle consisting of 456 pages.

8 Having heard and so far as relevant read that evidence and read the documents in the bundle to which we were referred by the parties, we made the findings of fact set out in the paragraphs immediately following this one. After stating those findings of fact, we refer to the relevant case law, after which we state our conclusions. In the course of stating our conclusions we respond to particular submissions made on behalf of the parties. While we do not refer to every

submission made by the two counsel, we took into account fully both of their helpful skeleton arguments and their equally helpful oral submissions.

Our findings of fact relevant to the preliminary point before us

The parties

9 The respondent is a higher education corporation within the meaning of the Further and Higher Education Act 1992. Technically speaking, the institution known as Buckinghamshire New University is an institution for whose conduct the respondent (i.e. the corporation with that name) is responsible, but for practical purposes in most circumstances no distinction is, or needs to be, drawn between the corporation and the institution. There was, however, a need to draw such a distinction here. We therefore refer below to the institution as "the university" and the corporation which is responsible for its conduct, i.e. the respondent, as "the respondent".

10 Before the claimants were dismissed for redundancy, they were employed in the following posts:

10.1 Professor Moss was Professor of Management and Marketing in the School of Business, Law and Computing;

10.2 Dr Smith was employed as a Reader in Criminology and Sociology in the School of Human and Social Sciences; and

10.3 Ms Wassell was employed as a Principal Lecturer in Service User and Carer Engagement in the School of Health Care and Social Work.

The circumstances in which the claimants were dismissed

11 The claimants were dismissed after a restructuring of the layer of staffing in the university in which their posts were all situated. That layer was the posts of Principal Lecturer, Reader, and Professor. Those posts were (in the circumstances which we describe below) replaced by the third to the sixth of the following posts:

11.1 Head of School

11.2 Associate Head of School

11.3 Professor (Research)

11.4 Professor (Education)

11.5 Associate Professor (Research), and

11.6 Associate Professor (Education).

12 The first two of those posts were introduced after 12 December 2017, which is the date given at the end of the document at pages 181-186 (i.e. pages 181-186 of the bundle; any reference below to a page is, unless otherwise stated, to a page of that bundle) with the names of Nick Braisby, Deputy Vice-Chancellor (as he was at the time; he later became the university's Vice-Chancellor, we saw from the document to which we refer in paragraph 36 below) and Lynne Warwick, Director of Human Resources at its foot. That document, entitled "Academic Restructure: Business Case" stated the purpose of the restructure in paragraph 2.5 on page 181, in the following manner:

> "The restructure proposed in this paper is intended to create better strategic alignment within and performance of academic units through adherence to the following principles. The principles are informed by the University's strategy, the need to expand and develop a more competitive portfolio, introduce synergies as well as economies of scale, and create academic units poised for growth. The principles are:
>
> - To create a flatter organisational structure with clearer line of sight, reducing the hierarchical nature of the current structure, and minimising the number of organisational layers between the University's executive and frontline delivery units.
>
> - To create, as far as is possible, a greater coherence to the work of academic units, through bringing together the work of cognate groups and to promote synergies between their component subject areas, enhancing capacity for innovation and growth.
>
> - To create academic units balanced for size, being large enough to generate economies of scale, but not so large as to become unwieldy and require further organisational layers and structures.
>
> - To create academic units more capable of improved performance, including being more responsive to the student experience enabling improved performance against a variety of key performance measures."

13 The rationale for that proposed restructure was stated in the four preceding paragraphs on the same page, which were in these terms:

> "2.1 The current academic structure accommodates approximately 260 FTE staff within 2 Faculties, 4 Schools and 15 Academic Departments. The structure carries a significant number of management posts, though not

all are filled — in principle, the structure requires 2 Deans of Faculty, 4 Heads of School, and 15 Heads of Academic Department or equivalent.

2.2 The current structure has not led to success in meeting the University's strategic priorities as reflected in key performance measures. Student recruitment has suffered as the course portfolio has become increasingly uncompetitive; student satisfaction has declined and is below sector average; degree completion rates, good honours, and graduate employability are all well below sector average. Levels of research activity and enterprise income generation are low.

2.3 The University's academic structure is typically found only in much larger institutions. For example, the University of Manchester is structured into Faculties, Schools, and Departments, but has the UK's largest on-campus student population of around 40,000. A single School at Manchester may contain around 1,000 staff, meaning the entire academic complement at Bucks could fit comfortably within a single School.

2.4 Many Universities have reorganised to adopt simpler and flatter structures. For example, London Metropolitan no longer has Faculties, but 6 academic Schools instead. LSBU has reorganised to remove Faculties and adopt a structure of 7 academic Schools. The University of West London is divided into 8 academic Schools. Southampton Solent operate 5 academic Schools with a total complement of around 260 academic staff, and around 50-60 in each School. The University of Westminster is currently reorganising into Schools from a structure of 6 Faculties, each containing several Departments."

14 The accuracy of those paragraphs (2.1 to 2.4) was not challenged, and we accepted that they were accurate.

15 The "current position" was described on the next page, page 182, in the following way (which was also not challenged, and we accepted was accurate):

"3.1 The current academic structure contains approximately 260 FTE staff.

3.2 Staff are structured into 2 Faculties, Design, Media and Management (DMM), and Society and Health (S&H), both of comparable size. Each Faculty is further structured into 2 Schools, and each School houses a number of academic Departments.

...

3.6 There are 15 Academic Departments (one is called an Institute) across the two Faculties, each headed by a Head of Academic Department (HoAD), though not all Departments have an extant Head.

3.7 Academic Departments vary in size with some being as small as 8 FIE.

4. The proposal

4.1 The proposal is for an academic structure that comprises 7 academic Schools, each headed by a Head of School reporting directly to the executive via the Deputy Vice-Chancellor.

4.2 The proposed structure largely preserves the organisation of the current subjects and Departments within DMM; there is some limited but beneficial reorganisation of Departments and subjects in S&H.

...

4.4 Each new School would be led by a Head of School (HoS) supported by Associate Heads of School (AHoS), the number of whom would reflect the size and complexity of the School. In smaller Schools there would be 1 AHoS. The current proposal is for 8 AHoS, with 2 such posts in the new School of Nursing."

16 On page 184, under the heading "Financial and staffing implications", this was said:

> "The existing structure presumes 2 Deans, 4 Heads of School, and 15 Heads of Academic Department (or equivalent). The proposed new structure would require 7 Heads of School and 8 Associate Heads of School. Since these roles are substantially different from existing there is a risk of redundancy to the current management post-holders."

17 That too was not challenged and we again accepted that it was accurate. The same was true of the following paragraph, under the heading "Number and description of affected colleagues":

> "It is proposed to disestablish the roles of Dean, Head of School and Director/ Head of Academic Department. The substantive holders of these posts are at risk of redundancy, 16 staff in total."

18 At pages 187-192 there was a document entitled "Workforce Reconfiguration — Phase 3" which, it was apparent from the use of the words "Council Advisory Group" immediately below that title, was produced by that Group. It was not dated, and it was not proved formally by the respondent: Professor McLeod did not refer to it in her witness statement and when she was asked about it by Mr

Toms in cross-examination, she said that she had seen it "in the pack", i.e. the hearing bundle, and that she saw that it emanated from the "Council Advisory Group" and assumed that she was in attendance at that group when the paper was produced, but that was all. In fact, Professor McLeod was employed by the respondent for only 14 months, and we inferred from the evidence before us that she started in the respondent's employment in September 2018. The document at pages 187-192 was probably produced before then, since it had at page 191 a table headed "Phase 3 – High Level Timeline", and the first entry was "SMT 1st Paper", which was to be completed by 1 October 2018.

19 In paragraph 6 of the document, at page 189, the "current scope of the project" was said to be

19.1 "All levels of the workforce and organisation" and

19.2 "All PSE and Academic employees at all campuses".

20 The reference to "PSE" was, we were told (and we accepted) a reference to the non-academic (i.e. the support) staff of the respondent. Professor McLeod described them to us as (and we accepted that they were) the "professional services" staff, i.e. "everyone bar the academics; quality assurance and business facing staff".

21 There was a further document with the heading "Workforce Reconfiguration – Phase 3" at pages 193-198. That, however, did not have under that heading the words "Council Advisory Group". The document was a revised version of the one at pages 187-192. It also included the paragraph that we have set out in paragraph 19 above.

22 Both versions of the document referred in paragraph 10.4 to "the £2.8m of savings required".

23 There was an updated document entitled "Transformation Phase 3 - 'Fit for the Future'", with the words "SMT – 3 December 2018" below that title, at pages 204-209. Professor McLeod was able to give direct evidence about that, as she was part of the "SMT", i.e. the senior management team, at that time. When it was put to her by Mr Toms that "the senior academic staff come into the frame it seems at some point between December 2018 and March 2019 when the paper is produced", she said this (as noted by EJ Hyams and tidied up for present purposes):

> "My recollection of that time is that all staff remained part and parcel of phase 3. Part of that was looking at the shape of the schools: their expertise and experience; and we wanted to restructure the top tier which was Principal Lecturers and Readers. They were just under the level of Professor and just above Lecturer in terms of their career grades. A very important part

> of phase 3 was to align those senior leaders as Associate Professors to ensure parity between academics who were focussed on teaching and learning and researchers. ... So the focus of phase 3 was removing [the roles of Principal Lecturer and Researcher] and assigning new terms of Associate Professor Education (or Teaching) and Associate Professor Research. Doing that helps to align with other institutions internationally; in the USA the term Associate Professor is a familiar term, and we wanted to be in line with the competition. We also wanted parity between education and research. We did not intend to change terms of Senior Lecturers and Lecturers."

24 We all checked our notes and agreed that Professor McLeod had in that part of her evidence (and the part immediately following it) omitted to refer to the post of Professor. With the reservation that we believed that to be an inadvertent omission, we accepted that evidence of Professor McLeod.

25 The next relevant event was the production of the document entitled "Item: For Discussion" by the "University Executive Team" as a "Report for consideration by the Board at its meeting on 12th February 2019". That document was at pages 211-214. It had these words in the first box on page 211 under the heading "Introduction/Background":

> "This has come to UET as part of a series of agreed updates on 'Fit for the Future'".

26 On page 212, under the heading "2. Objectives", this was said:

> "The objectives as presented previously remain the same at this stage
>
> 2.1. To realise the projected £2.8m in net savings within the 2019/20 academic year and ensure the financial sustainability of the University. This is critical to the University's financial plans to reduce the deficit and return to surplus, which is a key regulatory requirement for the Office of [sic; that was probably intended to be "of"] Students.
>
> 2.2. To ensure that the right people with the right skills are in the right place with the right attitudes at the right time at all levels within the University. Core to this will be:
>
> 2.2.1. Ensuring the University is well placed to achieve the stepped change in student satisfaction and experience. Key to this will be safe-guarding talent and identifying critical roles to support talent management and succession.

2.2.2. Ensuring the University has the skills, experience, attitude and resources required to meet the growth in core student numbers, the right partnerships, apprenticeships as well as research and enterprise

2.3. To develop organisation design principles, structures and roles to inform the size and shape of the University and ensure the Institution remains fit for purpose and is well positioned to meet future growth opportunities. This will also need to be aligned to other initiatives underway within the organisation such as:

2.3.1. Student Connect

2.3.2. Programme Renaissance

2.4. To ensure that there is a process in place through the transformation programme, to undertake Business Process Reviews across the University. This will be key to sustaining the changes in workforce and will help with identifying efficiencies and effectiveness of delivery".

27 That passage was not challenged by Mr Toms, and Professor McLeod said nothing specific about it. We accepted in those circumstances that it was a genuine reflection of the respondent's position at the time to which it related, i.e. the first part of February 2019.

28 The first time that the final four of the posts referred to in paragraph 11 above were proposed was in the document at pages 224-232. That was produced in advance of the meeting for which there was the agenda at page 223. The meeting was called "Fit For the Future Meeting" and was to take place on 7 March 2019 between 12:30 and 16:30. The first item on the agenda was "Review of Fit For the Future update paper". That was the document at pages 224-232. It was headed "UET Meeting - Fit For the Future" and was dated 7th March 2019. That had as its objectives in numbered paragraph 2 a revised set of the words set out in paragraph 26 above. The change was not material. What was material was the second bullet point in the first box on page 225 under the heading "Wave 1: May 2019 – Aug 2019", which was this:

"Change structure with no dependencies (Prof/PL/Readers)".

29 The proposed change to that structure was stated in the following passage, on pages 226-227 (the bold font being original):

"3.6 Proposal

3.7 The summary below provides an over view of the proposed changes across the University

3.8 **Associate Professor (Research), Associate Professor (Education), Professor (Research) and Professor (Education)**

3.9 The proposal going forward is that the University does will not [sic] require the roles of Principal Lecturer and Reader or the Professorial role in its current format.

3.10 The proposed School structures will require the newly developed roles of Associate Professor (Research), Associate Professor (Education), Professor (Research) and Professor (Education).

3.11 The newly developed proposed JDs for Associate Professor (Research/Education) and Professor (Research/Education) roles required within the University will inform the requirements for the proposed changes which will be managed using the proposed principles below:

- A business case will be developed to detail the proposed Associate Professor and Professor structure by School/Discipline.

- The Principal Lecturer, Reader or Professor employees where there is not a suitable role to apply for within the new structure, will be placed at risk of redundancy and commence a period of 90-day consultation period.

- The Principal Lecturer/Reader/Professor employees within each school/discipline where appropriate will be invited to be assessed for the relevant School/Speciality Associate Professor/Professor role. This will include the following activity
    - Written statement against the requirements set out in the proposed JDs and a set of KPis of the proposed roles. This will include expertise in discipline and pedagogy.
    - An assessment panel will be convened to assess the applications for these roles: PVC Education, Director of Human Resources & relevant Head of School. Each application will be assessed on the following criteria:
        - Written statement for suitability of role
        - Job description and person specification
        - Key ‘soft’ objectives expected within the role
        - Specific KPI objectives expected within the role

3.12 Successful employees at the end of this process [who have applied for] the Associate Professor/Professor role will have their new role confirmed.

3.13 Employees unable to meet the requirements for the Associate Professor/Professor role will have a formal consultation period commence and be issued with notification of redundancy."

30 In the next paragraph on page 227, it was said that the business case for the proposed changes was "to be developed by 31/03/2019". Mr Toms relied heavily on those words (and the words in the first bullet point of paragraph 3.11 which we have set out in the preceding paragraph above) as showing that the proposed change was not founded on any objectively justifiable basis. However, on pages 228-230 there was a series of sub-paragraphs introduced by the words on page 227 "From initial scope it is expected for the following Principal Lecturer/Reader and Professor roles to be affected:" which described the changes expected to take place in the various schools of the university, and they included all three of the relevant schools. The relevant sub-paragraphs were as follows:

"**5.2 School of Business, Law & Computing**

- To be assessed:
  - 2.0fte [i.e. full-time equivalent] Principal Lecturer Computing to be assessed for the Associate Professor (Education) Computing
  - 1.0fte Reader Role Computing to be assessed for the Associate Professor (Research) Computing
- To be placed at risk
  - 0.3 PL Business School
  - Professor Business School"

"**5.5 School of Human and Social Sciences**

- To be assessed:
  - 1.fte Professor to be assessed for the Professor (Research) Social Science (there is one Prof Research post in new structure)
  - fte Principal Lecturer Sport to be assessed for the Associate Professor Education (Sport) (there is one AP Education Sport post in new structure)
- To be placed at risk (i.e. role no longer required in new structure)
  - 1 fte Principal Lecturer – Social Sciences
  - 0.6 fte Reader – Social Sciences"

"**5.6 School of Health Care and Social Work**

- To be placed at risk (i.e. role no longer required in new structure)
  - 1 fte Principal Lecturer (CPPD) International

o 1 fte Principal Lecturer (Social Work) Service Users."

31 Under the heading "9. Next Steps" on pages 231-232, this was said:

> "Post this analysis session it is expected that follow on meetings will be arranged with each UET member, the appropriate Head of School or Directorate, Business Partner and TP Manager to:
> - Discuss outcomes
> - Discuss new structures and organisational design
> - Investigate additional proposals
> - Scope out a business case framework".

32 When cross-examined about that document, Professor McLeod said that the extent to which for example Dr Smith performed well and was popular as a lecturer was irrelevant to the decision to "disestablish" his post of Reader. She said (as noted by EJ Hyams) that his post as Reader was "substantially research focussed" and that it was "felt" that the areas of research "which were sociology moving into philosophy" were no longer required; putting it another way, she said that there was "no need for a Reader in sociology and a researcher with publications in sociology and psychology". She said also that Dr Smith was not (as it was put to her by Mr Toms) replaced by a lecturer, although the teaching element of Dr Smith's job "would have been supported on the range of courses taught by Dr Smith including Criminology by a new member of staff." We accepted that evidence of Professor McLeod.

33 Similarly, Ms Wassell's post was "disestablished", said Professor McLeod, because the post of Principal Lecturer in Service User and Carer Engagement was no longer required. It had, said Professor McLeod, a few years ago been important to make sure that the School of Health Care and Social Work was "engaged with external people who assisted with the courses" which the university led (and continues to lead), and Ms Wassell had been "involved in that very much", but now the role was no longer required, and the teaching which Ms Wassell had done was now being done by "new and existing members of staff". We also accepted that evidence of Professor McLeod.

34 When it was put to Professor McLeod that Professor Moss had been replaced by a cheaper, younger member of staff, she said that that was not the case. Rather, she said,

34.1 one module which Professor Moss had led had been taken by a Senior Lecturer before the current reorganisation and she (Professor McLeod) had been unable as a result of previous restructures to see who had made the decision that that should occur, and

34.2 the rest of the lectures that Professor Moss had delivered were "taken on by members of the business, marketing and HR team".

35 We accepted that evidence of Professor McLeod.

36 There was a document at pages 263-270 headed "Local Joint Committee Minutes", of a meeting of 29 May 2019 chaired by Professor Nick Braisby, who was referred to at page 263 as the university's "Vice Chancellor". On page 267, under the heading "Impact of [sic] staff", there was this bullet point:

> "Looking to establish Associate Professor roles within Academic Schools, Clinical Skills Tutors, and Graduate Teaching Assistants. These will help us address the high staff costs and high staff to student ratio."

37 That was said by Professor McLeod in response to the proposition that the intention was simply to bring in cheaper, more junior staff to replace senior staff, to be part of the transformation programme which was aimed at ensuring that staff costs would be less than 50%, which involved "a balancing act" as far as student recruitment was concerned. Professor McLeod also said that the "new posts" were introduced for reasons relating to the "staff/student ratio". She said that the university had grown in the areas of apprenticeships, computing and sport, and needed to have more staff to teach students. She also said that the focus was on the future, and that while one objective was the saving of money, the main focus was on "the structures; getting the schools structured and realigned, ready for the future." We accepted that evidence of Professor McLeod, on the basis that she necessarily depended on what she was told by the staff of the schools in question: she was a Professor of Immunology and therefore necessarily had to rely on what she was told by specialists outside the area of biomedical sciences.

38 When it was put to Professor McLeod that the fact that an academic specialises in one area does not mean that she or he cannot offer something of value in another area, Professor McLeod acknowledged that that was true to an extent, but only to an extent.

39 There were at pages 279-293 and 294-314 two equality analyses of "Transformation Programme Phase 3", the second of which appeared to be a more developed version of the first. They both showed, however (at pages 280 and 295 respectively), that the implementation of the procedure would impact on the following posts:

> "• Associate Head of School x2
> • Principal Lecturer x 7
> • Reader x2
> • Professor x1
> • Senior Lecturer x2".

40 We noted that Phase 3 was evidently applicable to at least some of the holders of the new post of Associate Head of School. The two equality analyses both stated (at pages 281 and 296 respectively) that "There is no evidence to indicate that the procedure will have an adverse impact on any of the protected categories." However, it was clear from the table on page 291 with the heading "Age" that only employees aged 55 and above were affected: of those selected for redundancy, 89% were aged 55-64 and 11% were aged 65-74. It was therefore difficult to understand why the statement that ""There is no evidence to indicate that the procedure will have an adverse impact on any of the protected categories" was made.

41 When pressed by Mr Toms on the issue of the financial benefit of carrying out the restructure which led to the claimants' dismissals, Professor McLeod said (and we accepted) that the respondent had a strategic objective of getting salary costs below 50% of the respondent's income, and that such an objective was one of "fiscal propriety", which was "one of the stated aims of the [Phase 3] programme." When it was put to her that staff costs in the sector are on average 53.5% of income so that redundancies were not necessary, Professor McLeod said (and we accepted) that "every business including a university requires a surplus" of income over ongoing expenditure in order to be able to invest in for example new buildings and new members of staff, and that the "regulator", which we understood to be the Office for Students ("OfS"), "says that between 5% and 10% shows financial stability". She said also (and we accepted) that the respondent was "still quite lean but going in the right direction" and that the respondent "could not have used that surplus to retain staff".

42 It was also put to Professor McLeod that aspects of the process were unfair, such as putting Professor Moss into a pool of one and not permitting her to apply for the role of Professor or Associate Professor in the new structure. Professor McLeod said that the respondent had "revisited the pooling and any other options throughout the consultation" but confirmed that Professor Moss was in a pool of one, while, she said, (1) Ms Wassell was "pooled alongside two other members of staff for the Associate Professor post", and (2) there was simply no role available for Dr Smith in the new structure.

43 As for the possibility of there being a voluntary redundancy exercise, Professor McLeod said that there had been one of those a year before so that the staff who remained had decided not to take the package on offer with the result that a new voluntary redundancy exercise did not seem like a worthwhile "mitigation to put in place". Similarly, she said that pooling all of the staff (i.e. putting all academic staff into a single "pool" from which those to be dismissed for redundancy would be selected) would not have worked. That was because, she said, what was required was catering for the specialisms and disciplines that the university needed to retain, and she reiterated that the process was "very much around the Associate Professor [role] being future facing" and (we inferred from what she said) the person filling that role in any case having the subject expertise required

for the role. We accepted the evidence of Professor McLeod to which we refer in this and the preceding paragraph above, but on the basis that it was her genuine understanding of the position rather than that she had herself investigated the circumstances of each of the three relevant areas of the respondent's operations in which the claimants worked.

44 Finally, Professor McLeod said that she "did not recognise ... at all" the proposition that she and the respondent were applying a policy which was impacting disproportionately on older employees. We understood that to be a denial of an intention to focus on older employees and an assertion that the respondent's acts only unintentionally had a disproportionate impact on older employees. As so understood, we accepted that evidence of Professor McLeod.

Relevant case law and the parties' submissions

45 Ms Misra said that she and Mr Toms did not differ largely on the legal tests. However, there was some difference between them on the final submission of those of Mr Toms on the relevant legal tests, as set out in his written closing submissions, which were as follows.

> '5. Section 19(2)(d) EqA provides a defence for an employer in a claim of indirect [age] discrimination where they can show the PCP was a proportionate means of achieving a legitimate aim.
>
> 6. There are four legal principles as per *MacCulloch v ICI* (2008) IRLR 846 EAT per Elias J (approved by CA in *Lockwood v DWP* (2014) ICR 1257:
>
> (a) the burden of proof is on R;
>
> (b) the classic test was set out in *Bilka-Kaufhas GmbH v Weber Von Hartz* [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see *Rainey v Greater Glasgow Health Board* (HL) [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143;
>
> (c) the principle of proportionality requires an objective balance to 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 for it: see *Hardys*

& Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60;

(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. There is no 'range of reasonable response' test in this context: see *Hardys & Hansons plc v Lax* [2005] IRLR 726 CA.

Legitimate aim

7. Whether a PCP has a legitimate aim is a matter of fact for the ET.

(a) the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end; *R (Elias) v Secretary of State for Defence* (2006) IRLR 934;

(b) more generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough …. and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim; see *Age Concern (R on the application of Age UK) v Secretary of State for Business, Innovation and Skills* (2010) IRC 260.

8. Saving costs is not a legitimate aim which can justify an otherwise discriminatory practice; see *O'Brien v Ministry of Justice* (2013) UKSC 6 at paras 63-69.'

46 The latter proposition was contested by Ms Misra, who said this in paragraph 23 of her written closing submissions:

> "It is well-settled that the desire to make costs' savings alone do not provide a legitimate aim, in this context, but that costs plus other factors can be taken into account i.e. the so-called 'costs plus' rule endorsed by the Court of Appeal in *Woodcock v Cumbria Primary Care Trust* [2012] IRLR 491 and more recently by the Employment Appeal Tribunal in *Heskett v The Secretary of State for Justice* [2020] ICR 359 in which an absence of means was held to be sufficient as a legitimate aim in a case in which a policy of limiting pay increases was applied."

47 In fact, the case of *Heskett* had gone to the Court of Appeal, and its judgment was reported at [2021] ICR 110. The only reasoned judgment was given by

Underhill LJ: McCombe and Macur LJJ simply agreed with it. The headnote contained this passage (which we regarded as an accurate summary of (1) paragraph 88 of the judgment, which had to be read in the light of the overturning of the decision of the Court of Appeal in *Unison v Secretary of State* [2015] ICR 390; [2016] ICR 1, and (2) paragraphs 98-104):

> "*Held*, dismissing the appeal, that the saving or avoidance of costs could not, without more, amount to the achieving of a legitimate aim for the purpose of the defence of justification in a discrimination claim; but that an employer's need to reduce its expenditure, and specifically its staff costs, in order to balance its books could constitute a legitimate aim for that purpose; that since age, unlike other protected factors, was not binary it was difficult for an employer to make decisions affecting employees that would have a precisely equal impact on every age group; that, however, an employer still had to show that the measures complained of represented a proportionate means of achieving a legitimate aim, having regard to their disparate impact on the group in question; that, in assessing proportionality, the tribunal could examine carefully the nature and extent of the financial pressures on which the employer relied, as well as the possibility that they could have been addressed in a way which did not have the discriminatory effect complained of".

48 While we do not here set out paragraphs 98-104 of *Heskett* in full, we found them to be of particular assistance. We draw attention here in particular to paragraphs 101–103, where Underhill LJ said this:

> '101 I recognise that it may sometimes be difficult for a tribunal to draw the line between a case where an employer simply wishes to reduce costs and cases where it is, in effect, compelled to do so. But tribunals often have to make judgements of that kind and there is nothing uniquely difficult about this one. The judgement that would be required if [counsel for the claimant] Mr Menzies's submission were correct – that is, to assess the justification on the basis that any consideration of the employer's financial position should be excluded – would be at least equally difficult, indeed more so.
>
> 102 Mr Menzies's principal response on this part of the argument was to rely on para 74 of the judgment of the Supreme Court in *O'Brien* [2013] ICR 499 and specifically on the statement that
>
> > "the fundamental principles of equal treatment cannot depend upon how much money happens to be available in the public coffers at any one particular time or upon how the state chooses to allocate the funds available between the various responsibilities it undertakes"

and that that argument "would not avail a private employer and . . . should not avail the state in its capacity as an employer".

103 I do not believe that that passage is applicable to the present case, or others of the kind which I have been considering in the previous paragraphs. The court was concerned with a case of (overt and deliberate) direct discrimination against part-time workers. At the end of para 74 it expressly equates it with a case of direct pay discrimination against women. As it says, such treatment contravened "the fundamental principles of equal treatment". In that context it is hardly surprising that it should make it clear that neither a private employer nor the state in its capacity as employer could seek to justify such discrimination (where, untypically, justification is an available defence) on the basis that times were hard and it could not afford to treat part-timers, or women, equally. But the present case does not involve direct discrimination. We are concerned with indirect discrimination – more specifically with a situation where the employer has altered its pay arrangements in a way which has had a disparate impact on employees of different ages (as such changes are very liable to do). I see no sign that the Supreme Court had in mind a case of this kind. What "the fundamental principles of equal treatment" require in such a case is that the disparate impact of the measures in question should be justified. Mr Menzies pointed out that the test of justification was expressed in identical terms in the case of indirect discrimination under section 19 of the 2010 Act and in the case of direct age discrimination: see section 13(2). That is no doubt correct, but it does not follow that the question of the legitimacy of a particular aim requires the same answer in both contexts."

49 We note finally in relation to *Heskett* that the headnote ended with this paragraph, which we accepted was an accurate summary of paragraph 89 of the judgment of Underhill LJ, while noting that the word "solely" was in italics in that paragraph, but not in the following part of the headnote:

'*Per curiam*. The "cost plus" label (and its cognates such as "cost alone" and "the plus factor") used by employment lawyers in this context cannot be said to be incorrect, and it is sometimes too convenient a shorthand to eschew, although it is to be avoided so far as possible since it can lead parties, and sometimes tribunals, to adopt an inappropriately mechanistic approach. It is better, in any case where the issue arises, to consider how the employer's aim can most fairly be characterised, looking at the total picture. It is only if the fair characterisation is indeed that the aim was solely to avoid increased costs that it has to be treated as illegitimate (post, para 89).'

50 Mr Toms also relied on the decision of the Court of Appeal in *Harrod and others v Chief Constable of the West Midlands and others* [2017] ICR 869 as showing

that when considering whether an employer which, when carrying out a restructuring exercise, has chosen to focus on "more senior staff" was justified in focussing on those staff, the issue is whether the "choice of method" was justified, and that that is different from whether or not the employer had a legitimate aim in seeking to reduce its costs in order to avoid becoming insolvent. In fact, *Harrod* was a case concerning an unusual situation, which was described succinctly (and in our view accurately) in this way in the headnote:

> 'Under regulation A19 of the Police Pensions Regulations 1987 a police officer could be required to retire in the interests of efficiency if he had entitlement to a pension worth two thirds of his average pensionable pay, an entitlement reached after 30 years of service. When the respondent police forces needed to reduce staff numbers to achieve efficient policing with reduced budgets, they compulsorily retired a number of police officers who had achieved that entitlement, which meant that they were aged at least 48 years. The claimants, police officers of various ranks so compulsorily retired, presented claims to an employment tribunal that they had been indirectly discriminated against on the ground of their age, as defined by section 19 of the Equality Act 2010. The employment tribunal upheld the claims, deciding that regulation A19 was a "provision, criterion or practice" for the purposes of section 19 that put those of the same age as the claimants at a disadvantage compared with those who were younger, and that the police forces defence of justification failed on the ground that their application of regulation A19 was not a proportionate means of achieving a legitimate aim within section 19(2)(d), since alternative measures were available which would have reduced the discriminatory impact of applying the provision.'

51 The EAT allowed an appeal against that ruling, and the Court of Appeal dismissed an appeal against the decision of the EAT. Ms Misra referred us to, and relied on, the following passages in the following paragraphs of the report of the decision of the Court of appeal:

> '31 ... The police forces had to justify the selection, which they did by reliance on regulation A19. They did not have to justify the numbers.' (*Per* Bean LJ.)
>
> '37 ... In the present case the disparate impact was produced by the use of the power under regulation A19 as the method of achieving the reductions in the numbers of officers that the forces required: that would necessarily have a disparate impact on older officers because the power is only available in the case of those who have achieved entitlement to two-thirds average pensionable pay.
>
> 38 It is the choice of that method that has to be justified. The question is whether it was a proportionate means of achieving a legitimate aim. In my view the right way to characterise the forces' aim is that they wished

to achieve the maximum practicable reduction in the numbers of their officers. That is unquestionably a legitimate aim. The essential, and unusual, feature of the present case is that, because of the absence of any general power to dismiss serving officers, the use of the power under regulation A19 was the only way in which that aim could be achieved: there is no other legal way to reduce numbers on a mass basis. In those circumstances, it is hard to see how its use could be said to be disproportionate, notwithstanding that it involved the application of an age-discriminatory criterion.'

'41 ... It is not open to an employment tribunal to reject a justification case on the basis that the respondent should have pursued a different aim which would have had a less discriminatory impact. The forces were entitled to decide how many officers they needed to lose. It is clear that each of these forces decided that it needed to reduce their forces by a number which was no less than the full number of those who had achieved two-thirds pensionable service: they might indeed have wished to lose a still greater number if they had had the power to do so, but, given the legal constraints, it was their aim to reduce numbers by at least that many. It is not, as both Bean and Elias LJJ point out, the decision to make a given level of reductions in the workforce which has a disparate impact but, rather, the means by which the workers affected are selected; and it is those means that require to be justified. Since in this case the use of regulation A19 was the only option it cannot be said to be disproportionate.' (*Per* Underhill LJ.)

'43 ... In this case the disadvantage which the claimants suffer is the act of dismissal. The act of dismissal is not itself an act of discrimination. What potentially renders it discriminatory is the way in which those to be subject to dismissal are chosen. It is the selection process which creates the risk of discrimination, not the decision to dismiss.

44 In this case the selection process undoubtedly gives rise to prima facie discrimination on grounds of age. That is the effect of applying the criteria in regulation A19. It is not disputed, however, that in the circumstances the adoption of those criteria is a proportionate way of achieving a legitimate aim. The dismissals are on grounds of efficiency – that has not been challenged and it is a legitimate aim; and adopting the selection criteria required by Parliament is a proportionate means of achieving it.

45 The employment tribunal considered that the relevant practice was that the forces would, subject to certain exceptions, "require all officers to retire at two-thirds average pensionable pay". Then in the course of its judgment the employment tribunal said, at para 72:

> "When looking at the appropriateness and necessity of the application it has to be appreciated that prima facie discrimination has been made out and that such discrimination should be avoided if reasonably possible."

46 On this basis the tribunal engaged with the question whether dismissals could be reasonably avoided and concluded that the chief constables did not need to dismiss as many staff as they did, or at least they did not satisfy the tribunal that they needed to do so. Accordingly, the claimants suffered the disadvantage of dismissal when they need not have done.

47 I have considerable difficulty with that analysis. Assuming that to be true, why does that render the dismissals discriminatory? The logic is that a claimant will have no discrimination claim if the tribunal is satisfied that an authority has dismissed no more staff than in the tribunal's view it was reasonably necessary to dismiss, but will have a claim if the number is greater than that. But how does it become discrimination on age or any other grounds because more officers are dismissed than the exigencies of the business require? In my judgment this is eliding the disadvantage with the discrimination and wrongly requiring the chief constables to justify both the dismissals and the process of selection. It is telling them that they should have adopted a different scheme and made their cuts in some other way.

48 There is another fundamental problem with the tribunal's analysis. The assumption underlying this argument is that the employer should be obliged to minimise dismissals and should take any reasonable steps to avoid them. But as Bean LJ points out, there is no general legal obligation to that effect. It is not the job of tribunals to question management decisions in that way, and they are not equipped to do so. Tribunals do of course have extensive jurisdiction relating to dismissals. For example in unfair dismissal claims they can properly seek to ensure that dismissals are for a good reason; they can enforce obligations to consult before redundancies are effected; and they can require an employer to show that a dismissal ostensibly for redundancy is genuinely for that reason. But that is a far cry from reviewing the decision of management as to the number of staff required to run their business. That will often involve difficult decisions about how resources should be prioritised. In my judgment discrimination law does not, and was not intended to, open up questions of this kind to scrutiny by tribunals. It is hardly surprising that the hearing before the employment tribunal took five weeks given the nature of the inquiry. It was not in my view an inquiry warranted by section 19.' (*Per* Elias LJ.)

52 Despite the fact that the facts of that case were markedly different from those in issue here, we accepted that those statements of principle applied here.

53 In paragraphs 28 and 29 of her written closing submissions, Ms Misra said this:

> "28. It is unsurprising that a large restructure would take place in phases, but the Tribunal must not lose sight of the fact that phase 3 was but one phase in a larger piece of work and ought not to succumb to C's s [sic] overly simplified case that by restructuring the tier of Academics below Academic Leadership (i.e., Professors, Principal Lecturers and Readers) this amounted to indirect indiscrimination [sic] that is simply incapable of justification.
>
> 29. In fact, it is unclear as to what it is C considers R should have done. It is plainly wrong to suggest that R was duty bound not to restructure the tier in which the Cs worked at all – it was not and could not be embargoed in this way. R consulted with the union (UCU), with each of its Schools, and with individuals affected by the proposals, in each case inviting proposals to mitigate against dismissals where possible."

Our conclusions

54 We came to the clear view in the light of the above case law, and despite what was said by the Supreme Court in *O'Brien* and on which Mr Toms relied in paragraph 8 of his written submissions (which we have set out in paragraph 45 above), that the aim of reducing costs here was, in the circumstances, a legitimate aim within the meaning of section 19(2)(d) of the EqA 2010. That was not least because of the factors referred to in the documents to which we refer in paragraphs 12-37 above and the evidence of Professor McLeod to which we refer in those paragraphs. For the avoidance of doubt, we saw it as being a legitimate aim to reduce costs in the following circumstances.

54.1 We accepted that paragraph 2.1 set out in paragraph 26 above was a genuine objective of the respondent, so that the aim of achieving net savings of £2.8m per year was intended to "ensure the financial sustainability of the University", which was genuinely "critical to the University's financial plans to reduce the deficit and return to surplus," which was, we accepted, "a key regulatory requirement for the Office [for] Students", which (see paragraph 41 above) we understood (in part from what we were told but also from the Higher Education and Research Act 2017) was the regulator for the respondent.

54.2 In addition, we accepted that the "Fit for the Future" document to which we refer in paragraphs 28-32 above, together with the oral evidence of Professor McLeod to which we refer there and in paragraphs 33-44 above, showed that the aim of the respondent was not just to save money: it was

also to carry out a restructure of the segment of the university's academic staff in which the claimants worked with a view to achieving the aims set out in paragraph 2.5 on page 181, which we have set out in paragraph 12 above.

55 As for the question whether it was a proportionate means of achieving that legitimate aim to restructure the tier of academic staff consisting of Principal Lecturer, Reader and Professor, we found what Elias LJ said in paragraph 48 of *Harrod*, which we have set out in paragraph 51 above, to be of particular assistance, even though it was decided against a very different set of circumstances, where there was only one way to achieve what the Court of Appeal concluded was the legitimate aim of the employer.

56 Thus, it was clear that the question for us was not whether or not the respondent could have achieved its aim of reducing its costs and achieving what we will characterise as a more streamlined middle academic management tier, by dismissing fewer staff. The question was, rather, whether or not what the respondent did here was a proportionate means of achieving a legitimate aim. The issue for us was whether or not the method of restructuring the tier of Principal Lecturers, Readers and Professors, namely by reducing their number and having instead the roles of Associate Professor and Professor, each of which role was capable of being focussed primarily on either teaching or research, was a proportionate means of achieving a legitimate aim. After careful consideration, we came to the clear view that it was indeed a proportionate means of achieving a legitimate aim. We did so for the following reasons.

56.1 The fact that (as we record in paragraphs 29 and 30 above) it was said in the first bullet point of paragraph 3.11 of the document part of which we have set out in paragraph 29 above that the "business case" would be "developed to detail the proposed Associate Professor and Professor structure by School/Discipline", did not mean that there was no such "business case". Rather, we saw the language used in that bullet point as being difficult to understand, given the clear structure proposed in the following part of the document of which paragraph 3.11 formed a part, which we have set out in paragraph 30 above.

56.2 Standing back and asking ourselves by reference to the evidence which we had heard and the facts which we had found, stated in paragraphs 9-44 above, whether the method of selecting staff to be made redundant here was a proportionate means of achieving a legitimate aim, we could see nothing which pointed towards a conclusion to the contrary.

56.3 Rather, on the evidence before us, we concluded that the disproportionate effect on older members of staff (i.e. those above the age of 55) of the restructuring exercise which led to the claimants' dismissals was

outweighed by the need of the respondent to achieve the aim which we had found was legitimate as stated in paragraph 54 above.

57 For those reasons, we came to the conclusion that the preliminary issue which we had to determine should be determined as stated in our above judgment.

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Employment Judge Hyams

Date: 13 October 2021

SENT TO THE PARTIES ON

21 October 2021

S. Bhudia

FOR THE TRIBUNAL OFFICE