Case Number: 2301655/2018

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**and**	**Respondents**
Mr L Gibbons and others		**National Crime Agency**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 5-11 April 2022; 12-13 April 2022 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mrs I Sood, Mr D Schofield**

On hearing Mr E Gold, counsel, on behalf of the Claimants and Mr J Milford QC, leading counsel, on behalf of the Respondents, the Tribunal determines that:

(1) The Claimants' complaints of direct discrimination because of age are not well-founded.
(2) The Claimants' complaints of indirect age discrimination are not well-founded.
(3) The claims of AB, Mr Baker, Mr Beddows, Mr Dalton, Mr Grant, Mr Long, Mr Batsford, Mr Donnelly, Mr Dowling and Mr Marsden were in any event presented out of time and the Tribunal has no jurisdiction to consider them.
(4) Accordingly, the proceedings as a whole are dismissed.

REASONS

Introduction

1 The Respondents are the statutory body which, in 2013, succeeded the Serious Organised Crime Agency ('SOCA'). It has the status of a non-ministerial government department and is sponsored by the Home Office. It is staffed by employees, many of whom are former police officers.

2 The Claimants (a list of whose names is appended to these reasons)[1] are former police officers who were at the times to which their claims relate employed by the Respondents and, before that, SOCA.

3 By a claim form presented at the London South Regional Office on 3 May 2018, the Claimants brought complaints of direct and indirect age discrimination and unauthorised deductions from wages, all of which the Respondents disputed. The matter was later transferred to the London Central Region.

4 By a reserved judgment following a public preliminary hearing on 6 and 7 July 2020, Employment Judge Glennie dismissed applications on behalf of the Respondents for the discrimination claims to be struck out as having no reasonable prospect of success, alternatively for deposit orders to be made on the grounds that they had little reasonable prospect of success. The nub of his reasoning was that the discrimination claims raised "complicated and nuanced" points of law which it would be wrong to seek to determine or even reach a provisional view upon at a preliminary hearing. He did, however strike out all but one of the complaints of unauthorised deductions from wages, and the remaining claim under that head was later withdrawn.

5 The matter came before us on 5 April this year in the form of a final hearing conducted by CVP, with seven days allocated. The Claimants were represented by Mr Elliot Gold, counsel, and the Respondents by Mr Julian Milford QC, leading counsel. We are very grateful to them for their assistance.

6 We heard evidence from three of the Claimants, Mr Nicholas Batsford, Mr Richard Ward and Mr Lawrence Gibbons. We also read a statement tendered by Mr Gold in the name of Mr Kim Wedgbury, a former employee of the Respondents and, before that, HM Customs & Excise. On behalf of the Respondents four witnesses gave evidence: Mr Tilmann Eckhardt, a Senior Policy Advisor for the Workforce Pay and Pensions Team at HM Treasury, Mr Steven Corkerton, the Respondents' Chief People Officer from 2017 to 2021, Mr Robert Chuck, their Head of HR from 2014 to 2016, and Mr Alun Bishop, their Payroll Manager.

7 In addition to witness evidence, we read the documents to which we were referred in the bundle of nearly 2,000 pages. We also had the benefit of a combined chronology and cast list, a statement of agreed facts and the opening skeletons produced by both counsel.

8 Preliminary reading, evidence and closing submissions occupied days one to four and half of day five. At that point we reserved judgment. The remainder of the allocation was devoted to our private deliberations.

[1] At a case management hearing held on 10 April 2019 Employment Judge Spencer made an order under the Employment Tribunals Rules of Procedure 2013, r50 anonymising one of the Claimants as AB. That Claimant is so named in the appendix to these reasons. Another appears there as CD because he or she is identified in that way in the appendix to the grounds of resistance and we are unclear as to whether an order has been made to protect his or her identity also.

The Issues

9 The nub of the Claimants' case was that pay abatement rules in the Respondents' Retention of Specialist Skills ('ROSS') policy applied to them were, on grounds of age, directly or indirectly discriminatory. The Respondents replied that no *prima facie* discrimination was made out and, in the alternative, that any discrimination (direct or indirect) was justified.

10 The parties agreed a list of issues, which was appended to a case management order of Employment Judge Goodman made on 25 June 2021. In so far as it addressed liability, it was in the following terms.

> **Direct discrimination**
>
> **1. Did the Respondent treat the Claimants less favourably because of their age (being between 48 and 55, alternatively between 48 and 60) by the application of the abatement rules under the Respondent's Retention of Specialist Skills ("ROSS") scheme, including:**
>
> **(a) A requirement that any Claimant had to resign and apply for any role through open competition in order to avoid abatement; and**
> **(b) Continuing to apply the ROSS policy to Claimants after they transferred into or undertook materially different roles from those to which they were first appointed after their retirement and return to work.**
>
> **2. The Claimants rely on a hypothetical comparator.**
>
> **3. If the Respondent did treat the Claimants less favourably because of their age, can it show that the treatment was a proportionate means of achieving a legitimate aim? In this case, the aims relied upon are:**
>
> **i. Safeguarding public expenditure by restricting the total remuneration made from public funds for those who have not genuinely retired from a public service career;**
> **ii. On propriety grounds, avoiding accusations of favouritism or corruption by permitting public servants to remain in their roles, while receiving full salary and full pension;**
> **iii. Maintaining confidence in the public service, which might be damaged if it appeared that those who had received generous pension terms were reemployed without any account being taken of the benefits they were receiving at taxpayer cost;**
> **iv. Avoiding creating a privileged upper tier of people paid both salary and pension, which could undermine morale and general policy on remuneration levels;**
> **v. Ensuring value for money is achieved and that public funding targeted at long term retirement provision is focussed on retirement or preparation for retirement.**
>
> **Indirect discrimination**
>
> **4. Did the Respondent apply to the Claimants a provision, criterion or practice (PCP) which was prima facie indirectly discriminatory in relation to their age (between 48-55, alternatively 48-60), being: a policy that if they retired and returned to work without open competition, they would be subject to the abatement rules set out at clause 6.3 of the Respondent's ROSS Scheme and specifically:**

i. Did the Respondent apply such a PCP both to the Claimants and to persons who did not share the Claimants' age?

ii. Did that policy put the Claimants and persons of the Claimants' age at a particular disadvantage when compared with persons not of their age?

5. If the answer to 4(i) and (ii) above is "yes", can the Respondent show that the PCP is a proportionate means of achieving a legitimate aim? The aims are those set out in paragraph 3 above.

Time limits

6. Are the Claimants' claims (or any of them) made out of time, and if so, would it be just and equitable to extend time under s.123 Equality Act 2010 to allow their claims to proceed?

The Legal Framework

Legislation

11 The Equality Act 2010 protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics'. These include age. By s5 it is provided as follows:

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

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.

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

12 Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

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

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

13 The 2010 Act, s19, concerned with indirect discrimination, includes:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a

particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

14 By s23(1) it is provided that:

> **(1) On a comparison of cases for the purposes of section 13 … or 19 there must be no material difference between the circumstances relating to each case.**

15 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) as to B's terms of employment;**
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
> **(c) [N/A]**
> **(d) by subjecting B to any other detriment.**

16 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. "Conduct extending over a period" is to be treated as done at the end of the period (s123(3)(a)). (Now, under the 'Early Conciliation' provisions, the period is often further extended by the time taken up by the conciliation process, but it is common ground that no such further extension can apply here given that, in all cases, the primary three-month period had expired before conciliation began.)

Authorities

Direct and indirect discrimination

17 In *Nagarajan* v *London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

It is well-established that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law (see *eg Onu v Akwiwu* [2014] ICR 571 CA).[2]

18 The 'significant influence' test serves its purpose where the inquiry is directed to the subjective motivation behind the act impugned as discriminatory.[3]

[2] The case, which was heard with another, went to the Supreme Court in 2016 and is further considered below *sub nom Taiwo v Olaigbe and another*.
[3] In such cases the 'burden of proof' provisions (the 2010 Act, s136) may also have a part to play.

But not all cases fall into this category. In some, motivation is entirely beside the point. *James v Eastleigh Borough Council* [1990] ICR 554 HL is a notable example. There, the Claimant, who was aged 61, was required to pay to use the Respondents' swimming pool while his wife, also 61, was not. The reason given, and accepted, was that the council had a policy of offering free swimming to people who had reached retirement age. She had; he had not. The House of Lords held by a majority that the policy was directly discriminatory because it was modelled exactly upon the discrimination inherent in the difference between the state retirement ages for men and women.

19 In *Amnesty International v Ahmed* [2009] ICR 1450 EAT, the Claimant, a UK national of northern Sudanese origin, worked for Amnesty International ('AI') in the UK as a campaigner on issues relating to Sudan. She applied for the post of Sudan researcher but AI refused to appoint her because it believed that the fact that she was of Sudanese origin would compromise its reputation for impartiality and could also expose both her and those who worked with her to a greater danger of violence than would be faced by a non-Sudanese person performing the job. Her complaint of direct racial discrimination succeeded before the Employment Tribunal. The EAT (Underhill P and members) dismissed the appeal. Giving judgment, the President said this:

> **31. It seems that the relationship between the approaches taken in *James v Eastleigh* on the one hand and *Nagarajan* … on the other is still regarded by some tribunals and practitioners as problematic. We do not ourselves believe that there is a real difficulty provided due attention is paid to the form of the alleged discrimination with which the House of Lords was concerned in both cases.**
>
> **32. … The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of.[3] …**
>
> **33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. … *James v Eastleigh* is a case of this kind. … In cases of this kind what was going on inside the head of the putative discriminator … will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. …**
>
> **34. But that is not the only kind of case. In other cases – of which *Nagarajan* is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. …**
>
> **35. Lord Goff himself in *James v Eastleigh* recognised the distinction between the two types of case … he characterised them as, on the one hand, cases where a "gender-based criterion" was applied and, on the other, cases where the complainant's sex is "the reason why the defendant acted as he did" or where the treatment occurs "because of his or her sex": he gives as an example of the latter case where "the defendant is motivated by an animus against persons of the complainant's sex" …**
>
> **36. There is thus, we think, no real difficulty in reconciling *James v Eastleigh* and *Nagarajan*. …**

We will adopt the EAT's concepts below, referring to 'criterion' or 'condition' cases on the one hand and 'mental processes' cases on the other.

20 The decision (on a 5-4 split of a nine-member constitution of the Supreme Court) in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others* [2010] IRLR 136 is a eye-catching example of a criterion case. But it is not, in our view, an authority that breaks any new ground. The majority view was simply that, on a proper interpretation of the facts, the school had applied an admissions criterion that was inherently racial and, on that basis, directly discriminatory.

21 In *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11 the Supreme Court was called upon to decide whether the conditions on which entitlement to State Pension Credit depended under UK Regulations were, for the purposes of EU law, directly, or indirectly, discriminatory on nationality grounds. The first condition, the *automatic* right to reside in the UK, was indubitably a right exclusively held by British citizens. The second, being "habitually resident" in the UK or elsewhere within the Common Travel Area, was not. A majority of the court (Lord Walker dissenting) held that the conditions must be read cumulatively and that, on that basis, the criterion complained of was indirectly, but not directly, discriminatory. Giving the principal judgment, Lord Hope said:

> **26. … Had a right to reside in the United Kingdom or elsewhere in the Common Travel Area been the sole condition of entitlement to state pension credit, it would without doubt have been directly discriminatory on grounds of nationality.**
>
> **27. … while all United Kingdom nationals have a right to reside in the United Kingdom, not all of them will be able to meet the test of habitual residence. Most are, of course, habitually resident here.**
>
> **…**
>
> **30. The approach which EU law takes to a composite test of this kind is indicated by the decision of the European Court of Justice in *Bressol v Gouvernement de la Communauté Française* [2010] 3 CMLR 559. The Belgian legislation that was analysed in that case … too involved a composite test, one element of which could be satisfied by a person who was not a national of the host Member State only if he met certain additional conditions … which every national of the host member state would automatically satisfy.**
>
> **…**
>
> **32. ... Advocate General Sharpston, in a powerful opinion, identified the issues as being whether the conditions, which had to be satisfied cumulatively, constituted direct or indirect discrimination. … She held that the first cumulative condition – that the principal place of residence was in Belgium – did not constitute direct discrimination. This was because Belgians and non-Belgians alike could establish their principal place of residence in Belgium. As this, apparently neutral, condition was likely to operate mainly to the detriment of nationals of other member states, it was indirectly discriminatory ... It seemed to her, in contrast, that the second cumulative condition was necessarily linked to a characteristic indissociable from nationality. Belgians automatically had the right to remain permanently in Belgium. They therefore satisfied the second cumulative condition automatically. Non-Belgians, on the other hand, had to fulfil additional criteria to acquire a right permanently**

> **to remain in Belgium ... This discrimination was based on nationality and was therefore direct discrimination. …**
>
> **33. However the Court did not adopt the approach of the Advocate General. As Lord Walker points out, it did not explain why it thought that the Advocate General was wrong to treat the case as direct discrimination. But the contrast between her carefully reasoned approach and that of the Court is so profound that it cannot have been overlooked. One must assume that her approach, which was to find that the measures were precluded because the second condition was directly discriminatory, was rejected by the Court as too analytical. The Court looked at the conditions as a whole.**
>
> **34. The Court concluded that, looked at in this way, the national legislation created a difference in treatment between resident and non-resident students. A residence condition, such as that required by this legislation, … affected nationals of Member States other than Belgium more than Belgian nationals and placed them at a particular disadvantage which was indirectly discriminatory. The second cumulative condition – as to the right to remain permanently in Belgium – which the Advocate General said was necessarily linked to a characteristic indissociable from nationality and directly discriminatory, was subsumed into the first when the two conditions were treated cumulatively. The fact that the Court then went on to consider whether the difference in treatment was objectively justified makes it plain beyond any doubt that it considered the case to be one of indirect, rather than direct, discrimination.**

22 In *Preddy v Bull* [2013] 1 WLR 3741 SC, the Claimant and his civil partner were refused a double room at the hotel run by the Respondents, on the stated ground that they were not married. At the time same-sex couples could not marry and opposite-sex couples could not enter into civil partnerships. By the Equality Act (Sexual Orientation) Regulations 2007 ('the 2007 Regulations'), reg 3(4), it was provided that, for the purposes of the provisions by which direct and indirect discrimination were defined (which were indistinguishable from the 2010 Act, ss13 and 19), "the fact that one of the persons (whether B or not) is a civil partner while the other is married shall not be treated as a material difference in the relevant circumstances." The Claimant's complaint of direct sexual orientation discrimination succeeded in the County Court and the Court of Appeal. The Respondents' further appeal to the Supreme Court was dismissed by a majority of 3-2. The principal judgment on the majority side, delivered by Lady Hale, included the following passage:

> **17. Put simply, Mr and Mrs Bull state that they did not discriminate against Mr Preddy and Mr Hall on the ground of their sexual orientation but on the ground that they were not married to one another. They have applied exactly the same policy to unmarried opposite sex couples. … They accept that it was indirect discrimination, as opposite sex couples are able to marry while same sex couples currently cannot do so, and so the policy puts the latter at a particular disadvantage.**
>
> **18. The Court of Appeal … based their finding of direct discrimination on the well-known, if controversial, case of *James v Eastleigh Borough Council* …**
>
> **19. Had it been available to them, their lordships might well have cited the words of Advocate General Sharpston twenty years later, in *Bressol …*, para 56:**

> **"I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification."**

In this she was building on the opinion of Advocate General Jacobs in *Schnorbus v Land Hessen* (Case C-79/99) [2000] ECR 1-10997, para 33:

> **"The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected."**

20. Applying Advocate General Jacobs' test, it can be argued that a marriage criterion is "indissociable from sexual orientation", in that at present persons of heterosexual orientation can marry and persons of homosexual orientation cannot. …

21. But applying the test as stated by Advocate General Sharpston, there is not an exact correspondence between those suffering the disadvantage of being denied a double bed, and those enjoying the correlative advantage of being allowed one, with the protected characteristic. While all same sex couples were denied, so too were some opposite sex couples. Furthermore, I note that in *Schnorbus*, the criterion (of having served in the army) was one which men could meet but woman could not; and in *Bressol*, the criterion (of having the right to reside in Belgium) was one which all Belgian nationals could meet, but only some foreigner nationals; yet in both cases the Court of Justice held that the discrimination was indirect rather than direct.

…

23. *Schnorbus* and *Bressol* … demonstrate that this case is not on all fours with *James v Eastleigh Borough Council*. There is not an exact correspondence between the disadvantage and the protected characteristic. In *Black v Wilkinson* [2013] 1 WLR 2490 at para 21, Lord Dyson MR confessed to "some difficulty in agreeing with the view that the decision in *James's* case compels the conclusion that there was direct discrimination in *Preddy v Bull*." In his view, this was not a case of direct discrimination against a homosexual couple on the ground of their sexual orientation, since there were other unmarried couples who would also be denied accommodation on the ground that they too were unmarried.

24. Were this case solely about discrimination against the unmarried, I would agree with him. …

25. Does it make a difference that this couple were in a civil partnership? In my view, it does. The concept of marriage being applied by Mr and Mrs Bull was the Christian concept of the union of one man and one woman. …

26. Civil partnership is not called marriage but in almost every other respect it is indistinguishable from the status of marriage in United Kingdom law. … Its equivalence to marriage is emphasised by the provision in regulation 3(4) that being married and being a civil partner is not to be treated as a material difference for the purpose of a finding of either direct or indirect discrimination.

> **27. Regulation 3(4) is by no means easy to construe. … In other words, it provides that people who are married and people who are civil partners are to be regarded as similarly situated.**
>
> **…**
>
> **29. ... With or without regulation 3(4), I have the greatest difficulty in seeing how discriminating between a married and a civilly partnered person can be anything other than direct discrimination on grounds of sexual orientation. At present marriage is only available between a man and a woman and civil partnership is only available between two people of the same sex. We can, I think, leave aside that some people of homosexual orientation can and do get married, while it may well be that some people of heterosexual orientation can and do enter civil partnerships. Sexual relations are not a pre-condition of the validity of either. The principal purpose of each institution is to provide a legal framework within which loving, stable and committed adult relationships can flourish. I would therefore regard the criterion of marriage or civil partnership as indissociable from the sexual orientation of those who qualify to enter it. More importantly, there is an exact correspondence between the advantage conferred and the disadvantage imposed in allowing a double bed to the one and denying it to the other.**

23 The two Justices who joined Lady Hale in the majority were Lord Kerr and Lord Toulson. The former appeared to base his reasoning firmly on the 2007 Regulations, reg 3(4). The latter seems (see para 70) to have shared Lady Hale's view (at para 29) that reg 3(4) was not essential to, but simply reinforced, the conclusion that direct discrimination was made out.

24 In *Taiwo v Olaigbe and another* [2016] ICR 756 SC[4] the Claimant was a Nigerian migrant domestic worker. She complained of mistreatment by her employer which, she said, amounted to direct, alternatively indirect, racial discrimination. The Employment Tribunal found that she had suffered the treatment complained of not because she was Nigerian or because she was black, but because her migrant status made her vulnerable, since she was dependent on her employer for employment and accommodation in the UK. By the time the case reached the Supreme Court, the only claim pursued was for direct discrimination. That claim was unanimously rejected. Giving the only judgment, Lady Hale said:

> **22. Parliament could have chosen to include immigration status in the list of protected characteristics, but it did not do so. … So the only question is whether immigration status is so closely associated with nationality that they are indissociable for this purpose.**
>
> **23. Mr Allen [leading counsel for the claimant] is entirely correct to say that immigration status is a "function" of nationality. British nationals automatically have the right of abode here. Non-British nationals (apart from Irish citizens) are subject to immigration control. But there is a wide variety of immigration statuses. Some non-nationals enter illegally and have no status at all. Some are given temporary admission which does not even count as leave to enter. Some are initially given limited leave to enter but remain here without leave after that has expired. Some continue for several years with only limited leave to enter or remain. Some are allowed to work and some are not. Some are given indefinite leave to remain which brings with it most of the features associated with citizenship.**

[4] Heard together with *Onu v Akwiwu*

> **24. In these cases, Ms Taiwo and Ms Onu had limited leave to enter on domestic workers' visas. It was the terms of those visas which made them particularly vulnerable to the mistreatment which they suffered.**
>
> **…**
>
> **26. Clearly, however, there are many non-British nationals living and working here who do not share this vulnerability. No doubt, if these employers had employed British nationals to work for them in their homes, they would not have treated them so badly. They would probably not have been given the opportunity to do so. But equally, if they had employed non-British nationals who had the right to live and work here, they would not have treated them so badly. The reason why these employees were treated so badly was their particular vulnerability arising, at least in part, from their particular immigration status.**
>
> **27. That, in my view, is enough to dispose of the direct discrimination claim. …**
>
> **28. [Reference was made to *Patmalniece*, *Schnorbus* and *Bressol*.] … In all three cases, the discrimination was held to be indirect rather than direct (the Court of Justice disagreeing with the Advocate General in *Bressol*). There was not an exact correspondence between the advantaged and disadvantaged groups and the protected characteristic, as some of those distinguished by their nationality were not disadvantaged, although others were.**
>
> **29. The same approach was adopted in *Preddy v Bull*, where Christian hotel keepers would deny a double bedded room to all unmarried couples, whether of opposite sexes or the same sex. That would undoubtedly have been indirect discrimination, as same sex couples were not then able to marry and thus fulfil the criterion, whereas opposite sex couples could do so if they chose. But the majority held that it was direct discrimination, because the hotel keepers expressly discriminated between heterosexual and non-heterosexual married couples. The couple in question were in a civil partnership, which for all legal purposes is the same as marriage.**
>
> **30. Mr Allen argues that these cases can be distinguished, because they were cases in which an express criterion was being applied, be it nationality or heterosexuality, whereas these appeals are not concerned with such a criterion or test, but with the mental processes of the employers. But that makes no difference. In "mental processes" cases, it is still necessary to determine what criterion was in fact being adopted by the alleged discriminator - whether sex, race, ethnicity or whatever - and it has to be one which falls within the prohibited characteristics. The point about this case is that the criterion in fact being adopted by these employers was not nationality but, as Mr Allen freely acknowledges, being "a particular kind of migrant worker, her particular status making her vulnerable to abuse".**

25 Lastly in connection with the distinction between direct and indirect discrimination, we must briefly mention the judgment of Langstaff P in *Harrod v Chief Constable of West Midlands Police* [2015] ICR 1311 EAT. That case arose out of a dispute about the legal consequences of a provision of the Police Pensions Regulations 1987 which empowered a chief constable to require an officer to retire in the interests of efficiency if he or she had accrued an entitlement to a pension worth two-thirds of his or her pensionable pay, which entitlement was reached on completing 30 years' service. The litigation, in which very senior counsel appeared on both sides, was argued exclusively as a claim for indirect discrimination and on appeal the judge dealt with it on that basis. But in a

postscript to his judgment, he remarked that, despite the way in which it had been argued, he considered it properly analysed as a complaint of direct discrimination, apparently because those aged 48 or over[5] were potentially "at risk" of being adversely affected (despite many not having sufficient service to be caught by it) whereas those below that age could not. On a further appeal, the Court of Appeal refused to engage with the judge's observations. Direct discrimination was not before the court and they could not in any event bear upon the issues raised by the appeal (see [2017] EWCA Civ 191, *per* Bean LJ).

Detriment

26 A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL. Very recently, Griffiths J, sitting in the EAT in *Warburton v Chief Constable of Northamptonshire Police* [2022] EAT 42 (Judgment 14 March 2022), drew attention to the focus in the *Shamoon* test on the *reasonable* worker, pointing out that the test is not wholly objective. Accordingly, there will be cases in which, even though the Tribunal reasonably judges that that there is no disadvantage, the worker reasonably sees matters differently. In such circumstances, the test will be satisfied.

Time

27 The 'just and equitable' discretion to apply a longer time limit for the presentation of claims that the 'default' three months is to be used with restraint: its exercise should be the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

The Facts

Agreed facts

28 Counsel provided us with a helpful statement of agreed facts, in the following terms.[6]

> **1. The Police Pensions Regulations 1987 ('PPR') enacted the 1987 scheme and replaced the Police Pensions Regulations 1973. In turn, on 6th April 2006 the Police Pensions Regulations 2006 enacted the 2006 scheme, at which point the PPS was closed and no new persons could join it. All the Claimants were members of the 1987 scheme.**
>
> **2. Under the 1987 scheme, a member was entitled to retire on reaching 30 years' pensionable service. They were [to] be entitled to receive a lump sum and draw their full pension benefit.**
>
> **3. On 22nd June 2009, the Serious Organised Crime Agency ('SOCA') introduced the Retention of Specialist Skills Scheme ('ROSS Scheme'). Where a member of the**

[5] Since no police officer could commence service below the age of 18
[6] We have added some minor corrections in square brackets. The footnotes are also our additions.

1987 scheme retired after reaching thirty years' service, it provided the terms upon which they could return to SOCA. This was in one of three ways:

(i) At para 6.1, all retiring members could apply for any post which was advertised externally under open competition. A member who was successful in an external competitive process could receive their police pension lump sum, pension and an unabated SOCA salary;

(ii) At para 6.2, the Executive Director of Corporate Services could in exceptional circumstances approve certain posts that required specialist skills for internal-only advertisement. This required a business case showing that the skills required could be sourced only within SOCA. A retiring member who was successful in such a competition could receive their pension lump sum, police pension, and an unabated SOCA salary;

(iii) At para 6.3, a member could apply to retire and return to SOCA without competition. Where SOCA accepted that a post holder had particular skills and expertise that were critical to the business, their role would not be subject to any form of competitive process. This would enable SOCA to retain business critical skills that were not available outside of SOCA. It would prevent the loss of those critical skills that would otherwise result in a shortfall in the establishment and impact on operational capability.

4. For a member to return under the ROSS Scheme para 6.3, a business case had to be made by the deputy director of the business area. This, in turn, had to be considered by the Executive Director of Corporate Services. The roles would require skills that were specialised or expert and the post holders had to have those specialist or expert skills. The skills had to be operationally essential for the roles to be performed: para 6.3.2. Each individual circumstance had to be considered on its own merit: para 6.3.3.

5. If the business case was successful, a member had two options:

(i) Not to retire, to continue in service, maintain their SOCA salary but draw no pension;

(ii) Retire and then return to work in their previous role without competition. In such a case, either their salary would be abated so that their abated SOCA pay plus their pension did not exceed their pre-retirement base salary; or they could receive their full salary for the role subject to agreement to return part of the pension, so that their SOCA pay plus their pension did not exceed their pre-retirement base salary.

6. There are the further following terms:

(i) As part of para 6.3.4, and immediately underneath the three options stated above, it was stated in a separate paragraph, "In addition the PPS member can at any time apply for any externally advertised post";

(ii) At para 6.3.6, it was stated *inter alia*, "PPS members will not be precluded from applying from promotion";

(iii) At para 6.3.8, the salary on returning to work would be in accordance with SOCA's practice on salaries on appointment of new employees;

(iv) At paragraph 6.3.9, it was stated *inter alia*, "PPS members who are successful in an external competitive selection process must retire and take up their new role within 6 months of the date of the job offer letter".

7. A freeze on external recruitment started in June 2010 and lasted until 2012.

8. The second version of the ROSS Scheme was published on 16th June 2010. Whereas ROSS Scheme v1 at para 6.3.1 stated that it would enable SOCA to retain business skills that were not available outside SOCA, v2 stated that it would enable SOCA to retain business skills which were unlikely to be easily attained outside SOCA.

9. The third version of the ROSS Scheme was published on 14th December 2010. This was supported by the Operating Procedures HR16 OP01. This provided:

(i) At para 5.2.4, a member who believed that their post met the criteria of requiring specialist skills not easily available outside of SOCA could request that the post be advertised internally. At para 5.2.9, this could be approved to target specific skills and to facilitate progression and career management (ROSS 6.2);

(ii) At para 53.4, an application for retention without competition (ROSS 6.3) had to be considered by the deputy director of the business area, then (at para 53.5) be reviewed by the deputy director of human resources, then (at para 53.6) be submitted to the Director of Capability and Service Delivery for a final decision;

(iii) At para 53.13, the returning salary would be in accordance with SOCA's practice on salaries on appointment for re-joiners.

10. On 7th December 2011, the ROSS Scheme was suspended.

11. The fourth version of the ROSS Scheme was published on 18th September 2012 and supplemented by an Operating Procedure published on 21st September 2012. It stated at para 6.3.14, "Having retired from SOCA in accordance with 6.3 of these procedures, abatement will continue to be applied throughout employment with SOCA. This includes lateral moves, promotions and changes of post which arise from any internal or external recruitment processes which are undertaken whilst employed within SOCA."

12. On 18th December 2012, SOCA agreed to pay additional tax liabilities of officers who had retired and returned to work under the ROSS Scheme, arising from [any failure to take a sufficiently long break before returning to work].[7]

13. After the recruitment freeze, there have been periodic recruitment campaigns where selection for posts has been by open and competitive process.

14. On 7th October 2013, the National Crime Agency ('NCA') commenced operations, taking over functions of SOCA. The Claimants transferred to the NCA.

15. Also on this date (7th October 2013), the ROSS Operating Procedure HR01 OP10 v1 was published. It provided *inter alia*:

(i) At para 6.3.14, a member who had returned to work in accordance with 6.3 "will be able to apply for an external competitive process provided they have completed the required minimum period of tenure in the specialist post as set out in Policy HR01 Resourcing. All roles will be subject to abatement";

(ii) At para 6.3.18, "Having retired from NCA in accordance with 6.3 of these procedures, abatement will continue to be applied throughout employment

[7] This agreement brought to an end a period of uncertainty, which lasted for about a year, as to whether any tax liability might attach to the Claimants personally.

> **within NCA. This includes lateral moves, promotions and changes of post which arise from any internal or external recruitment processes which are undertaken whilst employed within NCA."**
>
> **16. On 8th December 2014, following the 'O'Neill' judgment[8], the Respondent approved two changes to the ROSS Scheme. The first was that no deductions would be made to abatement following annual pay awards. The second was that officers would benefit from pension indexation calculations.**
>
> **17. On 31st December 2015, the 'Project 500' recruitment campaign ended. This had been an ongoing recruitment campaign to fill vacancies across the Respondent. Selection for posts was by open and competitive process.**
>
> **18. On 3rd November 2016, the Respondent revised the ROSS with immediate effect. ROSS 6.3 officers could apply for externally advertised vacancies with no requirement to resign before applying and abatement terms would not apply to such an officer on their successful appointment.**

Further facts

29 At the risk of some repetition, we summarise the main features of the ROSS para 6.3 scheme and its context and application as follows.

(1) Employees with 30 years' service in the PPS ('the 30+ cohort') may retire with full pension benefits at any age.
(2) Since police officers are not appointed at below 18 years of age those in the 30+ cohort cannot be younger than 48.
(3) 30+ cohort officers may choose to apply to retire and return without open competition under ROSS, para 6.3.
(4) Where an application is made and a business case for accepting it is made out, the employee may (but is not obliged to) retire and return without open competition, following a short break.
(5) If the employee retires, he or she will be entitled to take a (usually) tax-free lump sum in commutation of 25% of the pension earned and draw the balance of the pension in the usual way.
(6) On the other hand, abatement will apply to restrict the returnees' income (salary plus pension) to the "reference" (*ie* pre-retirement) salary.
(7) Promotions and changes in roles or duties do not operate to lift abatement. That rule was made explicit in 2012.
(8) Following the *O'Neill* judgment in 2014, the scheme was amended to give employees the benefit of pay increases.
(9) From September 2016 or earlier, the scheme has been restricted in such a way as to enable returnees to fill posts for a maximum of 18 months, to allow time for permanent successors to be appointed through open competition. The opportunity for open-ended employment under the scheme, enjoyed by the Claimants, is no longer available.
(10) From November 2016 returnees were free to apply for new roles without first leaving the Respondents (for a second time) and (as before) if they secured fresh positions through open competition, abatement ceased to apply.
(11) Returnees' salaries are set in accordance with the Respondents' Remuneration Policy. Four points can be noted. (a) The general rule is that

[8] A decision of the London South Employment Tribunal (EJ Milton). There was no appeal.

> new joiners start at the pay grade minimum. (b) Starting pay for employees who have previously worked for the Respondents will "take into account" previous experience. (c) ROSS returnees will be employed at the grade minimum plus 35% of the grade minimum and the target range minimum. (d) The effect of (a)-(c) is that, while ROSS scheme returnees do not join at the bottom of the applicable scale, they may well receive salaries substantially below their pre-retirement earnings.

30 The Claimants all retired more or less as soon as they could under the ROSS scheme. All commuted 25% of their pensions to receive substantial lump sums. All were placed on salaries set by reference to the Remuneration Policy. All received pay increases, backdated where necessary, in accordance with the *McNeill* judgment. Abatement was then applied to all.

31 Many if not all of the Claimants negotiated shorter working hours in order to eliminate or reduce the effect of abatement.

32 Most if not all of the 15 Claimants have ceased to be affected by abatement, having secured fresh positions through open competition. 11 made that transition between April 2015 and December 2017. Mr Gibbons followed in or around May 2019.

Analysis and Conclusions

Direct discrimination

33 The direct discrimination claim was debated by reference to three submissions advanced by Mr Milford on behalf of the Respondents and opposed by Mr Gold on behalf of the Claimants. We will take them in turn.

(1) 'Exact correspondence' and 'indissociability'

34 In the first place, Mr Milford contended that there was "no exact correspondence between the advantaged and disadvantaged groups and the protected characteristic (*ie* being between 48-55)" and that such correspondence was a pre-requisite for a condition-based complaint of direct discrimination.

35 Mr Gold's primary submission, as we understood it, was that there was a distinction to be drawn between tests of "indissociability" and "exact correspondence" said to have been propounded by A-Gs Jacobs and Sharpston in the cases of *Schnorbus* and *Bressol* respectively, that the former was right and the latter wrong, and that if the former was applied to the instant case a case of direct discrimination was made out.

36 We cannot accept Mr Gold's starting point. We have not been shown any acknowledgement in EU jurisprudence of the A-G's opinion in *Bressol* as marking a significant departure. We find this unsurprising. It does not have the appearance

of any sort of departure.[9] It may perhaps be that, in the passages cited above, she and A-G Jacobs were directing their minds to different if related considerations: she to the required correspondence between the condition and the advantage and disadvantage it causes to the groups affected by it; he to the closeness of the link between the condition and the protected characteristic.[10]

37 In any event, our conjecture is supremely irrelevant. Our duty is simply to understand and apply the law which is binding upon us. Two points shine out from domestic authority at the highest level. First, the supposed conflict between the Jacobs and Sharpston formulations is illusory. The Supreme Court has found them to be compatible with one another, the latter "building on" the former (see the judgments of Lady Hale in *Taiwo*, para 28 and *Preddy*, paras 19-21, 29). Second and in any event, contrary to Mr Gold's submission, the key question *is* whether there is "exact correspondence between the advantaged and disadvantaged groups and the protected characteristic" (*Taiwo*, para 28). The need for such correspondence explains why, as the majority of the Supreme Court held in *Preddy*, the fact of the claimant and his partner being in a civil partnership was critical to the finding of direct discrimination. That fact, in the view of the majority, led to the conclusion that "the criterion of marriage or civil partnership [was] indissociable from the sexual orientation of those who qualify to enter it" and so ("[m]ore importantly") enabled the court to find an "exact correspondence" between the advantage and disadvantage resulting from a rule making a double room available to a married couple but not to a couple in a civil partnership (para 29). It is clear from the judgments of each of the three Justices in the majority in *Preddy* that, but for the claimant being in a civil partnership, the discrimination would have been found to be indirect, not direct.[11]

38 Mr Gold submitted (very politely) that the analysis of the Supreme Court in *Taiwo* and *Preddy* was open to question. When we asked if we were being invited to depart from it on the basis that it was *per incuriam* he hastily disavowed any such submission, but produced another Latinism, *sub silentio*, one seldom deployed in the Central London Employment Tribunal. We were not sure what he had in mind but time was tight and we did not wish to interrupt his flow. We simply make the obvious point that (even if of a mind to do so, which of course we are not) we can no more depart from binding authority by quietly ignoring it than by challenging it head on.

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[9] Mr Gold seemed to submit that the Grand Chamber had disagreed with A-G Sharpston on the 'exact correspondence' requirement. We agree with Mr Milford that it did not. We also note his point that there is a certain irony in the fact it was she, despite what Mr Gold characterises as her unduly restrictive analysis, who reasoned (in *Bressol*) that the composite, two-part test under scrutiny was directly discriminatory and the Grand Chamber that took the opposite view.

[10] We do see some force in Mr Gold's point that A-G Jacobs's formulation may offer somewhat greater flexibility than A-G Sharpston's in particular circumstances. For example, the principle that pregnancy-based discrimination is of itself direct sex discrimination (see *eg Dekker v Stichting Vormingscentrum voor Jong Wolwassenen* [1992] ICR 325 CJEU) may sit more happily with his formulation than A-G Sharpston's since, although no man can become pregnant, it is also a fact that some women cannot bear children. But to contrast the usefulness of two tests in a particular factual context (as Lady Hale herself did in *Preddy*, paras 20-23) is not to declare them to be in conflict with one another.

[11] See paras 24-25 (Lady Hale), para 62 (Lord Kerr), paras 69-70 (Lord Toulson).

39 Mr Gold sought support from the *JFS* case. We have already explained our view that, stripped of its factual complexities, that authority represents an orthodox application of familiar principles. We see nothing in the decision to help the Claimants here.

40 Nor have we been shown any other authority that calls into question the applicability to the instant case of the 'exact correspondence' approach.

41 Mr Gold further submitted that even if the proper test was one of 'exact correspondence', it was satisfied. With respect to him, we find that argument clearly untenable. The relevant condition – completion of 30 years' membership of the PPS – is self-evidently *linked* to age. But is not age itself, although the *context* makes it inevitable that the affected group will be over 47. And in any event there is no exact correspondence between those of the Claimant's age group (48-55 (or 48-60)) and the (as the Claimants must put it) 'disadvantaged' group of those subject to abatement, since many in the age group will not have served the 30 years necessary to qualify for the right to retire and return under the ROSS scheme.

42 It follows that the complaint of direct discrimination fails without more.

(2) Less favourable treatment

43 Mr Milford's second submission was that "there has been no less favourable treatment of any person in materially the same circumstances as the Claimants."

44 We have reminded ourselves of the terms of the 2010 Act, ss13(1) and 23(1). The former provision posits a comparison with a comparator, real or hypothetical. The latter dictates that it must be a 'like for like' comparison: save for the difference in age (strictly, age group), the circumstances of the Claimants and their hypothetical comparators must be the same. Apples must be compared with apples.

45 The statutory requirement for a like-for-like comparison faces the Claimants with a stark difficulty: the allegedly detrimental treatment on which they rely (application of the ROSS scheme and consequential abatement of pay) could not have been applied to any hypothetical comparator because we must attribute to such a comparator (a) an age below 48 and (b) freedom to retire and return without abatement of pay. The comparison is impossible since (as is common ground) the ROSS scheme did not enable employees to retire and return having accrued less than 30 years' service (and therefore below the age of 48) and there was no other route to that end.

46 Nor would it have been open to the Respondents to make separate provision (by amending the ROSS scheme or otherwise) for employees to retire and return below the age of 48 and (therefore) with less than 30 years' service, because to do so would have been unlawful (see the Police Pensions Regulations 1987, reg B1(5)). It is not open to the Claimants to compare their treatment with that hypothetically applied to an imaginary comparator in circumstances where

such treatment would have been contrary to law. If statute dictates that those in the 'advantaged' and 'disadvantaged' groups be treated differently, that state of affairs makes the comparison invalid under s23(1) because there is a material difference between the circumstances of the claimant and the comparator(s): see *Palmer v Royal Bank of Scotland* [2014] ICR 1288.

47 Mr Gold seeks to meet these difficulties by contending that the better course is to put comparisons to one side and focus on the 'reason-why' question. This, he says, avoids arid debates about the precise attributes of the comparator. The higher courts have certainly observed more than once that in mental processes cases where an hypothetical comparator is relied upon it will often be profitable to focus first on the issue of *why* the employer treated the employee as he or she did. The answer may swiftly resolve the obverse question of whether the hypothetical comparator would have been more favourably treated. But we do not accept that this approach is beneficial, or even workable, in a criterion/condition case. Here, the 'because of' test turns on the way in which the condition works and the analysis necessarily depends on how (if at all) it operates to the disadvantage of the claimant *vis-à-vis* his or her comparator. The comparative exercise must come first.

48 Further and in any event, the 'less favourable treatment' question cannot, as Mr Gold's submissions seemed to suggest, simply be wished away. The statutory comparison lies at the very heart of the concept of direct discrimination and must be addressed in every case.

49 What does proper application of s23(1) in the present context show? In our judgment, it demonstrates that the direct discrimination claim is fatally flawed: it cannot succeed because no legally valid hypothetical comparator can be identified at all, let alone one who would, in circumstances not materially different to the Claimants', have been treated more favourably than they were.

(3) Detriment

50 Mr Milford's third submission is that the Claimants have suffered no detriment.

51 We start by noting that the parties were agreed that the discrimination claims are brought under s39(2)(d) only. There is no claim under s39(2)(a) or (b) (which are reproduced above for completeness only).

52 We have reminded ourselves of the authorities, which show that for the purposes of determining whether a detriment is established, the bar is set relatively low. Moreover, as the *Warburton* case demonstrates, the perception of the complainant is material and cases will arise in which there may be room for more than one reasonable view as to whether a worker has been disadvantaged in the workplace.

53 We fully accept that the Claimants share a sincerely-held sense of grievance about the terms of the ROSS scheme and the way in which it was applied to them.

54 These things having been said, we are unable to accept that a detriment is made out here. Undoubtedly the Claimants resented the fact that abatement was applied to them, but they nonetheless opted to retire and return under the ROSS scheme. Those of them who gave evidence told us that they had no real choice. What they meant was that it was plain and obvious that doing so was in their financial interests. It gave them their lump sums, saved them (a) NICs (which, post-retirement, were payable on (abated) salary but not on pension income) and (b) further police pension contributions at 11%, and left them free to open new pension schemes if they wished. Overall, admission to the ROSS scheme was manifestly a benefit and not a detriment. Mr Gold in his closing submissions readily acknowledged as much, observing that, had they not retired when they did, they would have suffered significant financial losses. How then can they contend that the grant, pursuant to their applications, of admission to the scheme constituted or entailed any detriment? In our judgment, detrimental treatment could only be made out if features of the scheme which they see as disadvantageous (for example, abatement itself or the original requirement, later removed, to retire before applying for a post through open competition)[12] could be separated from the entire package and treated as free-standing detriments. We do not consider that that approach is permissible. It seems to us a somewhat extraordinary notion that an employer might make available to an employee an opportunity which was favourable overall despite some features not to his or her liking and later face legal proceedings on the basis that the option freely taken by the employee had brought with it, in the form of the unwelcome features, actionable detriments. Absent any citation of authority legitimising a 'term by term' approach to detriment claims (equal pay analysis is, of course, another matter), we take the view that the Claimants' case on detriment is not merely ambitious but misconceived.

55 For these reasons we uphold Mr Milford's third submission.

Does Harrod make any difference?

56 We have cited the relevant passage from the judgment of Langstaff P in *Harrod* and referred to the way in which his remarks were dealt with (or rather not dealt with) by the Court of Appeal. In our judgment *Harrod* takes us nowhere. The judge's remarks were *obiter* and, given that the case was presented and argued as a claim for indirect discrimination, the submissions of counsel and authority cited did not address the concerns to which he adverted.

Conclusion on direct discrimination

57 For the reasons stated, we have reached the very clear conclusion that the complaints of direct age discrimination are unsustainable.

[12] We do not include here the application of the Remuneration Policy, about which the Claimants also feel notably aggrieved, because that was not a feature of the ROSS scheme at all.

Indirect discrimination

58 The relevant 'provision, criterion or practice' ('PCP') was being subject to "a policy that if they retired and returned to work without open competition, they would be subject to the abatement rules set out at clause 6.3 of the Respondent's ROSS Scheme".[13]

59 Did the Respondents apply the PCP to persons with whom they did not share their relevant protected characteristic of age?[14] It is common ground that they did not. Moreover, they could not, because the policy was itself defined by reference to that protected characteristic. Accordingly, the indirect discrimination claim falls at the first hurdle, namely the requirement for application of a PCP 'across the board', to persons who share the protected characteristic and persons who do not.

60 In case our reasoning under s19(2)(a) is mistaken, we will complete the analysis. Did the application of the policy put the Claimants, and those with whom they shared their relevant protected characteristic of age, at a particular disadvantage in comparison with persons who did not share those characteristics?[15] To address that question, one must identify the relevant pool for comparison. Given that the guiding principle is that the pool must be selected with a view to testing the alleged discrimination, we agree with Mr Milford that it must be confined to those affected by the PCP and must not include those not so affected. Who are the affected people? It is, we think, inescapable that they can only be those who have retired and returned without open competition. But since abatement applies to all in the pool, no question of relative disadvantage (measured by reference to age) can arise. It follows that the claim also fails under s19(2)(b).

61 Mr Milford's second and third arguments under direct discrimination apply equally to indirect discrimination. We have upheld those arguments and our conclusions on them stand as separate grounds for rejecting the complaints of indirect age discrimination.

62 For all of these reasons, the complaint of indirect discrimination fails.

Jurisdiction – time

63 It is common ground that 10 of the 15 Claimants presented their claims outside the primary three-month limitation period, measured from the last day on which abatement was applied to them.

64 Although the parties may disagree as to *how far* out of time the claims are, they agree that jurisdiction in respect of the 10 depends on the Tribunal being

[13] See the list of issues, above.
[14] See s19(2)(a).
[15] See s19(2)(b).

persuaded to exercise its discretion to substitute a longer time limit in place of the 'default' three months.

65 We are satisfied that this is not a proper case in which to exercise that discretion. On the contrary, in circumstances where we have found no legal merit in the claims (however put), it would be wholly idle to extend time.

Outcome

66 For the reasons given, the claims, heartfelt as they are, must be dismissed.

67 In view of the clear conclusions reached on whether *prima facie* complaints of discrimination are made out, we decline to make findings on the Respondents' justification defences. In our view, it would not be proportionate to do so. If the matter goes further, and if we are ultimately found to be wrong on either direct or indirect discrimination, no doubt the matter will be remitted to us accordingly. In that event, we will be much assisted by a higher court's guidance as to the nature of the discrimination which it falls to the Respondents to justify.

Employment Judge Snelson
27th April 2022

Judgment entered in the Register and copies sent to the parties on : 27/04/2022

For Office of the Tribunal

APPENDIX

LIST OF CLAIMANTS

Hugh Baker
Nicholas Batsford
CD
Noel Dalton
Joy Davis
David Donnelly
Lawrence Gibbons
Christopher Grant
Carl Long
Richard Marsden
John O'Neill
John Reynolds
AB
Richard Ward