Case Numbers: 3207780/2020, 3203913/2020, 3211894/2020, 3204870/2020 3210894/2020, 3203015/2020, 3211246/2020, 3206621/2020

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr L. Broadbent**
(2) Mr C. Bulcock
(3) Ms T. Jones
(4) Mr D. Deex
(5) Mr S. Hendry
(6) Mr A. Linton
(7) Mr A. Small
(8) Mr J. Watling

Respondent: **Police Federation of England and Wales**

Heard at: **East London Hearing Centre**

On: **6-8, 13-16, 20-23, 27-30 September and 3 October 2022, 19-20 and 23-27 January 2023,**
and in chambers on 6-10, 14-17 February and 6 April 2023

Before: **Employment Judge Massarella**
Members: **Mrs B.K. Saund**
Mrs M. Legg

Appearances:
For the Claimants: Ms S. Jolly KC
Ms A. Beale (Counsel)
Ms L. Veale (Counsel)

For the Respondent Mr J. Galbraith-Marten KC
Mr R. Fitzpatrick (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimants' claims of direct age discrimination succeed in relation to Issues 7-11 and 13;**

2. **the Claimants' claims of victimisation succeed in relation to Issues 7-11 and 13;**

3. the Claimants' claims of direct age discrimination and victimisation in relation to Issue 12 fail and are dismissed;

4. the Claimants' claims of indirect age discrimination fail and are dismissed.

REASONS

INTRODUCTION

Background to these proceedings

1. These proceedings concern claims for direct and indirect age discrimination and victimisation brought by 9,989 Claimants, who are serving or former police officers and current or former members of the Police Federation of England and Wales (the Respondent in these proceedings, also referred to in the documents as 'PFEW').

2. The claims arise from the actions taken by the Respondent in response to the government's introduction of a new police pension scheme in 2015 ('the 2015 Scheme'), and the Claimants' ultimately successful legal challenge to the transitional provisions applicable to that scheme (the Police Pensions Challenge ('PPC')).

3. The transitional provisions provided either for full protection for officers closest to normal retirement age on 1 April 2012, by permitting them to remain in their existing, more favourable, pension scheme, or partial protection for a specified period by a tapering mechanism. Anybody not in those groups was afforded no protection at all.

4. Similar changes and transitional provisions were applied across the public sector. Groups of judges (in the *McCloud* case[1], represented by Leigh Day solicitors) and firefighters (in the *Sargeant* case[2], acting through the Fire Brigades Union ('FBU')) also pursued legal challenges to their own transitional arrangements in 2015 ('the parallel litigation').

5. The officers instructed Leigh Day to act on their behalf and the first claims were issued on 11 December 2015, but the claims (and subsequent appeals) in the parallel litigation were heard ahead of the PPC.

6. The judges' and firefighters' claims for direct age discrimination succeeded in the Court of Appeal in December 2018, and the respondent parties to the PPC conceded liability in relation to the PPC age discrimination claims in August 2019.

[1] *McCloud v Lord Chancellor and Secretary of State for Justice and another* [2019] ICR 1489 in the Court of Appeal
[2] *Sargeant and others v London Fire and Emergency Planning Authority and others* [2019] ICR 1489 in the Court of Appeal

7. In October 2019, the Respondent in these proceedings was given permission by the Employment Tribunal (London Central) to join the PPC as an interested party.

8. The logistical process of placing the disadvantaged officers back into their legacy schemes for the relevant period is ongoing, but the PPC claimants' claims for injury to feelings and individual financial compensation have now been settled.

9. By final order sent to the parties on 5 November 2020 (following the hearing on 2 November 2020), the ET made a declaration that all existing claimants had been entitled to full transitional protection for the purposes of the Police Pensions Regulations 2015 with effect from1 April 2015.

10. It was not in dispute that the Respondent did not agree (and still has not agreed) to provide any financial support to the PPC; nor is it disputed that the Respondent had not agreed to provide financial support for any other equality challenge by its members to the transitional provisions of the 2015 Scheme until it commenced funding legal claims for its members, separately from the PPC claims, in May 2020.

Procedural history

11. It is the Claimants' case in these proceedings that the Respondent sought actively to deter and obstruct them from pursuing the PPC; that it created division and ill-feeling towards them for doing so; and that it campaigned, communicated and presented a distorted, misleading and inaccurate assessment of the Claimants' legal claims, the costs and financial consequences of those claims, and group litigation in general, as well as the impact on other members.

12. The Respondent resists the claims in their entirety, denies that it engaged in the alleged conduct and maintains that it sought to engage constructively with the Government to ensure that police officers retained the best pension scheme possible in the circumstances.

13. These proceedings were issued on 10 September 2020, after an ACAS early conciliation period between 14 August 2020 and 9 September 2020. With one exception, the Claimants are again represented by Leigh Day.

14. The exception was Mr Keith Flanagan. Leigh Day came off the record in his case in February 2021. He took no active part in the proceedings; he did not respond to a written request from the Tribunal at the beginning of the final hearing to state whether he was still pursuing his claims; nor did he comply with an unless order, giving him a final opportunity to confirm his position. His claims stand dismissed.

15. There was a first preliminary hearing for case management on 1 February 2021 before EJ Burgher, at which the Claimants were given permission to provide further particulars of their claims and the Respondent to provide a fully pleaded response.

16. There was a second preliminary hearing for case management on 17 June 2021 before me, at which some issues were further clarified, and orders made.

17. An issue of legal professional privilege arose; a two-day preliminary hearing was listed in December 2021; the parties resolved the issue, and the hearing was vacated.

The final hearing

18. On the first morning of the hearing, the Tribunal conducted a preliminary hearing for case management.

19. There was a bundle of 3,501 pages, a first supplementary bundle of 1,020 pages, a second supplementary bundle of 224 pages and a witness statement bundle of 321 pages. We were also provided with a chronology, a list of issues (appended to this judgment) and a cast list, all of which were agreed. There were helpful opening skeleton arguments on both sides. The Tribunal spent the second and third days of the hearing reading the statements, skeletons and some other documents identified by the parties.

20. On the morning of the fourth day, there was a further, brief case management discussion. The Claimants' representatives made an (unopposed) application under rule 50 for any references to the personal addresses of serving or former police officers to be redacted. The Tribunal considered the detailed written submissions in support of the application, which addressed the legal principles (in particular, the importance of open justice) and referred us to the relevant authorities. The Tribunal made an order for redaction for the reasons given orally at the hearing.

21. Arrangements were made for named individuals to observe the hearing remotely in accordance with the provisions of the Remote Observation and Recording (Courts and Tribunals) Regulations 2022.

22. On behalf of the Claimants, we heard evidence from:

    22.1. Mr Lee Broadbent (Greater Manchester Police, founding member of the Police Pension Challenge group);

    22.2. Mr Christopher Bulcock and Ms Tieneke Jones (officers with Lancashire Constabulary);

    22.3. Mr Darren Deex (Inspector with Essex Police who joined the force at the age of 19 and met with national and local officials to explain the position of his age cohort);

    22.4. Mr Scott Hendry (an officer with Merseyside Police who communicated extensively with national and local federation officials in the latter stages of the PPC);

    22.5. Mr Alexander Linton (an officer with Gloucestershire Constabulary who joined the PPC in March 2016);

    22.6. Mr Andrew Small (a former officer with Derbyshire Constabulary who left the force owing to ill health in 2019);

22.7. Mr James Watling (a Metropolitan police officer who was a member of the Pension Challenge admin team from the summer of 2015).

23. All the witnesses, with the exception of Mr Bulcock (who was eligible for tapered protection), fell outside the protection offered by the transitional provisions in the 2015 Scheme.

24. On behalf of the Respondent, we heard evidence from:

24.1. Mr Ian Rennie (General Secretary of the Respondent from May 2008 until his retirement on 23 May 2014);

24.2. Mr Andy Fittes (General Secretary of the Respondent from 24 May 2014 until 30 September 2018); and

24.3. Mr Alex Duncan (National Secretary[3] of the Respondent from 1 October 2018, remaining in that position until this year).

25. The hearing was originally listed to determine liability in respect of all Claimants. During the hearing, a number of issues arose as to how any judgment made by the Tribunal on the basis of the evidence given by the eight Claimants who attended to give evidence would be binding on the other Claimants. Although the parties attended the hearing assuming that it would be possible to determine all the cases, it emerged that they were not of one mind on the question of the effect of the judgment on the absent Claimants. No application had been made by either party for lead Claimants to be identified in accordance with rule 36.

26. After discussions with Counsel, and with their agreement, the Tribunal decided to determine the cases of the eight Claimant witnesses. The claims of the remaining Claimants were adjourned to be considered at a preliminary hearing for case management, on a date to be confirmed following the promulgation of this judgment. The question of how the Tribunal should deal with them will be considered at that hearing and orders made.

27. The final hearing was originally listed for 20 days. Owing to judicial availability, the hearing was initially reduced to 16 days. It was clear from the outset that extra days would be needed. The earliest available dates were in late January 2023. The Tribunal listed a further five days, the first of which was for the Tribunal to read back into the case. We then heard evidence from the remaining three witnesses.

28. The parties were given a day to perfect their written closing submissions. The submissions on behalf of the Claimants ran to 277 pages; those for the Respondent to 103 pages, with a 296-page annex, consisting of an annotated transcript of the oral evidence. We were provided with three lever-arch files (double-sided) of authorities. The parties made oral submissions on the last day of the hearing.

29. We informed the parties at the end of the hearing that there was likely to be a delay in completing and sending out the judgment in this case, given the

[3] the title replaced that of General Secretary

complexity of the issues, the volume of material provided and the competing demands of other cases.

30. The Tribunal deliberated over ten days. Our findings and conclusions set out below are unanimous. We cannot refer in our judgment to all the evidence and submissions put before us. The fact that a particular point is not dealt with expressly should not be taken as indicating that we did not consider it.

31. The Tribunal is grateful to both leading Counsel, their juniors and instructing solicitors for their assistance throughout the hearing.

FINDINGS OF FACT

Organisational structures

The Respondent

32. The Respondent is a statutory body, created and regulated by Part III of the Police Act 1996 and the Police Federation (England & Wales) Regulations 2017. The constitution and functions of the various bodies which comprise the Respondent are now set out in the Police Federation Rules, made pursuant to reg 22 of the 2017 Regulations, and which came into force on 18 January 2018.

33. The principal function of the Respondent is to represent the interests of serving police officers in England and Wales in accordance with s.59 Police Act 1996. It is not a trade union (and so is not affiliated to the TUC); police officers are not permitted to join a trade union pursuant to s.64 Police Act 1996. Superintendents and chief superintendents are represented by a separate staff association, the Police Superintendents' Association of England and Wales; the most senior officers are members of the Chief Police Officers Staff Association.

34. The Respondent is a trade organisation for the purposes of s.57 Equality Act 2010 ('EqA').

35. There are forty-three police forces operating in England and Wales grouped by the Respondent into eight regions. Region 2 (referred to below) is the North-East Region, comprising the police forces of Cleveland, Durham, Humberside, Northumbria and North, South and West Yorkshire.

36. Each police force has its own Federation branch. Each branch was, under the 1969 Regulations, governed by a Joint Branch Board ('JBB'). Each of the eight regions elected from among their number a constable, sergeant and inspector to represent officers of those ranks at national level. Those regional representatives formed separate rank committees that together made up the Joint Central Committee ('JCC'), and it was from the JCC that the Respondent's principal officers were then elected, including its General Secretary. Before 2017 the JCC was the main decision-making body of the Respondent.

37. Since the coming into force of the 2017 Regulations, each branch is run by (i) a Branch Council and (ii) a Branch Board, elected from the members of the

Branch Council. Different arrangements apply to the Metropolitan Police force, but they are not material for these purposes.

38. The National Council essentially comprises all the Branch Chairs and Secretaries. They elect the National Board from among their number. The role of the National Board is to lead and run the Federation, making policy decisions and formulating strategy. It sets its own procedure and meets as and when necessary. The main function of the National Council is to hold the National Board to account and approve the long-term strategy of the Federation. It meets not less than three times a year.

39. Mr Steve White was Chairman (under the old structure) from May 2014 until the end of 2017. Mr John Apter was National Chair between August 2018 and March 2022.

The Police Negotiating Board

40. The Police Negotiating Board ('PNB') was a statutory body continued in being by s.61 of the Police Act 1996. It was replaced (for England and Wales) by the Police Remuneration Review Body (PRRB) on 1 October 2014. At the material time it comprised an Official Side and a Staff Side. Each side appointed twenty-two representatives.

41. The Respondent was entitled to appoint seven representatives to the Staff Side of the PNB. The other Staff Side representatives were appointed by the Chief Police Officers Staff Association, the Police Superintendents Association of England and Wales, the Association of Chief Police Officers in Scotland, the Association of Scottish Police Superintendents, the Scottish Police Federation, the Superintendents Association of Northern Ireland and the Police Federation for Northern Ireland.

42. The function of the PNB was to make recommendations to the Secretary of State on various matters including hours of duty, leave, pay and allowances, and pensions. S.62 Police Act provides that the Secretary of State must take into consideration any recommendation made by the PNB before making regulations under s.50 of the Act.

43. However, with effect from 1 April 2014, this does not include pensions. Police pensions are now governed by the Public Service Pensions Act 2013, section 1 of which provides that 'regulations may establish schemes for the payment of pensions and other benefits to…members of police forces for England, Wales…'

44. Under s.21 Public Service Pensions Act 2013, before making any public service pension scheme regulations, 'the responsible authority must consult such persons (or representatives of such persons) as appear to the authority likely to be affected by them'.

The membership of the Federation

45. All police officers are automatically members of the Respondent. Members can elect not to pay subscriptions and thereby not receive the legal

representation and other benefits that subscribing members receive, but they still remain members of the Federation.

46. The Respondent did not conduct an annual tally of its members, nor did it have a database of members. Mr Rennie's best estimate was that in 2008 there were around 142,000 members; by 31 March 2012, that number had fallen to approximately 134,403; by 2014 to 126,000; and by 2016 to 121,706. This reflected both the reduction in the number of police officers because of the Government's cuts to police funding, as well as loss from retirements.

Responsibility for equalities issues within the Respondent

47. On 23 May 2008, Mr Ian Rennie became General Secretary of the Respondent. He also held the position of Secretary of the Staff Side of the PNB. He had no training in equalities law. For most of the material period there was no individual within the Respondent who was responsible for equalities issues at its head offices in Leatherhead. Although an equalities sub-committee existed within the JBB/INB, there is nothing to suggest it was ever tasked with examining issues relating to pensions or the PPC.

48. The Respondent retained Ms Jane Monkhouse, formerly of the Equal Opportunities Commission, to advise on equalities issues. Mr Rennie gave some generalised evidence that he sought her advice about the equalities implications of the pension changes. There is no record of any such advice; Mr Rennie could not recall what Ms Monkhouse said on the subject, nor when she said it. We think it likely that she was not asked to advise on the question of age discrimination in the 2015 Scheme.

49. The independent review into the Respondent conducted by Sir David Normington ('the Normington Review', see below at para 138) concluded in early 2014 that inadequate consideration was being given to all protected characteristics identified in Equality Act 2010, and observed that no one within the Respondent had an explicit mandate for ensuring the needs of a diverse membership were met. It said that the Respondent had 'an enormous distance to travel if it is to promote equality internally', recommended that there be a new drive to improve the position and proposed that this should be led by a professional Director of Equality and Diversity who would be a member of the Leatherhead HQ staff. There is no record of the Respondent making that appointment.

Proposals for pension reform and consultation: June 2010 to September 2012

The police pension schemes of 1987, 2006 and 2015

50. Before 2015 there were two police pension schemes: the Police Pension Scheme 1987 (PPS) which was available to officers who joined the police before 6 April 2006; and the New Police Pension Scheme 2006 (NPPS) which was available to officers who joined the police between 6 April 2006 and 31 March 2015.

51. The PPS and the NPPS were contained in the Police Pensions Act 1976 (PPA). S.2 PPA states that any pension regulations made under the PPA

could not worsen the position for serving members in relation to compulsory retirement age or scale of pensions unless members agreed. To avoid this 'no worsening' provision, primary legislation was introduced by the Government in the form of the Public Service Pensions Act 2013 (PSPA), which was enacted on 24 April 2013. S.18 PSPA prevented further pension being earned in the PPS or the NPPS from 1 April 2015, other than in accordance with 'transitional arrangements.' This enabled the 2015 Scheme to be introduced.

52. All three schemes are defined benefits schemes: the amount paid on retirement is predetermined by a formula based on the officer's earnings history, length of service and age, rather than being dependent on individual investment returns.

53. The PPS and NPPS were final salary schemes: an individual's pension was based on their pensionable service and their best twelve-months' salary in the last three years before their retirement in the form of a fraction of that salary for each year of service.

54. The 2015 Scheme is a career average (CARE) scheme: an individual's pension is based on their salary over the whole of their career. Each year a pot is built up based on salary in that year; at the end of each year all the pots are increased in line with the revaluation rate used for the scheme. When the individual retires, their total pension is calculated by adding up the pots of pension they have built up each year throughout their career and a pension at that level is then payable for life.

55. Although a final salary scheme is generally regarded as the most favourable, a CARE scheme may be more beneficial to some individuals, owing to the combined effect of the accrual rate and the uprating mechanism.

<u>The Hutton and Winsor Reviews</u>

56. In June 2010, the then Labour Government commissioned a detailed review of pensions across the public sector to be carried out by the Independent Public Service Pensions Commission (IPSPC) led by Lord Hutton ('the Hutton Review').

57. In October 2010, the Government commissioned the 'Review of Police Officer and Staff Remuneration and Conditions' led by Mr Thomas Winsor ('the Winsor Review').

58. The Hutton Commission's Interim Report was published on 7 October 2010. It recommended that the most effective way of making savings in the short-term was to increase member contribution rates. Lord Hutton also said that longer-term structural reform was needed as the status quo was not tenable: a more prudent approach to meeting the cost of public service pensions was required to strike a fairer balance, not just between current taxpayers and public service employees, but also between current and future generations.

59. On 8 March 2011, Part 1 of the Winsor Review was published. On 10 March 2011, the final report of Hutton Review was published. It recommended moving to CARE, rather than final salary, schemes. In those new schemes, to

which all existing members of the current schemes would be moved, members' normal pension age (NPA) should be linked to their state pension age. However, in the case of the uniformed services, including police and firefighters, the Commission recommended that a new NPA of 60 should be set to reflect the unique characteristics of the work involved.

60. The Commission also recommended that existing members should retain a final salary link in respect of their past service. In its view this would limit the impact on existing, older members of the scheme, and would thus avoid the need for any special protection, which would in any event not be possible in practice owing to age discrimination legislation. Mr Rennie accepted in cross-examination that the Respondent knew this when it entered into negotiations with the Government.

61. The Commission's recommendations were accepted as a basis for consultation by the then coalition Government in its 2011 budget.

62. The Hutton Review did not deal in any detail with police pensions. In May 2011, Mrs Theresa May (then Home Secretary) announced that those matters would be considered in part 2 of the Winsor Review.

63. On 14 September 2011, the TUC announced a day of action in November, in part at least in response to the proposed pension reforms. Two million workers took part.

The new offer to unions

64. On 2 November 2011, the Chief Secretary to the Treasury (Mr Danny Alexander) announced a new offer to the unions including: a more generous accrual rate; and transitional provisions to ensure that anyone with ten years or fewer to their pension age on 1 April 2012 would see no change when they retired. Mr Alexander wrote:

> 'It is my objective to ensure that those closest to retirement should not have any detriment either to when they can retire nor any decrease in the amount of pension they receive at their current Normal Pension Age. Over and above the costs ceiling, the Government's objective is to provide this protection to those who on 1 April 2012 are within ten years of Normal Pension Age. Schemes and Unions should discuss the fairest way of achieving this objective, and for providing some additional protection for those who are just over ten years from their Normal Pension Age. I would be willing to consider tapering of transitional protection over a further three to four years. Full account must be taken of equalities impacts and legislation, while ensuring that costs to the taxpayer each and every year should not exceed the OBR forecast for public service pension costs - i.e. those forecasts made before the further reform set out in this letter.'

65. The transitional provisions, which later became the focus of the PPC, originated in proposals put forward by the TUC.

Heads of agreement

66. On 20 December 2011, Mr Alexander announced that heads of agreement had been established with most unions in the local government, health, civil service and teachers' schemes. Agreements would vary as between sectors, provided they remained within the overall cost ceiling. However, they would all

have core elements in common: the switch from final salary to CARE schemes; an increase in pension ages; individual members would contribute more; those within ten years of retirement would see no change in their normal pension age nor any decrease in the amount they received at that age.

67. In its response, the TUC said that progress varied between the sectors, but that in most cases the emphasis was now on giving active consideration to the new proposals rather than taking further industrial action.

68. Mr Alexander confirmed that discussions on the uniformed services' schemes would be brought forward in due course. Mr Rennie accepted that the Respondent knew at the time that it was open to it to look for a proposal which cost the same, but with its own preferred configuration.

Part 2 of the Winsor Review

69. On 15 March 2012, part 2 of the Winsor Review was published, which recommended, among other things, a normal pension age of 60 for police officers, in line with the Hutton Review.

70. On 21 March 2012, the Respondent's JCC published its view that the Winsor Review was deliberately offensive and detrimental to policing in England and Wales and called for the Home Secretary to reject it. She accepted it.

Engagement or Challenge

71. The means available to the Respondent in any negotiation with the Government on matters affecting their members were limited in certain respects. It had no power to take industrial action. When it came to pay, it had the right to arbitration, if agreement could not be reached. Arbitration was not available when it came to pensions. It could engage in what was described as consultation with the Home Office, via the Staff Side of the PNB: it could put forward proposals and counterproposals and engage in detailed discussion and argument.

72. The Respondent characterised this as 'engaging positively'. We find that, whatever language was used at the time, it was a form of negotiation. The Respondent had considerable influence over the final form of the 2015 Scheme. In his witness statement Mr Rennie described the outcome in relation to retirement age as:

> 'a serious and key issue and a very important improvement for all of [the Respondent's] members – we worked extremely hard to change the Home Secretary's position on this.'

73. As part of its messaging to members, the Respondent consistently maintained over the following years that it had faced a binary choice between engaging positively with the government's proposals and challenging them in the courts/tribunal. We find that was misleading. Mr Rennie accepted in oral evidence that it was open to the Respondent to do both in appropriate circumstances. We saw instances of this: in the context of the drafting of the regulations implementing the 2015 Scheme, and again in 2020 in relation to the government consultation about changes to the 2015 Scheme, when the

Respondent advanced proposals, while making it clear that, if agreement was not reached, legal action might be taken.

The consultation period: 27 March 2012 to 22 June 2012

74. On 27 March 2012, the Home Secretary wrote to Staff Side of the PNB with her proposals for long-term reform of police pensions. She set out the Government's preferred scheme design, while making it clear that there was scope for counterproposals. She expressly stated that 'all aspects' of the proposals were envisaged to be the subject of detailed discussion and that the Government would respond to 'any alternative suggestions.' Paragraph 3 of Annex A listed 'the elements of the scheme where there is flexibility to depart from the preferred design', which included:

> 'transitional protection (taking full account of equalities impacts and legislation, while ensuring that costs to the taxpayer in each and every year do not exceed the Office for Budget Responsibility forecasts for public service pensions).'

75. Mr Rennie accepted, and we find, that the Home Secretary was giving the green light to the Respondent from the outset to provide its own detailed counterproposals in relation to the proposed transitional provisions.

76. The Home Secretary offered full protection to those officers within ten years of eligibility for retirement on a maximum unreduced pension. In the main body of the letter, she wrote:

> 'The Government's objective remains to protect those within ten years of normal pension age so that they see no change in when they can retire nor any decrease in the amount they receive at their current normal pension age. In the context of this commitment and the special circumstances of members of the 1987 Police Pension Scheme, transitional protection will be extended to officers in that scheme who, at April 2012 are aged 45 or over, or are aged 40 and over and who are ten years or less away from being able to retire on a maximum, unreduced pension.'

77. The Respondent made no enquiries of the Government during the consultation period as to the rationale for this proposal.

78. Mr Rennie agreed that when he saw the Government's proposals for full protection, he realised that those entitled to it were being given 'a very sweet deal' because they would see no change in when they could retire, no decrease in any amount of pension received and no change to the commutation on lump sum pensions. He also accepted that it was obvious that the transitional provisions would have a disproportionate, adverse impact on younger members and that the Respondent understood from the outset that that there was a 'possibility' of age discrimination.

79. We find it ought to have been obvious that (as Mr Rennie accepted in cross-examination) those furthest from retirement had no real prospect of being able to recoup the losses they would incur over the course of their working lives. Mr Linton illustrated the point neatly in his witness statement:

> 'The starting point when thinking about pension changes and who might be affected, the starting point might be that those about to retire might be most affected. But once you start digging through financial changes to the pensions, you quite quickly realise that those about to retire are the least affected. The older officers go on to retire on the

> same date, the big pot already accrued will stay the same. So if they're 3 months from retirement, the change to their pension is less than £1 per month. As it gets more £10 per month, people with many years to go, £1000s per month.'

80. In our view the potential for age discrimination was so obvious that it cried out for a cogent explanation of what the justification for it might be.

81. A minuted meeting of Staff Side took place on 11 April 2012. A small pensions technical working group was set up, consisting of eight individuals, including Mr Rennie, to consider the Home Secretary's proposals with the PNB's professional advisers and then to report back to Staff Side. All were longer-serving officers; none of them were from the younger cohort. There are no further minutes of Staff Side meetings between this date and the date on which the PNB responded to the Home Secretary on 22 June 2012 (below at para 96). There are no records showing what input (if any) the technical working group had.

82. Mr Linton speculated that, by protecting older members, the Government knew it would be extending protection to the leaders of the unions/staff associations and were thus likely to avoid challenge. The Tribunal is not in a position to make a finding as to that. It is striking, however, that at no point before May 2020 did the Respondent, the overwhelming majority of whose leadership appears to have belonged to the the group protected by the transitional provisions, raise any objection in principle to the transitional provisions. On the contrary, it actively championed them for the best part of eight years.

Financial modelling

83. Surprisingly, given that a central plank of the Respondent's commitment to the transitional provisions was that they benefited the majority of its members, none of the three General/National Secretaries took steps to establish whether that was factually accurate.

84. The Respondent carried out no financial modelling during the consultation period (or at any point thereafter) to establish the impact of the proposals on different cohorts of officers by age. It had no documents containing a breakdown by age and/or service profile of its members. If the Home Office held such figures (there was no evidence that it did), the Respondent did not see them. The earliest statistical analysis was not produced until 2014, by the Government Actuary's Department (below at para 164), which provided a snapshot of the position in 2012; it was never updated.

85. Mr Rennie said that he focused on trying to get 'the best scheme going forward for all members'. His 'rough idea' at the time was that the transitional provisions benefited more than 50% of officers.

Equality impact assessment

86. No equality impact assessment ('EIA') was carried out by the Respondent, nor did Mr Rennie press the government for its EIA (if there was one). His evidence was that there were 'discussions' about equalities issues, including age discrimination; there is no record of them. If they happened, we find that any consideration of age discrimination must have been cursory.

Consultation with members

87. As for communication with the Respondent's membership during the consultation period, Mr Rennie appears to have circulated an update about the reforms to Branch Boards in April 2012, which was not in the bundle. In August 2012 (after the consultation period had closed), a further update was circulated, probably to Branch Boards, which included a link to the letter, which the Respondent had sent to the Home Secretary of 22 June 2012 (para 96).

88. The Respondent did not conduct a survey of its members to canvass their views on the pension proposals. Mr Rennie's evidence was that it would have been difficult to do so, absent a database of members and given the complexity of the subject matter. However, at the beginning of 2011 the Respondent had conducted a survey of members about the Government's cut to the policing budget and the Winsor recommendations. It is unclear why a similar survey could not have been conducted on the pensions issue. We find that Mr Rennie had already formed a firm view as to the approach he intended to take and was not minded to involve the membership.

89. We further find that this was characteristic of a top-down approach to decision-making within the Respondent. Not only was there no consultation of the membership at large, there was little evidence that the bodies charged with deciding/reviewing policy (the JBB/JCC and their successors, the INB/INC and NB/NC) were consulted in a meaningful way. When it came to key decisions, they were usually updated and nothing more. There was only one occasion during the whole chronology - at a meeting of the National Council on 10 July 2019 (para 458 below) - when a pensions issue was put to a vote, and then only by way of an 'indicative' show of hands

90. The Tribunal was struck by the extent to which the General/National Secretaries were able to act freely, supported and enabled by a loyal executive team but apparently unencumbered by scrutiny or accountability. There was, it appears to us, a democratic deficit within the organisation. Mr Broadbent observed, not unfairly in our view: '[the Respondent] had a pattern of treating members like mushrooms, namely kept in the dark and fed manure.'

The legal advice obtained by the Respondent during the consultation period

91. Mr Rennie sought advice on the Government's proposals from Mr John Sturzaker of Russell Jones and Walker (now Slater and Gordon), who were the Respondent's retained solicitors at the time. Mr Sturzaker instructed Mr Martin Westgate QC to advise. Both Mr Sturzaker and Mr Westgate were specialists in the field of pensions law.

92. Mr Sturzaker sent instructions to Mr Westgate on 24 April 2012. Their focus was on exploring ways to block the introduction of the scheme, whether by way of a public law challenge, by arguments based on interference with property rights under the ECHR, or in reliance on the 'no worsening' provisions in s.2 of the Police Pensions Act 1976 (above at para 51). There was no mention of age discrimination, even though the Respondent was alive to the

issue. Mr Rennie accepted that he was seeking advice from Mr Westgate as a pensions expert, rather than in relation to discrimination law.

93. On 4 May 2012, Mr Westgate sent Mr Sturzaker an interim note (which was not in the bundle). He observed in his covering email: 'I am afraid it is difficult to be specific since the proposals are so general'. Mr Sturzaker replied to Mr Westgate on 6 June 2012, raising queries on the interim advice, some of which were about the transitional provisions. Again, there were no instructions to advise on age discrimination.

94. Mr Westgate's final written advice was not received until 18 July 2012, after Staff Side's response to the Home Secretary (below at para 95 onwards) had been submitted. In an email of 12 July 2012, pushing Mr Westgate for his opinion, Mr Sturzaker said that it would be 'useful' to have the opinion as it was 'one of a number of streams' feeding into Staff Side's final position.

Staff Side response to the Home Secretary

95. Mr Rennie accepted that the timing of Mr Westgate's advice meant that Staff Side's final position on the transitional provisions had already been decided on before the advice was received: it would support them, while seeking extensions to them. There is no record of the basis for that decision, nor of its being referred to the JCC for approval.

96. On 22 June 2012, Mr Rennie (on behalf of Staff Side) replied to the Home Secretary's letter of 27 March 2012. Among other things, he wrote:

> 'We have been unable in the time available to give full consideration to all aspects of the issue, including the possibility that an alternative scheme design might better meet the concerns of our members and the needs of the police service.'

97. Mr Rennie proposed that any new scheme be applicable only to new recruits. As for the transitional provisions, he wrote:

> 'We consider that the natural meaning that any police officer would have ascribed to the Chief Secretary's words was that if on 1 April 2012 s/he was within 10 years of being able to retire with a pension, s/he would be able to retire with the pension s/he would have expected on retirement at such date.
>
> The current proposal on transitional arrangements covers most such officers, but it does not provide full protection for the following groups:
>
> > (a) officers who had 20 or more years' service in PPS at 1 April 2012 but are under the age of 40; and
> >
> > (b) officers who had 15 or more years' service in PPS and were aged 40 but under 45 at 1 April 2012
>
> We consider that full protection should be extended to cover these officers, who anticipated being able to retire with an immediate pension after a further 10 years' service. A failure to do so may amount to unlawful age discrimination.'

98. Mr Rennie accepted in cross-examination that he was proposing an extension of the transitional provisions which would benefit officers aged 38 and over. There is no evidence that calculations were done to determine that a cut-off age of 38 was the optimal point for full protection. He accepted that, 'if Staff

Side suggested it', they could have proposed a different way of splitting the available budget which was less disadvantageous to younger members. It was put to him that the Respondent actively chose to protect those least financially affected by the proposals rather than those who stood to lose the most, he responded: 'Staff Side did; it was Staff Side's decision'.

99. We found Mr Rennie's attempts to distance himself from decisions by taken by Staff Side unconvincing. He was the General Secretary of the Respondent, representing the largest group on the PNB; he was also the Staff Side Secretary and lead negotiator of the PNB. We think it implausible that any decisions were taken, or policies adopted, without his approval. Absent any documentary evidence of decisions being taken by anyone else, we are satisfied that he was ultimately responsible for the decisions taken, and the policies adopted, as later were his successors as General/National Secretary, Mr Fittes and Mr Duncan.

100. In a section dealing with Staff Side's specific concerns, Mr Rennie referred to 'the need to comply with the public sector equality duty and to avoid unlawful discrimination against any group or groups with a protected characteristic'. He continued:

> 'Before any final decision is made as to the appropriate design of future arrangements or in relation to the transitional arrangements, a full equality impact assessment covering at least the following groups will be required: different age groups; officers with shorter periods of service (who may well be disproportionately female); officers who work or have worked part-time (who are likely to be disproportionately female); and disabled officers.'

<u>Developments between June and September 2012</u>

101. On 26 June 2012 Mr Sturzaker updated Mr Westgate. He made no reference to age discrimination in this email, nor in two emails of 6 July 2012, arranging a telephone conference with him. By email dated 12 July 2012, Mr Sturzaker forwarded to Mr Westgate a document containing some scenarios which had been prepared by the Home Office for the attention of Staff Side. The Home Office wrote:

> 'If you would like to consider alternatives or further smoothing, that is possible. Any alternative design would need to be fully costed, with extra costs having to be paid for from within the cost ceiling and would be subject to the usual HM Treasury consent.'

102. The Respondent was being told in terms by the Home Office that they could take money from one pot and put it into another, provided it did not exceed the overall budget. Mr Rennie accepted that neither he nor anyone from Staff Side considered whether there was any less discriminatory way of redesigning the scheme so as to be fairer to younger officers.

103. There was no reference to age discrimination in Mr Sturzaker's covering email to Mr Westgate, but he must have asked him to deal with the issue because he did so. We are not prepared to find, as Ms Jolly invites us to do, that Mr Rennie asked Mr Sturzaker to convey to Mr Westgate that he and Staff Side did not want to challenge the transitional provisions on grounds of age. There is no evidence of such an instruction. On the other hand, we think it probable that, already by this stage, Mr Rennie thought that the advantages of the

transitional provisions to officers nearing retirement were so valuable that they would outweigh the potential for discrimination against younger officers.

104. On 18 July 2012, the draft of the first advice from Martin Westgate QC was received by the Respondent. In his summary Mr Sturzaker flagged as one of the main points:

> 'The transitional arrangements are likely to mean that any *prima facie* discrimination on age/disability grounds will be justifiable'.

105. At this point the view expressed was that the transitional provisions might be the means of justifying *prima facie* discrimination, rather than their being the source of it.

106. In the 20-page advice Mr Westgate dealt with age discrimination in two paragraphs, of which the following is the more substantial:

> 'It is arguable that transitional protections that apply only to those above the age of 40, or 45 as the case may be, will be unlawful for the purposes of this Directive.[4] Members below that age will have their past service recognised on the old terms but will not be able to draw their pension until later than they can now. This difference does not fall within the derogation in 6(2) because this must be strictly construed and while that might permit the establishment of a scheme that has some differential entitlements at the outset it does not enable the Member State to remove, on a differential basis, rights that have already been granted. The rule will therefore only be justifiable if the difference in treatment is objectively justified by a reasonable aim. This will be direct discrimination so as the Supreme Court has held in Seldon v Clarkson Wright & Jakes [2012] UKSC 16 this limits the menu of available aims to social policy objectives. However, it is very likely that this difference will be held to be justifiable. It is a legitimate aim to strike a fair balance in the distribution of funds between members of a pension scheme [Footnote inserted: There is some doubt whether the simple fact of cost saving can be relied on at all on its own rather than as the "background" to other policy objectives In Seldon the court contrasted social objectives with "purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness". However, these comments have to be applied with some caution where the entire exercise consists in the distribution of finite resources or allocating a fair share of the burden of savings]. The change does affect an accrued expectation but there are real differences between those having 10 years or less to serve and those with more service. The former will have less time to adjust to retirement and the tapering transitions have mitigated the losses that might otherwise have been caused by a rigid 10 year cut off point. Moreover, it is hard to see why those with more junior service should be entitled to continue to draw the whole of their pension at 55 when a significant part of this will be in respect of service earned after the changes were made. It would be possible in theory to have a transitional scheme under which existing members would be entitled to draw their pensions based on past service at an earlier age but the remainder at 60 but that is impractical and it is not disproportionate to fail to include that option.'

107. In his last sentence, Mr Westgate described as 'impractical' and 'disproportionate' exactly what the Government's proposed to implement, save that the CARE Scheme 2015 portion of the pension was to be drawn at state pension age rather than at sixty. No one queried this anomaly.

[4] Council Directive 2000/78/EC, which prohibits discrimination on grounds of age, to which Mr Westgate referred in the previous paragraph

108. Mr Westgate did not expressly consider the possibility of an Employment Tribunal challenge. He did not have available to him any information about the legitimate aims the Government would actually be relying on; he could only speculate. Nor did he have any statistical modelling to enable him to assess the discriminatory impact of the arrangements on different age groups.

109. Mr Rennie did not forward Mr Westgate's advice to anyone in the Federation. For reasons of confidentiality, he kept it in a locked drawer in his office and made it available to members of JCC, Staff Side and Branch Board officials who asked to read it. He did not make it generally available to the JCC before the letter of 20 July 2012, or before the announcement in September 2012. He circulated copies to JCC at a meeting later in the year (he could not remember when), collecting them back at the end of the meeting.

110. This was the only advice on age discrimination which Mr Rennie received from Counsel during his tenure as General Secretary.

The July 2012 Staff Side proposal

111. On 20 July 2012, Mr Rennie wrote to the Home Secretary, setting out a framework for a reformed police pension scheme which it would be prepared to accept. The JCC did not vote on the terms of the letter. This was the Respondent's last opportunity to shape the proposed scheme. It made two proposals:

> '1. That there be the following modifications to the reference scheme as outlined in Annex A of your letter to John Randall dated 27 March 2012:
>
> - officer contributions are reduced from 13.7% to 13.2%;
> - that any member who serves until 55 will be able to access his or her full CARE pension from the age of 60 with no actuarial reduction (and that any actuarial reduction for payment of pension to such an officer before 60 be calculated on the basis of the pension being payable from 60);
> - that CPI + 1.25% is applied as the earnings revaluation measure; and that the accrual rate is 1/56.
>
> 2. That in relation to transitional protection:
>
> - full protection (on the basis discussed in more detail with your officials) be extended to members of the 1987 scheme who have 10 years or less to age 48 and are 10 years or less from a maximum unreduced pension as at 1 April 2012;
> - tapering protection (on the basis discussed in more detail with your officials) apply to members of the 1987 and 2006 schemes who are within 4 years of full protection on 1 April 2012; and
> - the costs of transitional protection (including 4-year tapering) are outside the CARE cost ceiling.'

112. Staff Side did not renew its earlier request (para 100 above) for an EIA to be carried out. Mr Rennie said that he assumed that the Government had taken advice on the equality impact of the 2015 Scheme from its legal advisers before reaching agreement with the TUC and during the consultation period

with the PNB; he believed that the Government 'must have taken' such issues into account; he said that it 'would have been nice' to have seen the Government's assessment. He disagreed with the proposition, which was obviously right, that the Respondent had a responsibility to satisfy itself on behalf of its members that an EIA existed and, if it did, to find out what it said.

113. In light of the above, we are satisfied that it was Mr Rennie's decision, endorsed by Staff Side, to prioritise the interests of older officers over those of younger officers, in the knowledge that younger members would be the most adversely affected.

The August 2012 update

114. In around August 2012, the Home Office released the draft 'Police Officer pensions: reform design framework' (the RDF). It outlined the main elements of the 2015 Scheme, pending further work on details and approval by Government.

115. In August 2012, the Respondent published 'Police Officer Pension Reform: Current Position August 2012', which included the following passage:

> 'The precise position in relation to future pension arrangements is not yet known. The position of each member will depend on the precise arrangements which are introduced. Until these are known it is not possible to say how, and to what extent, individual officers will be affected.

116. The document went on to explain that the dialogue between the Home Office and Staff Side was continuing and that, in the meantime, requests from individual members for legal advice about the changes would not be dealt with.

117. On 3 September 2012, Mr Rennie wrote to the Home Secretary to confirm that Staff Side accepted the proposed scheme in the context of the Government's wider reform of public service pensions.

The final shape of the scheme

118. On 4 September 2012, the Home Secretary announced the RDF in Parliament. The parameters of the deal were now fixed. As a result of the negotiations, and in addition to the extensions to the extensions to the transitional provisions, the Respondent had secured the following changes:

    118.1. an accrual rate of 1/55.3 (the original proposal was 1/57);

    118.2. revaluation based on Consumer Price Index (CPI) plus 1.25% (rather than being based on national average earnings); and

    118.3. amendments to the normal retirement age so that police officers could retire at the age of 55 (not 60 as originally proposed) and, if they retired between the age of 55 and 60, they could take immediate pension, actuarially reduced from the age of 60. The original proposal meant that Police Officers retiring before the age of 60 would not be entitled to collect their career average pension until state pension age, which was due to increase to 67 and subsequently 68.

119. Mr Rennie accepted in oral evidence that the risk of the Government removing the concessions negotiated by the Respondent 'had significantly reduced' once they were publicly announced. He also agreed that, if the Respondent had later decided to go back to the Home Secretary with the threat of legal action, it was very unlikely that the concessions would have been lost. That was not reflected in the Respondent's subsequent messaging to its members, which consistently warned that gains might be lost if a challenge were mounted.

The Respondent's communications with members in September 2012

120. On 4 September 2012, the Respondent published a piece in its newsletter, Federation News, explaining the agreement on police pension reform to the membership. This was the first time that members learned what Staff Side had prioritised in the consultation process, including the fact that there had been no challenge to the transitional provisions.

121. We pause at this point to record that, in her closing submissions, Ms Jolly applies a series of labels to specific aspects of the Respondent's communications with its members, which she then uses as shorthand throughout the rest of her submissions (for example 'the Legal Advice Argument' and 'the Engage or Fight false choice'). The fact that we do not record them in this judgment does not mean that we have not had regard to them, nor does it mean that we were not persuaded by their cumulative effect. What they illustrate is a striking consistency of approach in the Respondent's messaging, which was unfailingly supportive of the transitional provisions, and which had its origins in this period, some three years before the first of the pleaded detriments in 2015.

122. In a statement issued on 5 September 2012, Mr Rennie emphasised that the Respondent had taken legal advice from leading Counsel and this had informed its response to the Home Secretary's proposals. That was not accurate, certainly in relation to the question of age discrimination: the only advice it received from Mr Westgate on that issue came on 18 July 2012, after the Respondent had submitted its written response to the Government's proposals on 22 June 2012, in which it accepted the transitional provisions in principle (para 96 above).

123. Mr Rennie also gave the impression in the piece that the Respondent faced a 'clear choice' between engaging with the government's proposals and challenging them legally. For the reasons we have already given, that was also misleading.

124. The Respondent was seeking, as Mr Broadbent put it, to 'rationalise the outcome' and to head off any criticism that it might have done better. Although at this stage the concerted and articulate campaign by members such as Mr Broadbent, focusing on the discriminatory nature of the transitional provisions, was yet to be formulated, individual members were already raising the issue. The Respondent did not meaningfully engage with it.

125. On 14 September 2012, the Respondent published on its website 'Long Term Reform of Police Pensions: Frequently Asked Questions', whose author was

Mr Rennie. He (and later Mr Fittes and Mr Duncan) accepted that central messaging of this sort, in particular the FAQs which were published from time to time, would be cascaded down to individual regions and then to individual members through the JBBs.

126. One of the questions was:

> '5. Do the age discrimination laws prevent the changes?
>
> We are advised that the changes are likely to be regarded as justifiable, in part because of the tapering provisions.'

127. This repeats the suggestion that the transitional provisions might be the solution to the problem of discrimination, rather than its origin. The misunderstanding could have been resolved by probing Mr Westgate's advice, which the Respondent never did.

Developments after the finalisation of the RDF: September 2012 to May 2014

Further legal advice in late 2012

128. On 17 September 2012, the Respondent reverted to Mr Westgate for further advice. The focus was on whether there was scope for individual members to bring claims for mis-selling of the pension, whether on the basis of estoppel, negligent misrepresentation or otherwise. Mr Sturzaker, in his detailed instructions, said he was 'doubtful that there will be many if any successful claims' and the Respondent was looking to 'manage expectations'. We note that some two weeks earlier, on 5/6 September 2012, a JCC meeting had taken place, at which it was confirmed that the Respondent would not support funding of individual claims challenging police pension reform. We think it likely that the Respondent was seeking legal cover for that decision.

129. Mr Westgate provided his second advice in early November 2012. He advised that it was extremely unlikely that individuals would be able to pursue claims of this sort.

The November 2012 article

130. In November 2012, an article by Mr Ian Leyland, outgoing Secretary of the Merseyside Police Federation, appeared in both Insight Magazine and Federation News: 'To negotiate or not to negotiate'. Mr Leyland defended the Respondent's approach to the consultation, emphasising that it had taken advice from a solicitor and leading QC specialising in pension law, and that there had been a binary choice between fighting the proposals or engaging with them. He listed legal claims which some members ('the lawyers on Twitter and Facebook', he called them) had advocated bringing, including age discrimination, and expressed the view that 'even the most cursory research reveals the weakness of each argument'. He wrote that a justification defence was 'likely to succeed'.

131. At this point the Government still had not said what it would be relying on by way of justification, if a challenge were brought. This marks the first time that a Federation spokesperson used dismissive/derogatory language in relation to a potential age discrimination claim. Mr Leyland wrote that 'if you launch a legal

challenge at any stage then it is back to the original position and any improvements made through consultation would be taken off the table'. The Respondent knew that was unlikely (above at para 119).

The ballot on industrial rights

132. In November 2012, the Respondent announced a ballot as to whether members wanted it to seek industrial rights for its members, including the right to strike. There was no reference to there being a turnout requirement. Mr Rennie was not in favour of the proposal.

133. The outcome of the ballot (announced on 4 March 2013) was 45,651 in favour, 10,681 against. The Respondent explained - to members' surprise - that the proposal was not carried because there was a requirement that more than half of the total membership vote in favour.

134. Ms Jolly invited us to find that the ballot was effectively fixed to achieve the result which Mr Rennie preferred. There is insufficient evidence for us to make that finding, but we make two observations: if it was not deliberate, it was remarkably careless; and it is not inconsistent with the democratic deficit in the Respondent's approach to its members, referred to above (at para 90) and in the Normington report below (at para 138).

The September 2013 legal advice

135. On 25 June 2013, Mr Sturzaker sent lengthy, detailed instructions to Mr Westgate on Mr Rennie's instructions, asking for further advice as to whether the transitional provisions might be indirectly discriminatory, by reference to matters such as career breaks and unpaid leave. The instructions made no reference to age discrimination, but they did contain the following:

> 'Staff Side's starting point is an assumption that continued membership of either NPPS or PPS will be more favourable than membership of CARE. This is overwhelmingly likely to be the case in relation to all but the most unusual circumstances.'

136. Mr Westgate provided two written opinions. Unsurprisingly, neither of them dealt with age discrimination; he had not been asked to do so. Mr Sturzaker then asked follow-up questions. We note that they had never gone through a similar process of probing Mr Westgate's earlier advice on age discrimination. We think Mr Rennie was content to bank that advice because it was consistent with his preferred position.

137. On 30 September 2013, having received Mr Westgate's reply to his queries, Mr Sturzaker wrote to Mr Rennie, setting out the Respondent's options in relation to the indirect discrimination issues, which included making it clear to the Home Office that the Respondent 'may support members who want to bring claims'. This profoundly undermines the Respondent's insistence that it had a binary choice between engagement and legal challenge: it knew it could do both.

The Normington Review and the Select Committee report

138. On 20 January 2014, the independent Normington Review of the Respondent was published. Among its conclusions were observations about transparency, communication and representation within the organisation. It included the following passages:

> 'If rank-and-file officers are to be denied normal trade union rights, they need a body which can represent them powerfully and effectively in discussions about police pay and conditions. This is not just about being guaranteed a hearing. It is an essential part of the 'deal' that the ranks-and-files' views are respected and valued.
>
> […]
>
> There is particular dissatisfaction [among ordinary members] with communication with an enormous gap between the national leadership's willingness and capacity to communicate and the expectations of the membership. This, coupled with a general lack of transparency, creates suspicion that the national leadership lead a comfortable life out of touch with the realities of the front-line.'

139. Similar concerns were raised when, on 13 May 2014, the Home Affairs Select Committee for policing published its report 'Reform of the Police Federation'. It wrote:

> 'Police officers have every right to expect strong, effective representation at both national and local level. It is in the interests not only of serving officers, but of the wider public, that proper attention should be paid to the voice of rank-and-file officers when major decisions about policing are being taken, whether by the Home Secretary, by Police and Crime Commissioners, or by forces themselves. The Federation, as the only body which, by law, is able to give that voice to police officers, must play a central part in any decision-making about the future of policing.'

The period leading up to the implementation of the 2015 Scheme: May 2014 to April 2015

<u>The start of Mr Fittes' term as General Secretary of the Respondent</u>

140. On 24 May 2014, Mr Andy Fittes replaced Mr Rennie as General Secretary of the Respondent. Mr Rennie had intended to stand again as General Secretary, but it became apparent in early 2014 that he no longer had the support of the JCC - in part as a result of the Normington report - and he decided not to do so. Mr Fittes was elected unopposed. Mr Rennie felt he had been forced out and did not provide a handover of any sort. Mr Fittes had seen summaries of the legal advice received about the pension reforms, but not the advice itself. He had been a member of the JCC between January 2013 and May 2014, at which Mr Rennie gave updates on the work of the PNB, of which Mr Fittes was not a member.

141. Mr Fittes relied, in part, on briefings from Mr Rennie's former PA. He saw the full legal advice on pensions reform in his first two weeks in the role. He reviewed it and was briefed by his team at Head Office: Ms Joan Donnelly, Head of Research and Policy Support; Ms Mariam Conway, Senior Research Officer; and Mr Mike Brown, Pensions Research Officer. None of them were lawyers.

142. When Mr Fittes took over there was still no EIA; he did not commission one, or press the Government for one, during his tenure. Although he maintained that there were 'ballpark figures' as to the breakdown of the membership by

age/length of service, there was no statistical analysis of the sort we have described below (para 161 onwards); he did not commission one during his tenure. He accepted that he knew it was younger officers who were most adversely impacted by the 2015 Scheme, including the transitional provisions.

143. Mr Fittes decided to maintain Mr Rennie's approach. He accepted in oral evidence that he was the ultimate decision-maker and that there was no vote on this issue. Mr Rennie had committed the Respondent to pursuing policies which, we acknowledge, might have been difficult for his successors to unpick without significant loss of face. Nonetheless, there were opportunities for them to do so as the parallel litigation unfolded; any changes could legitimately have been presented as being in response to the changing legal landscape. Neither Mr Fittes nor Mr Duncan chose to do so because, we find, they did not want to; they wanted to maintain the Respondent's support for the transitional provisions.

Consultation about the draft regulations

144. Between June 2014 and March 2015, Mr Fittes and his team worked with the Home Office on the drafting of the regulations which would implement the 2015 Scheme at the beginning of April 2015. Mr Sturzaker and Mr Edward Cooper (solicitor, also of Slater and Gordon) advised from time to time on these issues, but no advice on age discrimination was sought from them during this period.

145. Mr Fittes found the Home Office's approach frustrating. On at least one occasion (in an email of 23 January 2015), he raised the possibility of legal action, if agreement could not be reached on a specific issue. He accepted that this demonstrated again that the Respondent knew that engagement and legal challenge could be deployed side by side.

Changes to the Respondent's structure after September 2014

146. In September 2014, the PNB was dissolved, after which pensions fell under the Police Advisory Board for England & Wales. In 2015, the JCC was replaced by the Interim National Board (INB); the JBB was replaced by the Interim National Council (INC).

147. The constitutional position is that the Board determines strategy and runs the Respondent; the function of the Council is to elect the Board and hold it to account. For example, it was the Board that determined funding criteria for legal representation. It then fell to the head of civil claims to determine individual applications in accordance with those criteria.

The beginnings of the PPC: the meeting of 23 February 2015

148. In February 2015, the PPC group started on Facebook, to explore a challenge to the 2015 Scheme. On 23 February 2015, three members of the PPC, including Mr Broadbent, went to the Respondent's Leatherhead HQ to meet Mr Fittes and others, to discuss the challenge and to read Mr Westgate's advice.

149. Before the meeting Mr Fittes emailed a member of the group, saying that the Respondent did not consider that there was the possibility of a legal challenge to the 2015 Scheme but that 'if we discover one, we would fight it'. This was the first of many occasions on which the Respondent undertook to keep its position in relation to a legal challenge under review.

150. At the meeting Mr Broadbent raised the issue of age discrimination. He gave himself as an example of someone who would be adversely affected. Mr Fittes was sympathetic but he did not offer any practical solutions or assistance. He was clear that the Respondent would not fund the PPC or provide funding for it to seek independent advice. That was his position; there was no INB involvement.

151. By this point, Mr Fittes knew that some judges and firefighters were preparing challenges to the transitional provisions on age discrimination grounds; he also knew their focus would be on justification; he accepted that what happened in those cases 'would be something we would be interested in'. The only advice he had on the issue of justification were the paragraphs in Mr Westgate's opinion quoted above. Mr Fittes could not recall asking what materials had been available to Counsel; he accepted that he should have been concerned about the lack of an EIA; he also accepted that the lack of analysis in the opinion of the disparate impact of the transitional provisions on different age groups was something he 'could have looked at differently'.

152. He also knew that the option which Mr Westgate described as 'impractical' and 'disproportionate' (above at para 106) was, in fact, adopted in the 2015 Scheme. He acknowledged that, if Mr Westgate was wrong about this, he had a responsibility to go back to him and query it.

153. Despite this, and the fact that a group of the Respondent's own members were organising to press the case for a challenge on age discrimination grounds, Mr Fittes did nothing to initiate a review of the legal position. He confirmed that this was because he was happy with the advice he already had.

<u>The coming into force of the 2015 Regulations</u>

154. On 5 March 2015, the Police Pensions Regulations 2015 were laid before Parliament.

155. On 6 March 2015, the Respondent published 'Police Pension Scheme 2015 – FAQs'. As usual, they were cascaded down to members through the regions and posted online; they were also sent to the INB and INC, which had not seen them in advance. The document included the following:

> 'We have sought leading counsel's advice on whether there are legal challenges available to us to stop the CARE 2015 Scheme being introduced or to prevent it being applied to existing members. The answer is that there is no challenge available to us. We have considered all possible avenues, but in particular:
>
> […]
>
> (ii) Age discrimination

> We are advised that the changes are likely to be regarded as justifiable on the ground of age discrimination, in part because of the tapering provisions.'

156. The document also asserted that, if the Respondent had challenged the transitional provisions as discriminatory before implementation in April 2015, it was 'inevitable' that the government would have removed them altogether. Mr This was not something which Mr Westgate had previously advised might happen and the Respondent knew it was unlikely (para 119 above).

157. On 9 March 2015, the Respondent reverted to Mr Westgate for further advice. Age discrimination was not expressly raised in the instructions, nor was the anomaly in Mr Westgate's earlier advice (para 107), nor is there any reference to the parallel litigation. Mr Fittes' evidence was that he was 'still trying to understand what their challenge was'. He did not contact the General Secretary of the FBU to find out, at least not at this point.

158. On 27 March 2015, the Respondent published updated FAQs. A new section was added, trumpeting the Respondent's achievement in securing changes to the transitional provisions, in particular tapered protection.

159. At some point in March/April 2015, the PPC group contacted Leigh Day solicitors.

160. On 1 April 2015, the Police Pensions Regulations 2015 came into force.

The statistical position in 2012 and 2015

161. We pause at this point to examine the statistics to the Respondent in 2015 as to the impact of the transitional provisions on different age groups.

162. In his witness statement, Mr Fittes wrote that his decision not to support the PPC in 2015 was influenced by the fact that over half of the Respondent's membership would benefit from the transitional provisions; he considered that it was not in the majority's best interests to support the challenge.

163. In practice, the transitional provisions operated as follows:

163.1. all officers born on or before 31 March 1967, and thus aged over 45 on 31 March 2012, fell within the fully protected Group 1;

163.2. officers born on or after 1 April 1978 and thus aged 33 or younger on 31 March 2012 were not entitled to any protection (Group 3);

163.3. between those ages, the protection available depended on the period of service remaining to retirement on a full pension; with officers aged 41-44 eligible for full (Group 1) or tapering (Group 2) protection; officers aged 38-40 entitled to full, tapering or no protection, and officers aged 34-37 entitled to tapering or no protection;

163.4. no officer aged under 38 was entitled to full protection.

164. The only pre-April 2015 information in the bundle as to the numbers advantaged and disadvantaged by the transitional provisions is in the Government Actuary's Department valuation of Police Pension Schemes

dated 11 December 2014, which gave a snapshot of the position in 2012. As at 31 March 2012, there were 134,403 active members of the 1987 PPS (108,229 members) and 2006 NPPS (26,174 members). Those figures break down as follows:

	All active members (1987 + 2006 scheme)	Active members of the 1987 scheme	Active members of the 2006 scheme
Protected	49,459 (36.8%)	48,219	1,249
Tapered	18,103 (13.5%)	16,709	1,394
Unprotected	66,841 (49.7%)	43,310	23,531
Total members	134,403	108,229	26,174

165. The Respondent's analysis includes officers in Group 2 when considering the number of officers who were 'protected' by the transitional arrangements, giving rise to a slim combined majority: 50.3% with some protection; 49.7% with none. We think the Claimants' analysis is more persuasive: that the number of officers adversely affected by the transitional arrangements comprised Groups 2 and 3, i.e. tapered and unprotected, which reflects the fact that the majority of Group 2 officers were in a worse financial situation, owing to the CARE Scheme 2015, than previously. Together those two groups amounted to a clear majority of 84,944 (63.2%).

166. Even if the Respondent's analysis were correct, this was the position as at 2012. Its witnesses acknowledged that, by the time the 2015 Scheme came into force, any majority which had existed in 2012 had been extinguished because of retirement (including some officers choosing to retire early because of the impending reforms), deaths, and government cuts in police numbers. The cuts had led to a reduction in the number of active members from 134,000 to 120,000.

167. Strikingly, the Respondent continued to include the 2012 snapshot as illustrative of the benefits of the transitional provisions in documents circulated to members as late as 2018/2019 (para 377 and 465 below), by which time they were of historic interest only.

168. The clearest evidence of what the Respondent believed the position to be in 2015 is contained in an email of 19 November 2015, in which Mr Fittes wrote:

> 'Around 80,000 officers are unprotected which leaves around 40,000 in tapering or protected.'

He could not recall where those figures came from, other than that 'someone must have given me them'. They confirm that, by the time the 2015 Scheme came into operation, Mr Fittes knew that those members to whom the provisions provided any advantage at all represented around a third of the total membership (Mr Fittes accepted that the position was unlikely to have changed between April and November 2015).

169. In evidence before the Tribunal, he initially continued to assert that the figures relating to the position in 2012 were reliable, eventually accepting that they

were not, because they included officers who were entirely unaffected by the provisions of the 2015 Scheme, having left before it came into operation.

The Respondent's initial response to the PPC: April to September 2015

The Respondent's funding criteria

170. On 1 April 2015, a revised version of the Respondent's funding criteria protocol for providing legal assistance was circulated. The previous version was from 2009. According to both versions, funding could be provided for individual matters, including employment matters, which could be of interest to the membership as a whole or to a section of it. There was a discretion to fund cases even when the criteria were not met. There was no bar on retrospective funding of cases. Mr Fittes knew of past instances of retrospective funding.

Mr Westgate QC's advice in April 2015

171. On 7 April 2015, Mr Westgate provided a written opinion, which was sent on to Mr Fittes and others on 14 April 2015. At paragraphs 20-21 of his opinion, he said this about the transitional provisions:

> 'as a matter of fact these arrangements discriminate on the grounds of age. In some cases the transitional protection is, at least in part, directly linked to an individual's age and in other cases the service criterion is indirectly linked to age because benefits linked to long periods of accrued service necessarily benefit older workers.'
>
> […]
>
> 'When I last advised on this issue I considered that this discriminatory impact would be justifiable because it was a proportionate approach to a legitimate aim to cushion the blow for people who may find it more difficult to adjust to change at the end of their employment or during a period of transition. The caselaw has continued to develop in relation to the justification of age discrimination but nothing in the more recent cases makes me think that a challenge on age discrimination grounds will stand any prospect of success.'

172. At paragraph 22 of his advice, Mr Westgate referred to provisions in the EqA on discrimination in the exercise of public function. He wrote that he would address age discrimination mainly by reference to the Equal Treatment Directive 2000/78, Article 14 of the ECHR and Article 21 of the EU Charter of Fundamental Rights. He did not mention the employment provisions in the EqA.

173. Mr Westgate then set out a more detailed analysis in support of his overall conclusion, dealing with legitimate aims at paragraph 35 onwards and proportionality at paragraph 37 onwards, in which he wrote:

> 'In the light of these cases the provision of full and tapered protection plainly meets a legitimate aim. The sole question is whether it is disproportionate to stop that protection so that, in effect, younger workers do not get the benefit of it. I do not think there is any realistic chance of a finding that the present arrangements are disproportionate. This is for several reasons:
>
> […]
>
> (c) The object of transitional protections is not to ensure that there is no change but to provide a buffer to protect those who are likely to have most difficulty adjusting

> to the new regime. This suggests that a line must be drawn somewhere and it is a matter of evaluation and judgment where protection should begin and end.'

174. At paragraph 45 Mr Westgate wrote:

> 'A second and more fundamental point is that limited transitional protection can be justified for reasons other than cost. The government is entitled to shape its long term pension arrangements in accordance with its general social and economic objectives. It has done so by making the 2015 Scheme. Having made that scheme it is also entitled to take the view that as a matter of general principle and practice all police officers should migrate to it. Transitional protections are an exception to that principle and they exist for the pragmatic reason that it is necessary to provide a "buffer" as explained above. But that buffer is only necessary for the people who will find it most difficult to adjust and those are likely to the ones who are closer to retirement. Obviously there will be some individuals who do not need the buffer and others who will suffer hardship despite it but it is not possible to carry out an individual evaluation in each case. That would be administratively cumbersome but also problematic as a matter of principle because it would be difficult to reach agreement on the criteria to apply to decide whether somebody ought to get protection or even when they should get it. Since the object of the transitional rules is to provide certainty and an ability to plan ahead that object would itself be undermined by a system of ad hoc decisions in each case.'

175. In his covering email, Mr Westgate quoted a passage in the original RDF which encouraged 'further engagement on equalities matters as potential issues become apparent'. He wrote:

> 'I can find references to assessments in Northern Ireland and Scotland but nothing for England & Wales. I am far from wanting to encourage a claim based on s. 149 of the Equality Act [the public sector equality duty] and so I haven't raised this in the advice but was there an impact assessment and if not then where do we find an explanation for the justification for any discriminatory impact. As I have suggested in the advice I think this can all be inferred from the nature of the scheme but I would expect to have it spelled out somewhere.'

176. Mr Fittes accepted that he had not seen any evidence that older officers, near to retirement, would find it difficult to adjust. On the other hand, by this point he did have information about younger individuals who would be adversely affected by the provisions, yet he did not go back to Mr Westgate to ask him to advise on them, nor did he ask him to clarify the anomaly in his earlier advice or flag up to him the parallel litigation. He did not press the Government, either for an EIA or for details of its justification defence.

177. Mr Fittes shared Mr Westgate's advice with the INB at a meeting on 23 April 2015. He did not mention the lack of an EIA. He was resistant to the suggestion (both at this and the subsequent meeting on 14 June 2015) that a second opinion should be sought from different Counsel.

178. In our judgment, this all points towards a wish on Mr Fittes' part not to disturb the *status quo* in relation to the transitional provisions.

<u>The exchange about an equality impact assessment in 2015</u>

179. On 5 May 2015, Mr Broadbent wrote to Mr Fittes to ask whether an EIA had been conducted, either by the Respondent or the Home Office. Mr Fittes responded on the same day:

> 'To date the Home Office are of a view that the consultation process has dealt with the equality issues and that the impact assessment would be completed once the scheme was active. I have sought legal advice on this and will now be raising this at the next Scheme Advisory Board meeting on the 8th July in order that they now comply with this requirement.'

180. The Scheme Advisory Board ('SAB') was a statutory body established under the legislation that introduced the 2015 Scheme. It comprised the National Police Chiefs' Council, the Association of Police and Crime Commissioners and the police staff associations. It was attended by Home Office staff who dealt with pension matters. It existed to facilitate the smooth running of the 2015 scheme and to provide advice to the government when requested.

181. Mr Broadbent replied, saying that he thought the Government was obliged to show that the changes made were compliant with equality legislation and provide evidence of this. Mr Fittes replied:

> 'They are under a[n] obligation and as I say the position from where we started at Hutton (Accrued rights are sufficient transitional protection) to now has shifted considerably. The Home Office view as I said is that the consultation has incorporated views made on the subject and our position from the start has been to maximise the protection for all groups. I am now looking at individual sets of circumstances to see if we have anything to look at at this stage and as I said I will be pushing at the next meeting to get the Home Office to formally bring together the work done so far in a proper EIA.
>
> There are numerous letters and documents over the last 4 years regarding the subject if you wanted to read them I'm happy to spend some time going through them but won't be circulating them electronically.'

182. This email suggested that the Respondent was keeping the position under review. However, there was no evidence of active consideration being given to individual circumstances.

183. The next day, 6 May 2015, Mr Broadbent asked Mr Fittes if the PPC group's legal team could contact him to arrange for documents to be shared with them. Mr Fittes understood at this point that an equality challenge by the PPC group was likely.

184. At a meeting of the UK Police Pensions Consultative Forum on 8 July 2015, Mr Fittes did ask about the EIA. The minutes record the Home Office saying that they 'would share the equality impact assessment that had been undertaken for the 2015 pensions regulations, although they believed this was already in the public domain'. Mr Fittes could not recall it being sent to him or chasing it further. If there was one, the Tribunal did not see it.

<u>Further FAQs (June/August 2015)</u>

185. Further FAQs were drafted in June 2015 but not published until August 2015. They were prepared on Mr Fittes' behalf by his office without input from the INB or INC. In the introductory section of the June draft the following passage appeared:

> 'As we have now been advised by counsel on more than one occasion that there are no grounds on which we would be able to mount a successful legal challenge, and bearing in mind PFEW's funding criteria, we do not intend to pursue this matter any further.

> However, the PFEW will, of course, continue to monitor the situation as the new scheme and transitional provisions come in to effect and if individual circumstances and cases arise in which it is considered that a legal challenge is likely to succeed, we will pursue those on behalf of our members.'

186. Mr Fittes was unable to point to any evidence of a specific decision being taken not to pursue a challenge by reference to the funding criteria. He accepted that he never took advice on the merits of an individual case. By giving the impression that the Respondent remained open-minded about a challenge, the document was misleading; we are satisfied that Mr Fittes had no intention of pursuing such a challenge.

187. On around 13 July 2015, some 200 judges launched discrimination claims arising from transitional arrangements in their equivalent pension scheme, some of whom were represented by Leigh Day.

The executive committee meeting on 14 July 2015

188. At an INB meeting on 14 July 2015, Mr Fittes provided information about the PPC group. He explained that they would be challenging the transitional provisions, that their challenge was based on the judges' challenge, and that they anticipated the case would take five to seven years to work through the courts.

189. The minutes record Mr Fittes observing:

> 'It was noted that PFEW legal advice is that this will not win and the concept is well established and was negotiated by TUC. It was highlighted that the Equality Law only says all have to be treated equally not that all have to be treated well and the Judges have particular set of circumstances that cannot all be correlated across to the Police.'

190. Insofar as Mr Fittes was suggesting that the Respondent had specific advice on the PPC or the judges' challenge, that was misleading. As for the reference to equality law, Mr Fittes knew the transitional provisions did not treat younger and older officers equally.

191. Mr Fittes emphasised the importance of there being a consistent message to membership. There was discussion of the separate advice which Region 2 was expecting to receive:

> 'It was noted that Region 2 should be reminded that a co-ordinated response was agreed.'

192. There was no suggestion of there being a vote, or even a debate, about the position he had adopted in the draft FAQs referred to above.

The parallel litigation

193. On 15 July 2015, Ms Conway emailed to Mr Fittes some detailed information about the firefighters' claims. She wrote:

> 'In short it seems that the basis for the FBU challenge is age discrimination (and other related areas of discrimination arising out of that). It focuses on the fact that not all firefighters in the older pension schemes are fully protected. Even those members who receive tapered protection (and are therefore not fully protected) will come under this

> claim. The FBU has identified and lodged a test case in every single fire service in the country in support of the claim.'

She ended her email:

> 'I wonder if the FBU has had different legal advice to us on the transitional protection arrangements, if it's just that their protection arrangements are slightly different to ours (for the PPS 1987 - the NPPS 2006 protection arrangements are also based purely on age), or if other issues are involved here? I imagine that if the FBU were to be successful in its challenge then that could have implications for all public service workers who are not covered by full protection, including police officers.'

194. Also on 15 July 2015, Mr Brown emailed Mr Fittes about the judges' challenge, observing:

> 'What is really striking is the similarity with the Firefighters in terms of the challenge being mounted, the reasons for it and the arguments used by Government in support of its claim of objective justification.'

195. By this point, it was clear to Mr Fittes that the judges' and firefighters' claims were being pursued in the Employment Tribunal. Of course, Mr Westgate had not advised on the position in employment law. Despite the undertaking to keep the situation under review, Mr Fittes did not ask Westgate for further advice.

196. On 3 August 2015, Mr Fittes emailed the INB and INC to say that he was aware of the PPC; he reiterated that the 'extensive legal advice' obtained by the Respondent was that there was no available challenge to the 2015 Scheme. He did not mention that no specific advice had been taken about the PPC or the parallel litigation. He stated that the Respondent would monitor the firefighters' and judges' claims, 'acting appropriately upon any outcome and what that may mean for us'.

197. In the same email he wrote:

> 'They have not got any advice yet but have got a firm of solicitors to collate questionnaires regarding officers situations so clever really.'

198. By his language, Mr Fittes was already beginning to cast doubt on the good faith of the PPC and its legal advisers.

<u>August 2015 PPC Introduction document</u>

199. On 4 August 2015, Mr Broadbent sent information about the PPC to local branches of the Respondent. He explained that, contrary to the advice obtained by the Respondent, the PPC and its legal team believed that a legal challenge was available, which they were now actively pursuing. He asked that an attached information sheet be circulated. It specifically raised the prospect of employment tribunal proceedings and noted that Counsel had assessed the prospects of success as being good.

200. This prompted an internal discussion within the Respondent. In an email of 5 August 2015, Mr Fittes again emphasised the importance of consistent messaging by the Respondent, saying that:

> 'the legal position remains unchanged and as we have always said we will keep any legal developments under review […] we are not funding this action by the officers. They have decided to take advice and that is their choice. Our decisions are based on our funding protocols'.

201. In an email dated 6 August 2015, Mr Neal Alston (of Hertfordshire JBB) wrote:

> 'My point is this - fund rules allow for less than 50% cases to proceed if it is for the greater good. Would it not make sense to take on the case of Lee Broadbent, the leader of this group, fund it and see what happens, win or lose, rather than take the risk that a case wins and we lose thousands of members. If Leigh Day are prepared to lose one case on the off chance of huge profit, aren't we prepared to on the off chance of a huge negative impact on reputation.'

202. Mr Gary Maloney and Mr Nick Smart (JBB Secretary and Chairman, West Yorkshire Police Federation) agreed, as did a number of senior Federation officers in West Mercia, Surrey and Essex. Mr Smart even offered to be a 'guinea pig' in any test case:

> 'We have the money. Do we have the will? Why not run a case? (And if not, explain this rationale to the masses).'

203. Mr Fittes' reply of the same day was that funding decisions could not be made via email; the Respondent would need to fully understand the detailed legal basis of the challenge before making a decision; it would also need to see what would happen with the judges' case which was 'likely to take years to resolve'. Mr Fittes accepted that, if it was right that the process would take years, there was no risk of anyone losing the transitional benefits until it was complete, by which point there would be far fewer people fully or partially protected because it would be close to the end of the 10-year period of protection.

204. Mr Fittes also wrote:

> 'This would not be a simple matter of running one case; we would be accepting the whole costs of the matter on something which at this time our advisers are telling us we will not win.'

205. He accepted in cross-examination that he did not know about costs in the Tribunal at that stage; he had had no legal advice on the subject; he could not remember what he meant by 'the whole costs'. In the same email he misleadingly suggested that fresh legal advice had been taken.

206. Mr Simon Payne (Chairman, Warwickshire JBB) replied:

> 'I take the view that this is a very simple strategic decision. Let's not forget that this group are police officers and our members. The INB and INC need to make a decision on this important issue. That's what we are there for. Whatever that decision is, will become the position of PFEW on this matter. Then we have a direction of travel and can move forward.'

207. Later the same day Mr Fittes issued a statement, which was posted on the website, explaining that the Respondent would not be challenging the introduction of the 2015 Scheme at that time, but that it would continue to monitor the situation and maintain an open mind, should circumstances

change. Mr Fittes accepted that neither the INB nor the INC had any input into the decision on how to respond to the PPC group's email of 4 August.

208. Mr Fittes accepted that he was maintaining the Respondent's policy of support for the transitional provisions. We observe that, from this period onwards, a concomitant policy of opposition to the PPC emerged.

The August 2015 FAQs and subsequent communications

209. Mr Fittes' intention had been to delay publishing the June 2015 draft FAQs until after the Region 2 advice had been received. He decided not to wait; they were published on 11 August 2015. We find this was expedited to head off the PPC. We note that the reference in the draft to the possibility of pursuing challenges based on individual circumstances had been removed.

210. On 12 August 2015, Mr White wrote to the INB about the PPC, urging them to circulate the FAQs as widely as possible:

> 'The top line message I would suggest has not changed and needs pushing; that we have obtained several detailed pieces of legal advice from leading counsel, the most recent of which was this spring after the scheme had been finalised, but this advice states there is no current legal avenue where a successful challenge is possible to the scheme. Indeed this advice suggests that any challenge may be hugely detrimental to thousands of members. In addition, we have always stated that should the legal situation change through other cases or other changes to the law, we would re visit this.'

211. Less than an hour later he sent an email to the INC, in which he wrote:

> 'Events have to a degree over taken us and we are now working on further avenues and tactics to get the message and the facts concerning the changes to the pensions schemes and the legal position to as wide an audience as possible.
>
> There is some social media activity surrounding the Pension Challenge group. A number of INB members have met with officers from this group and we will continue to engage with them to a degree, but not via social media. We will keep this under review, in particular regarding the advice and opinion they are giving to members and its validity. We are not in the business of stifling debate but now need to ensure that the significant work we have undertaken over the past 3 years to get the very best for our members gets heard.'

212. We find that, far from engaging with the PPC group, the Respondent was setting out to do all it could to preempt the rise of PPC among the membership; by this point some 43,000 members had registered interest in the challenge.

213. As for the suggestion that it would 'keep under review… the advice and opinion [the PPC group] are giving to members and its validity', plainly it could not do that because it did not know, and took no steps to find out, what the legal basis of the PPC was.

Mr Fittes' briefing notes of 7 and 8 September 2015

214. On 7 September 2015, Mr Fittes circulated an internal briefing note about the PPC in advance of a regional meeting, which confirmed that the Respondent would not be pursuing its own challenge or supporting the PPC.

215. The document acknowledged that 'we did not refuse the option of transitional arrangements but tried to improve the situation for officers which we did'. It wrongly suggested that the Respondent had taken recent legal advice on the PPC. It failed to mention that there was an inherent similarity between the judges', firefighters' and police officers' cases, in that the government was likely to rely on the same justification. The note included the following passage:

> 'Leigh Day said it has 'offered' a no win no fee arrangement to challenge the Government. This is not entirely correct. It is also not correct that if you do not register with the firm you will not benefit from any 'win'. Any forced changes to Government policy would affect all the public sector. […] Please remember Leigh Day is a commercial enterprise who is in this to make money.'

216. This was misleading and/or partial in a number of respects: it was correct that Leigh Day was offering a no-win, no-fee arrangement; suggesting that there was no need to register with Leigh to 'benefit from any win' confused the issues of damages with that of broader, sector-wide remedies; the reminder that Leigh Day was a commercial enterprise implied that they were doing something wrong by representing members, which they were not; there was no mention of the timeframe (five to seven years) for resolution of the PPC claims.

217. The same note also revisited the issue of costs:

> 'If the PFEW decided to run a test case we would inevitably be accepting the full costs of the legal fight which would last years and which all our advisers are stating we will lose. It would be likely to utilise our total legal costs for a whole year (£13m).'

218. There is no evidence that a test case (which some senior members had been asking for (para 201-202) would cost £13m. The note also raised this concern about supporting a challenge:

> 'It would also mean we are fighting something which we accepted as a starting point when consulting with the Government.'

219. This is confirmation that the Respondent had embraced the transitional provisions from the outset.

220. On 8 September 2015, Mr Fittes circulated internally a document for the INC: 'Pensions Challenge Update – Hutton Review', which included the following passage:

> 'PFEW legal advice update
>
> Our legal advice remains of the view that the Pensions Challenge Group case is not likely to succeed. The rationale behind this is partly legal and partly looking at the possible routes that a Government would use in its arguments such as the system developed to raise state pensions age.'

This misleadingly implies that the Respondent had received legal advice about the PPC. The note also stated:

> 'PFEW continues to monitor the legal situation regarding the judges' pension challenge, the firefighters' challenge regarding fitness testing and the 'Challenge Group'. Meetings will continue if necessary and that can include contact between the legal teams.'

In fact, contact between the legal teams was never instigated. Mr Fittes' evidence was that he considered it but rejected it. He accepted that it would have been a significant benefit to the Respondent to understand the legal basis of the challenge in greater detail. He had two meetings with the General Secretary of the FBU at some point in 2015, but the FBU was reserved about sharing information; Mr Fittes suggested that it was suspicious of the Respondent, in part because it was not a trade union.

The meeting between the Respondent and the PPC group on 9 September 2015 and Mr Sturzaker's subsequent advice

221. On 9 September 2015, Mr Broadbent and some of the PPC group leaders met Mr Fittes and others. Mr Fittes declined to provide support for the challenge because of the legal advice he had received. He refused a request for a financial contribution to the challenge in the amount of £500,000. He said the situation would be kept under review; if it changed, they would 're-review' the advice. Mr Broadbent argued that it had already changed, given the judges' and firefighters' claims and Leigh Day's advice about the transitional provisions. Mr Fittes was not to be persuaded.

222. Mr Fittes told Mr Sturzaker what had happened at the meeting; he did not ask him to contact Leigh Day. Mr Sturzaker gave his analysis in writing the next day, saying that it was 'a very difficult situation'. He wrote:

> 'I do not consider there is any realistic response which the Federation can make which will cause the issue to disappear. It is necessary to bear this in mind (and the factors just listed) in working out how to proceed.'

We draw the obvious inference from this email: that Mr Fittes had asked Mr Sturzaker how they could make the PPC go away. Mr Sturzaker set out the reasons why the situation was difficult and repeated his opinion that the transitional provisions were likely to be justifiable. There was no reference in his advice to the judges' and firefighters' cases. It is apparent from a later passage that he did not know about them:

> 'Many unions have strongly opposed the pension changes, but there is no suggestion that any union is bringing a similar challenge, in circumstances where, on the face of it, the age discrimination issue is the same across the public service'.

223. Mr Fittes could not explain why he did not immediately go back to Mr Sturzaker and raise the FBU's challenge. Nor were there any documents from later in his tenure, showing him seeking advice on the parallel litigation. We are satisfied that he did not want such advice in case it forced his hand.

224. Mr Sturzaker advised that, given the huge cost of settling the PPC group's claims, he thought it 'overwhelmingly likely that the Government will fight the case hard for as long as possible (including appeals, and possibly a reference to the ECJ, if necessary) and will not settle'. Thus, the advice the Respondent received was that, whether the government decided to level down or level up, it would be years into the future and any rights acquired by that time would remain intact.

225. Mr Sturzaker also observed that:

> 'given the nature of the advice which Martin [Westgate] and I have given and the approach [which] the Federation took to the negotiations around pension reform, we have not to date been focusing on how a legal challenge would be brought. If we were to focus on how to bring a challenge, then this would require careful consideration with counsel. I anticipate however that the approach which in that (hypothetical) scenario we would adopt would be to seek to bring a test case or a few test cases for a small number of members with a view to resolving those test cases within the relevant limitation period, to avoid having to bring tens of thousands of claims.'

226. We find that it is clear from this passage that Mr Sturzaker had taken his lead from the Respondent as to the approach it wished to take, focusing away from any challenge to the transitional provisions.

The first pleaded allegations: September 2015 to November 2016

227. It is at this point in the chronology that the first of the Claimants' pleaded allegations appears. Many of them relate to communications about the PPC, sent out by the Respondent to its members. We preface this section of the judgment by recording Mr Fittes' evidence in his witness statement (at paragraph 76):

> 'When PFEW did circulate information, it always tried to provide members with a fully unbiased, neutral and independent view based on fact and reality. We had an obligation to ensure members had all of the facts and the arguments for and against both sides so they could then make informed decisions.'

<u>Allegation 9.2: Circulation of the summary of Neon Legal advice, September 2015</u>

228. On 15 September 2015, the legal advice commissioned by Region 2 (North East) from Neon legal, a law firm, was produced. Its advice was widely circulated by the Respondent. It was presented as a 'brief summary of the legal analysis' of the employment/discrimination aspects of the challenge, which had been provided by Mr David Reade QC. Mr Reade's original opinion was not appended to the document.

229. The headline summary by Neon was:

> 'Our conclusion is that there is no viable challenge to the central change in police pensions (the move to career average earnings) based on claims of age, race or sex discrimination to the Employment Tribunal. There are arguable claims in relation to age, race and sex discrimination around the Transitional or Tapered Protection but they are unlikely to succeed and if successful are only ultimately likely to lead to adverse changes to the Transitional or Tapered Protection.'

230. Neon recommended that Region 2 should not support its members in making the challenge.

> 'unless the PPC and/or their legal advisers are able to present a compelling legal argument for successfully making a claim based on discrimination against the fundamental change in the pension regime (we are not aware of any but would be happy to review any such legal argument) or the current legal position changes'.

231. It appears that Mr Reade may have had access to details of Leigh Day's approach through Mr Broadbent, who at the request of the secretary of South Yorkshire Branch Board (which was commissioning the advice) passed on some information of the arguments as he understood them.

232. However, there was no mention of the parallel litigation, from which we infer that neither Mr Reade nor Neon knew about it. Mr Fittes took no steps to point that out; he was content for the advice to be circulated despite this obvious flaw. He relied on the Neon advice as justifying the Respondent's position at the INB meeting later in the month (see below), knowing that it was based on incomplete information.

The INC meeting on 17 September 2015

233. On 17 September 2015, an INC meeting took place, at which the PPC was discussed. Mr Fittes explained the funding model adopted by Leigh Day and the basis of the challenge. He accepted in cross-examination that the briefing he provided contained incorrect or misleading information: it wrongly stated that the Respondent did not undertake class actions or CFAs (the Leigh Day model), when it had done so in the past; the briefing portrayed the PPC group as a small group of individuals, rather than the substantial group it actually was by this point; it also suggested that Leigh Day might not understand the complexities of police pensions. The notes record him saying that 'PFEW represent everyone and have a moral duty to give an informed message even if people don't listen'. Mr Fittes accepted that, by this stage, there was hostility from protected officers towards the unprotected. Misinformation of this sort could only aggravate that.

234. The notes recorded that 'Mr Fittes highlighted the importance of the consensus in the room and the need to continue standing together'. There was no vote taken on pensions or the PPC.

235. Mr Fittes summarised his position in an email later the same day to a core group, including Mr Sturzaker, Mr White and the Head Office team. He planned to set up a private meeting with Leigh Day. Meanwhile he set out his strategy, which included:

> '(1) Provide the INC/INB with the fact sheet which summarises the talk I gave to them […] (2) Produce some sort of short 'crib sheet' for workplace Fed reps to help them explain the main Fed position on this matter. Produce a video which captures the main points of (1) and (2) […] Develop a clear message which reflects all of the above […] which hopefully helps the rest of the organisation remain steady and consistent on the issue.'

236. Mr Fittes was determined to control the narrative on the PPC, with little sign of any meaningful input from the INC or INB. He developed this strategy with a view to countering the PPC roadshows, which were planned for October. Although he planned to meet Leigh Day before then, he acknowledged in Tribunal that 'we weren't changing our position at that point'. By this point, individuals within the Respondent were consistently, but not openly, monitoring the PPC group's online activity, and reporting back either to Head Office or to the INB and/or INC. This covert surveillance is consistent with the developing sense of the Respondent treating the PPC group as its adversary.

237. On 21 September 2015, a petition was launched on Facebook for the Respondent to pay the legal costs of the PPC. Mr Fittes circulated generic responses to queries he anticipated would be received from members.

Allegation 9.1: 'The Pensions Challenge: The PFEW Position' document of 23 September 2015

238. On 23 September 2015, the Respondent published 'September 2015 - The Pensions Challenge: The PFEW position'. We note that the position contained in the document had not been expressly approved by the INB/INC. At the INB meeting on 23/24 September 2015, Mr Fittes again emphasised 'the need for strong communication' with members by adhering to a 'corporate view', which he provided. No vote was taken.

239. We also note that the Respondent did not wait until after its planned meeting with Leigh Day (para 252) before publishing this document. We find that its main purpose was to dissuade officers from joining the challenge at a point when it feared (rightly) that it was gathering strength. We are satisfied that the Respondent was prepared to use misinformation to achieve that aim.

240. In cross-examination Mr Fittes accepted that members were plainly entitled to know about the judges' and firefighters' cases. We find (and Mr Fittes accepted) that they were not mentioned anywhere in the document; that it was misleading not to mention that the Respondent had not taken legal advice in relation to the PPC or the parallel litigation; that it was a material omission not to point out that, by the time the PPC had worked through the courts, far fewer officers would be vulnerable to any consequential changes the government might make; that the section headed 'Arguments for and against the challenge' contained no arguments *for* the challenge; and as for the reference to a risk of costs in the ET if the PPC failed and was found to be 'vexatious, abusive, disruptive or without any reasonable prospect of success', there was no basis for considering that the PPC fell into any of those categories.

241. The document also contained the following passage:

> 'Officers may also wish to consider the likely cost to the Government were a challenge to succeed. If every officer were to win back £20,000, then assuming similar damages would pertain across all of the public services, the cost to the Government would be approximately £120,000,000,000. This is one reason why we consider the Government will fight this challenge to the very end. We do not believe that they will be open to the possibility of a settlement.'

242. Mr Fittes was unable to recall who produced those figures or how they had reached them: neither the PPC group nor Leigh Day were the source; Mr Broadbent's evidence was that it was a figure which was in the public domain (being the difference between the total saving the government hoped to achieve through the reform of public sector pensions (£400b) and the amount that been saved as a result of the switch from RPI to CPI (£280b)). However, that is not the context the Respondent provided for the figure, which appears to be a crude calculation based on the approximate number of public sector workers multiplied by damages of £20,000 for each individual.

243. In our view, the precise meaning of the passage is opaque, but there is no doubt that the sheer size of the figures gave an alarming impression, which we think was intentional. That is why the crucial fact was omitted: that the fact that the litigation was likely to last a long time was actually advantageous to the

protected group (see below). Mr Fittes accepted that he could see how this might seem like scaremongering; we find that it was.

244. Finally, the document pointed out that not everyone would benefit from the PPC and raised the concern that, if it were to succeed, many officers who currently enjoyed protection would lose it:

> 'even if the claim were to be successful, this is likely to make the situation much worse for others, while obtaining a relatively small payment for the claimants.'

245. We accept Mr Galbraith-Marten's point that all sides acknowledged that there was a risk that some officers who enjoyed protection might lose it, but there was no indication in the document as to *how many* might be worse off by the time the litigation was concluded. Of course, the Respondent had conducted no proper analysis, but it certainly knew that the numbers of those at risk was diminishing at a pace, the longer the litigation lasted. Mr Fittes agreed that he should have included that information; instead, he left out the very thing which was most likely to happen; we think that was deliberate.

246. In the Tribunal's view, the information provided in this document fell far short of Mr Fittes' stated aspiration of being 'unbiased, neutral and independent'. We acknowledge that, as with many of the other communications, Mr Galbraith-Marten was able to point in his written closing submissions/annex to aspects of the document which were accurate and uncontroversial. However, this does not alter the fact that, overall, it was heavily weighted against the PPC.

247. We go further and find that it was a misleading and manipulative document, the tone and content of which was obviously likely to contribute to an 'us and them' situation between the protected and unprotected groups within the Respondent's own membership.

<u>Mr Richard Cooke's response to the Respondent's position on the PPC</u>

248. That was certainly how it was perceived by some. On 2 October 2015, Mr Richard Cooke of the West Midlands JBB circulated a robust response to the Respondent's briefing document. In his covering email he said that his aim was to try and get the Federation in West Midlands to commit to funding its members' costs in the event of a successful claim, with a view to changing national policy later on. He wrote:

> 'I am deeply disappointed the Federation has released such a one-sided document (see attached) and is now engaged in an active campaign to discredit an honest group of colleagues working hard on our behalf without any financial support. In my, view we all owe them a debt of gratitude for not lying down and bringing this to the fore. I find it appalling that the leadership will go to such lengths to try to dissuade their unprotected colleagues, who make up the vast majority of officers, from gaining some justice for the discrimination they have suffered and losing us all the potential of re-opening the pensions issue and making them more favourable for all.'

249. He then made six headline points:

> '1) Protecting officers within ten years of the retirement age was not the only possible way the government could have dealt with the pension issues relating to the "cliff edge" issue […]

> 2) As this "briefing" confirms, if this fails at the first hurdle no officer incurs any costs. It's well worth a try even if unlikely to succeed! […]
>
> 3) At least three sources of legal opinion are taking a different legal view to the Federation in relation to the same points and legal principles; the FBU, Judges & law firm Leigh Day. It is also my understanding that the same QCs are now acting on behalf of the FBU, Judges & Police in this matter, although different lawyers were initially consulted. This document makes no mention of this which obviously casts doubt on the assertion that success is "highly unlikely" […]
>
> 4) It's happening anyway whether we like it or not. The only difference it will make if no officer sues is that no officer will get compensation and we will not have demonstrated solidarity with each other and the rest of the public sector. We should not sit by and watch or simply "monitor the situation". Colleagues need our help and reassurance now, and we should make all our reserves available for this fight now! If the leadership want to gauge opinion then let us have an urgent ballot of the membership now! […]
>
> 5) The alleged risks of currently protected officers losing protection, in the event of a successful outcome, are being significantly over exaggerated […] Protection COULD NOT be withdrawn from them retrospectively, so any potential loss would affect a very small number of officers, by that time, and must be weighed against a potentially very significant gain for the vast majority […]
>
> 6) There is no realistic prospect of an ET viewing such a claim as "vexatious, abusive or disruptive" and therefore awarding costs to the government - this is blatant scaremongering […]
>
> 7) If the preliminary Employment Tribunal is successful, wouldn't the Fed, at that point, take over the costs anyway? Surely the pressure to do so, in that event, would be both overwhelming and irresistible? The initial advice would have been shown, in that event, to have been wildly inaccurate, so why are we telling members now, years before we know, that if this "unlikely" event transpired we would still wash our hands of them? What a way to endear us to our members!'

250. Mr Fittes, who saw this email at the time, accepted in cross-examination that none of the assertions made in these headline points was factually incorrect. He accepted that he could have called a ballot of the membership - the Respondent had balloted members on other issues - but he chose not to. We think this was because he feared it might force his hand.

251. In our view, Mr Cooke's observations were remarkably prescient.

[Allegation 9.3]: The Respondent only met with Leigh Day once, on 6 October 2015, despite multiple attempts to keep the Respondent informed and updated on the progress of the parallel litigation and its relevance to the Respondent's members

252. On 6 October 2015, the Respondent met with members of the PPC group and their legal team (led by Mr Chris Benson of Leigh Day and Mr Keith Bryant QC). This meeting is the necessary background to the Claimants' substantive allegation that the Respondent thereafter failed to engage with the PPC group/Leigh Day (Allegations 9.3.1 to 9.3.6, shown below as subheadings in italics).

253. In his statement Mr Fittes suggested that he approached the meeting with an open mind 'to ascertain if there were areas of commonality that could be agreed on'. We find that he approached it with a closed mind and with a view to seeking tactical advantage.

254. There are various notes of this meeting, to which Mr Fittes was taken. The Respondent's only note consists of a list of questions Mr Fittes intended to ask with brief manuscript annotations by an unnamed colleague, indicating the answers he received. These included the fact that, if the claims succeeded each claimant might be awarded '£7/8k', a much lower figure than the £20,000 which the Respondent had quoted in the September position document (para 241).

255. The Respondent's note also recorded that the main attack on the Government's justification defence was that it was solely based on cost; that their expected outcome, if successful, was that the claimants would be reinstated to their original schemes 'for the interim at least'. There was also a discussion about how any appeal to the Court of Appeal might be funded.

256. Mr Fittes made it clear at the meeting that the Respondent would not be funding the challenge. Leigh Day's note records that Mr Benson asked the Respondent to maintain a neutral stance towards the PPC and to avoid negativity. Mr Fittes said that the Respondent could not 'stay mute' and suggested that it was up to each of its 43 regional divisions to adopt their own position. He said that, knowing that the main thrust of his strategy was to impose a centralized, disciplined message on the regions. However, he agreed to confine his comments to saying that 'the meeting happened and was constructive.'

257. After the meeting, Mr Fittes provided a summary to the INC and INB on 9 October 2015, explaining that in the coming weeks 'we will continue to develop messages that state the Federation's position on this matter and share them with you.'

258. Although the notes record one of the Respondent team saying that the 'best way to avoid pitfalls and misinformation moving forward is to have dialogue with LD', Mr Fittes accepted he did not engage with Leigh Day after that point; there were no further meetings during his tenure, despite multiple approaches from Leigh Day.

<u>Allegation 9.6: The Q&A video with Mr Fittes on 9 October 2015</u>

259. On 9 October 2015, Mr Fittes took part in a video Q&A session on the pension changes. We find that this was timed to pre-empt the Leigh Day roadshow (para 264). He explicitly confirmed the Respondent's support for the transitional provisions. He explained why he thought they were a good thing:

> 'it protects officers from dramatic changes, it cushions the blow to pay and conditions, and also it's a common theme that is used throughout the working environment to mitigate the impact of changes to pay and conditions […]'

260. He explained that he considered the arrangements justified because they 'protect those who are coming towards the end of this service who have less opportunity to adjust their financial circumstances'.

261. Mr Fittes wrongly stated that the Respondent did not mount class actions. He confirmed that the Respondent would not be supporting the PPC, while giving the impression that he remained open-minded and would keep the situation

under review. He referred to the parallel litigation and gave the misleading impression that the Respondent had taken, and was continuing to take, up-to-date legal advice, including in relation to the firefighters' challenge.

262. He continued to rely on the figure of £20,000 damages per claimant across the public sector, even though he now knew from Leigh Day that the figure was wrong (para 254). He did so in the context of giving an alarming impression of the potential negative consequences of the PPC and other challenges ('there are high risks involved in this'). He wrongly stated that those on tapered protection had suffered no loss.

263. We reject Ms Jolly's submission that Mr Fittes' reference to the PPC claimants, in this document at least, as 'a group of officers' was disparaging of them. Mr Fittes was clear that they came from all over the country and that he could understand their anger and upset and why they were bringing the PPC. Mr Galbraith-Marten reminded us (in his annex) that Mr Broadbent accepted in cross-examination that, on this occasion, Mr Fittes expressed some sympathy for the challengers.

<u>The Leigh Day 'roadshow' and responses from within the Respondent</u>

264. On 12 and 13 October 2015, Leigh Day carried out roadshow presentations about the PPC.

265. On 13 October 2015 Mr Simon Roberts (of Cheshire JBB) emailed a summary of the meeting he had had with Leigh Day the previous day to Mr Fittes:

> 'When the [PPC] legal team was asked why we have contradictory legal advice they said it may be what questions we have asked our legal team? They also said the legal advice they had centred around discrimination and was aimed at an employment tribunal.
>
> I was hoping to come away thinking they have no chance and I am happy to advise members accordingly. I think it has left us in a difficult position. From the meeting I was left with the feeling they have a chance, if they do win and we have shown them no support we are in a difficult position. I am not sure how many Chairs/Secs will attend the two meetings, I personally think it would be useful for them to come to the INC and give a presentation. This could be a very difficult issue for us to deal with and the whole INC would benefit from the presentation yesterday to fully sight them.
>
> I took a couple of the GMP officers for a drink afterwards, I accept they are angry but when you get beneath that they are passionate, informed and determined. These are normal cops taking annual leave to do this. If we are not going to help them in anyway I think that is a decision that should be made from an informed position.'

Mr Fittes did not follow up on this suggestion.

266. By contrast, Mr Steve Grange (Secretary, JBB West Midlands Police), who did not attend the roadshow and had only a second-hand account of it, wrote to Mr Fittes asking if it was time to 'come out against the challenge and warn our members of the danger of pursuing this rather than remaining neutral.'

267. On 16 October 2015, Mr Grange sent a detailed, analysis of the potential pitfalls of the PPC to members, the thrust of which was that the challenge 'could have serious detrimental effects on every single serving officer,

including yourself, and [I] therefore urge caution on anybody wishing to enter into this legal process'.

268. Mr Fittes engaged with Mr Grange and his hardline position; indeed, he reviewed and had input into his document, even though he acknowledged in oral evidence that the document showed scant understanding of the legal position. By contrast, he did not engage with Mr Roberts, who was advocating for constructive engagement with the PPC group.

269. In an email of 15 October 2015, Mr Graham Riley (Secretary, Gloucestershire Police Federation) expressed the view - which Mr Fittes agreed was not uncommon at the time among protected officers - that, although he was sympathetic to the situation of younger officers, he thought it 'a bit self-centred of them to have little regard for those that already have protection.' The divisions between older and younger members, which we find were exacerbated by the Respondent's messaging, were already apparent.

Allegation 9.5: 'The Pensions Challenge: The PFEW Position' document dated 16 October 2015

270. Mr Fittes then pressed ahead with issuing a further statement. On 16 October 2015, a summary document, 'The Pensions Challenge: The PFEW position' was circulated. This document represented a hardening of his line; we find that this was a direct result of the fact that he knew that Leigh Day was successfully gathering claimants. Of course, Mr Galbraith-Marten is right that the Respondent was entitled to explain to its members why it was not supporting the PPC. However, in doing so, it had an obligation not to mislead.

271. Ms Jolly provides a forensic analysis in her closing submissions of how this hardening of the Respondent's line manifested itself in the differences between the September and October versions, which we found persuasive. We highlight only the most striking points below.

272. Mr Fittes agreed that none of the inaccurate or misleading statements in the September statement, including the £20,000 damages figure, had been corrected, even though he knew them to be wrong.

273. Mr Fittes was taken to the following passage which expanded on the earlier version:

> Is everyone going to benefit from this challenge?
>
> No: in fact, we are concerned that ultimately if it were to succeed, many officers who currently enjoy protection would lose it and that the Government might choose, as a result of the challenge, to take pre-emptive action to make further changes to police (and maybe other public service) pension provision for the future, which will be detrimental to both existing and future officers - including those who join this challenge. In short, our main concern is that the challenge will seem on face value to give a short term gain for officers: but that in fact, because of actions the Government are likely to take in response, those same officers will suffer substantial longer term loss.'

274. Elsewhere in the document, the Respondent elaborated on the 'pre-emptive action' point as follows:

> 'If the Government were, at any point, to reach the conclusion that there was a possibility that the challenge might succeed, we believe that they would seriously consider taking pre-emptive action at that point to cap and mitigate any potential liability. There is no reason to expect that they would wait for the final outcome of the challenge. That action would be likely to involve a levelling down in some way of the future pension benefits of all officers and this would clearly be of detriment to all - including those officers taking the challenge' [emphasis added].

275. This omitted any reference to what by now was generally regarded, including by Mr Fittes, as the most likely outcome: that it would take between five and seven years for the litigation to work its way through the courts, during which time the 2015 Scheme would continue in force. He accepted that he should have included that information and that officers 'could have got misled by this'.

276. The following section was added.

> 'Does our (PFEW) legal advice suggest that the challenge will succeed?
>
> No: we do not believe the challenge will succeed. Furthermore, we would urge officers to consider what success looks like. Even if the legal challenge on this narrow point is accepted (and our advice suggests it will not be), there is a danger that the Government will take pre-emptive action and "level down" pensions. This will mean that any short term gain is overshadowed by longer term loss, which would affect every serving officer.'

277. This misleadingly suggested that the Respondent had up-to-date legal advice on what is described as 'this narrow point', when no advice had been taken since the judges' and firefighters' claims had been initiated and Leigh Day had clarified its challenge. We remind ourselves that in the legal advice received up to that point the possibility of an Employment Tribunal claim had not been considered at all.

278. Mr Fittes accepted, reluctantly, that the document could have caused and exacerbated division in the workplace between protected and unprotected officers, although he said that had not been his intention. He also conceded that documents such as the October position statement would have 'raised the emotional temperature' between those groups. He conceded, later in cross-examination, that some older colleagues 'may have' viewed with suspicion those younger officers who they considered were 'doing their legs' (i.e. swiping their legs from under them). We find that this was not just possible; the evidence suggests that such resentment was commonplace.

<u>Allegation 9.4: The letter from Mr Fittes to members sent on or around 19 October 2015</u>

279. On 19 October 2015, the Respondent posted on the Respondent's website a letter from Mr Fittes to all members, in which he argued that, while a legal victory for the PPC group might be of initial financial benefit to members of the challenge, it was likely to lead to consequential Government action which would be to the detriment of other officers and the PPC group themselves. He confirmed that the Respondent would not be indemnifying the officers undertaking the challenge or funding the challenge, if the initial legal arguments were won. The letter largely mirrored the content of the position document.

280. We find that the language Mr Fittes used in this letter to describe the PPC group was intended to portray it as acting selfishly, without heeding the interests of the wider membership: 'a group of individual officers'; a 'specific group of officers' who were defending their own 'individual interests' by pursuing a 'private action'. He contrasted this with the obligation on the Respondent 'to have regard to the bigger picture and to represent the longer-term interests of all its members now and in the future'.

281. He wrote:

> 'In view of our legal advice, we strongly urge all officers considering signing up to the pensions challenge to think long and hard and be sure that they understand all of the terms applicable before doing so.'

282. Mr Fittes was plainly seeking to deter officers from signing up to the PPC. In doing so, he fostered an 'us and them' division between those in the group and those outside it.

283. As with all the Respondent's communications, the October 2015 documents were cascaded down to local branch boards. The messages contained in them were repeated in the Respondent's online news forum and on its website. We accept Mr Broadbent's evidence that they triggered hostility towards him and others because older officers feared they would lose out as a result of the PPC.

<u>The response to the Federation's position statements</u>

284. Mr Broadbent responded in a measured email, challenging the substance of the Respondent's documents, ending:

> 'Once again one can only summarise [*sic*] that the intention of the National federation is not to impartially advise its members or maintain neutrality but to create fear, confusion and divide in order to mitigate the numbers wishing to partake and ultimately seek financial redress.'

285. Mr Fittes circulated the email internally with the single-line comment:

> 'We have got them reacting to us which is good !!!'

Mr Fittes told the Tribunal that he regretted this response because 'it makes it sound as though what was happening was a game; it wasn't, it was serious stuff.' We find that this marked an escalation in the Respondent's opposition to the PPC group, treating it as its adversary.

286. As for the response of individual members, we were taken to an email of 25 November 2015, in which an officer said that she was cancelling her subscription. She referred to 'scare mongering tactics by the Federation solely with the intention of discouraging officers in progress with legal action, which I can only view as serving those that are in the protected bracket instead of supporting the majority of officers that are affected'. She added: 'there clearly appears to be a campaign to cause division within the ranks which I do not feel is helpful or supportive.'

287. This was typical of the view of many members, including the Claimants.

The INB meetings in October and December 2015

288. A meeting of the INB took place on 21/22 October 2015. Mr Fittes restated his position briefly. He did not ask for input, let alone a vote. A further INB meeting took place on 14/15 December 2015. Mr Fittes gave a short update: the PPC claimants had now contacted ACAS before issuing Tribunal proceedings; the firefighters had been given a hearing date in the Autumn of 2016. Again, no vote was taken.

289. By this point, around 3,000 officers had signed up to the PPC. The litigation proceeded under the name of the lead Claimant: *Aarons*.

Allegation 9.8: At a SAB meeting on 15 January 2016, Mr Fittes stated that the Respondent was not supporting the PPC

290. On 15 January 2016, a meeting of the SAB took place, at which the Home Office confirmed it would be joining with police forces robustly to defend the PPC claims. The minutes of the meeting record that the Home Office had requested from chief officers 'data to assess the makeup of forces regarding transitional, tapered and non-protected members and a breakdown by age, gender and ethnicity'. This was confirmation, if it were needed, that the Home Office lacked the means to conduct a proper EIA as to the impact of the transitional provisions.

291. What Mr Fittes ought to have done at this meeting, if he had any intention of maintaining the 'fully unbiased, neutral and independent view based on fact and reality' which was his professed aim (para 227), was to probe the Home Office as to what its justification defence could possibly be, absent the data it had only now requested. Instead, he confirmed that the Respondent was not supporting the PPC.

292. The Respondent was explicitly allying itself with the Home Office against 3,000 of its own members, in order to protect the transitional provisions, all the while assuring its members that it was keeping an open mind and keeping the position under review. This was not the only time this would occur.

293. Although we find the Respondent's conduct at this meeting revealing, and relevant to the issue of whether it was pursuing a policy of supporting/protecting the transitional provisions (Issue 10(c) below), we accept Mr Galbraith-Marten's submission that this allegation does not feed into any of the specific detriments relied on by the Claimants at Issues 7-9.

The March 2016 meeting between the Metropolitan Police Federation and Leigh Day

294. On 11 March 2016, a meeting took place between Leigh Day, members of the PPC and Mr Ken Marsh and Ms Emma Owens (Chair and Vice-chair of the Metropolitan Police Federation). This was relied on by the Claimants as an example of what constructive engagement looked like. The Met's minutes of the meeting recorded:

> 'We were made to feel very welcome and the people we met were all clearly fully engaged and passionate about the case. Lee & Paul both spoke at length at the frustrations they feel about the changes to our pension and both showed a remarkable

> level of knowledge both of the history (Hutton Review) and also the finer details of both the CARE scheme and the 1987 scheme. There was a high level of transparency from the members of the team we met and all of our questions were answered in great depth and detail. We were not left feeling that they did not have a thorough and comprehensive knowledge of just what they are attempting to do with this legal challenge.'

295. The conclusion, which Mr Fittes agreed demonstrated neutrality, was as follows:

> 'Officers should be encouraged that this case is not being taken lightly and that the members of the team are certainly passionate about the case and are putting in a lot of hard work and effort to seek judicial redress to our pensions. We would be inclined to wish to point out that any decision to enter into a financial agreement with Leigh Day Solicitors is binding. Officers should take time to read the contract details carefully. Officers should be fully cognisant of ALL the financial implications and that any decision is theirs alone to make.'

296. On 15 March 2015, Leigh Day shared with Ms Owens a copy of the PPC claimants' grounds of complaint to the ET. She explained that the claimants were divided into different groups by protected characteristics; different grounds were lodged for each group. Mr Fittes confirmed that he never asked to see any of the grounds; he could not explain why.

The July 2016 video

297. On 8 July 2016, Mr Fittes appeared in an 'Ask Fed' video about whether the Respondent would change its position on a pension challenge. He said:

> 'I think I've always said, and I've said it to the challenge group as well, is that we will review the situation as it goes along and of course where we look at the legal actions we look to what's happening and of course I'm not saying that our position is this and that is it and we'll never ever change it, we need to keep everything under review and see what's happening.'

298. In October 2016, Mr James Watling (Claimant 8 at this hearing) stopped paying the Respondent's monthly subscription.

Allegation 9.9: A pre-recorded Q&A video featuring Mr Fittes, distributed on or around 25 October 2016

299. On around 25 October 2016, shortly before the hearing of the judges' case in the ET, a pre-recorded Q&A video discussion with Mr Fittes was streamed. In it he explained how the Respondent fought to secure the tapering provisions and to 'achieve as much protection for as many people as we could within the legal parameters that we felt that we had'. He was open about the fact that 'what we had to do with that [legal advice] was decide what our policy was going to be'. He explained that the Respondent as an organisation believed that transitional provisions were 'a good thing' and 'the best we could achieve so we're not going to attack something that we actually believe in and that's one of the main reasons why we don't support the challenge'. Mr Fittes was frankly acknowledging that the Respondent's policy position of support for the transitional provisions would, if necessary, trump the legal advice.

300. Speaking about the tapering provisions, he acknowledged that:

> 'Granted, as time goes on less and less officers, more officers will retire will come out of tapering and move into CARE so its effect is lessened.'

Elsewhere in the discussion he said:

> 'And I think along that lines is one of the areas that I feel as though is misunderstood is this it is not about protecting a small group of people at the expense of the majority. As I said at the beginning, this is about trying to achieve most protection for the most officers that we possibly can […]'

These statements confirm that Mr Fittes knew that the transitional provisions were, by this stage at least, favourable to a minority of officers. In cross-examination he said this:

> 'I think I was always aware of the fact that once the scheme became active and officers started to retire who had full protection at that point, their numbers would reduce and unprotected numbers would increase.'

301. In relation to funding the PPC, Mr Fittes said this:

> 'I was asked specifically about what would happen should the pension challenge succeed. And, one I don't think that it will do and that's based on legal advice and our own opinion. But were it to, two things will have to happen. One, our internal processes about how we deal with funding requests would be reviewed. Which would mean that officers and I know there are some, who have requested funding which has been declined by the federation to support the challenge, those funding decisions would have to be reviewed in light of the legal result. It happens in all other cases where we have new legal information, we review the processes in place to see what has occurred and then make decisions based on that information.'

302. Mr Fittes agreed in cross-examination that any member hearing this would understand him to be saying that, if there was any success in the pension challenge, the Respondent would take legal advice and review its position on funding.

303. We agree with Mr Galbraith-Marten that, on this occasion at least, Mr Fittes cannot sensibly be accused of communicating 'distorted, misleading or inaccurate' information. On the contrary, he was unusually frank. Its significance is that it throws into relief the misleading statements made on other occasions, both earlier and later: for example, that the transitional provisions benefited the majority; and that the Respondent's position was primarily driven by legal advice.

The response to the parallel litigation at first instance: November 2016 to November 2017

<u>The judges' Tribunal hearing</u>

304. On 14-22 November 2016, the hearing in the judges' case (*McCloud*) took place in London Central ET before EJ Williams, sitting alone. The Respondent did not send anyone to observe the hearing, nor did it ask the Government to provide the evidence it was relying on, whether statements, data or EIAs (if they existed). It missed a golden opportunity to inform itself as to the government's likely justification defence to the PPC. We find this was not inadvertent; it continued to avoid information which might force its hand.

305. On 23 November 2016, Mr Fittes circulated to the INB a briefing paper on the judges' case, which his team had put together. It identified the broad outline of the case. The paper gave no information about the substance of the Government's justification defence (the Respondent had none). The focus was on distinguishing the judges' case from the PPC, rather than identifying areas of commonality. The paper then set out the possible outcomes of the judges' litigation. In this section the focus was on speculating about how the PPC group might respond to those outcomes, including whether it might cause the group to be 'more active around whether the PFEW should also have challenged on police pensions'. It set out how the Respondent might respond to such activity.

306. We find that this was a document created to pre-empt the impact a possible win by the judges might have on the Respondent. It indicated that, contrary to its public position of openness to review, it had a closed mind and was already laying the groundwork to enable it to resist calls to change its position.

Allegation 9.3.1 - 29 November 2016, following the conclusion of the judicial pensions claim hearing in London Central ET. Leigh Day's invitation to meet was declined

307. On 29 November 2016, Leigh Day sent two letters to the Respondent, one about legal expenses insurance, the other inviting the Respondent to a meeting to update it on the legal arguments in the PPC and the judges' case. By now Leigh Day was representing over 11,500 police officers.

308. On 13 December 2016, Mr Fittes and Mr White declined the invitation on the basis that the legal action was being undertaken by individual officers, some of whom 'also happen to be members of [the Respondent]'. They considered it inappropriate to discuss these 'personal claims'. They also wrote that 'as the claims are being taken in an individual capacity there is no discussion necessary regarding funding options, as any liability rests with you and those individuals.'

309. Mr Fittes agreed in cross-examination that the Respondent could have met with Leigh Day to explore a cost-efficient way of moving forward if the judges won. The Respondent's failure to take this opportunity to explore the legal arguments being advanced in the PPC and by the judges was, in our judgment, a dereliction of its duty towards its younger, unprotected members (by now the majority). The terms of the letter confirm that its policy of support for the transitional provisions, and its opposition to any legal challenge, remained unshakeable ('our position on this issue has always been clear and remains the same'). They also reveal that the Respondent's public assurances to members that it would be open-minded and keep the position under review were mere lip service. The refusal to meet Leigh Day was a further instance of its avoiding information which might require it to rethink its own position.

310. Although the tone of the letter was moderate and business-like, its disavowal of any possible interest in claims being brought by some ten percent of its own membership was remarkable.

<u>Mr Broadbent's blog of December 2016</u>

311. On 14 December 2016, Mr Broadbent published online a lengthy blog called 'Betrayal'. It set out the history of the reforms and observed that, had the Government applied the reforms across the board (as the Hutton report had recommended), the likelihood is that it would have been able to justify them; it was the decision to protect those in the last ten years of service (contrary to Hutton) that gave rise to the discrimination.

312. He observed that, in his view, the justification relied on by the Government was flawed. He explained that he had attended the ET hearing of the judges' case and recorded that their Counsel had drawn attention to the Government's failure to 'analyse the particular expectations and obligations the different cohorts of judges would have' or to consider 'not where the line precisely was drawn but indeed whether a line should have been drawn between the groups at all'.

313. Mr Broadbent went on to identify an additional factor which was specific to the police officers:

> 'The key difference in all of this is our protections clearly cost more because we can retire earlier. Whereas a civil servant with 10 year protection may retire at 60 a police officer can retire at 50. As far as I can see no adjustment has been made for life expectancy for various roles meaning the Government calculate we will be paid on average 38 years in retirement whereas a civil servant will be paid 28 years in retirement. To fund the gap and pay for the protections afforded for the next 10 years and into retirement, those younger officers currently in service are paying a heavier price.'

314. He then talked about what alternatives there might be to the shape of the present 2015 Scheme. He concluded:

> 'Now I'm just a lay person in this. I don't have the dedicated time to sit down day after day after day and focus on this issue alone. Our federation do and did have that time to look at and think hard about the reality of the protections and the implications it would have on people's life's. Yet I'm still to see a document which suggests, implies or even proves that the federation did anything but bow to the proposition of protections at the earliest opportunity.'

315. Mr Fittes accepted that the Respondent had never produced any similar analysis. He accepted in oral evidence that it would have been 'a good idea' to do so.

316. The blog also included a poll, asking protected officers: 'would you work an additional 18 months if it meant younger colleagues would not lose out in pension?' The response was 65/35 per cent in favour.

Allegation 9.3.2 – 'Leigh Day's invitation to meet of 15 December 2016'

317. On 15 December 2016, Leigh Day sent a letter to the Respondent acknowledging its response of two days earlier, saying that it should not hesitate to contact them if they did require an update as to the progress of the PPC. The Respondent ignored the offer.

<u>The hearing in the firefighters' case</u>

318. In January 2017, the hearing in the firefighters' case (*Sargeant*) took place in London Central ET before EJ Lewzey, sitting alone. Mr Fittes updated the INB, saying that, although there were similarities between the FBU and PPC cases, they were not identical: 'we are monitoring this.' It is unclear how he proposed to do so, or how he could comment on distinguishing features, given that the Respondent neither attended the hearing nor asked to see any of the material relied on by the government in its justification defence.

Allegation 9.11: 'The Respondent's communications following the judges' ET victory were dismissive'

Allegation 9.10: Notwithstanding the evidence, evolution and successes in the parallel litigation, the Respondent continued to refuse to reconsider their support, funding or engagement with the PPC

319. On 13 January 2017, the judgment in *McCloud* was promulgated, upholding the judges' age discrimination claims. Allegation 9.11 refers to a number of documents, in which the Claimants allege that the Respondent was dismissive about the outcome; we deal with them together in the paragraphs below.

320. Internally, the Respondent had acknowledged that the outcome in the parallel litigation was likely to be reflected in the PPC. However, in public it continued to seek to distinguish the cases. On 16 January 2017, a statement was issued:

> 'We note the outcome and will now need to look closely at the judgement in detail. We also wait to hear whether there will be an appeal. Police officers' and judges' pensions are different, so we will need to examine the judgement to see if there are implications for the transitional pension arrangements for police officers.'

321. The outcome in *McCloud* was obviously a boost for the PPC, with the further potential to benefit all the Respondent's younger members. The Respondent did not acknowledge this in any of its communications. Mr Fittes' explanation in cross-examination was that 'those were the press lines that were agreed at the time. I don't know why it didn't include a potential benefit for officers.' According to some undated manuscript notes of an executive committee meeting on 17 January 2017, the focus at the meeting was on 'holding our line'.

322. Even at this point, the Respondent did not conduct any statistical analysis to establish how many of its members might benefit. Asked why not, Mr Fittes' said: 'there was still a risk to members who did have transitional protection'.

323. On 17 January 2017, the Respondent published 'Judges' pensions Employment Tribunal further update'. The document included the following:

> 'The judgment does not state that either judges only subject to the new scheme (without protection) or in the old scheme have been treated illegally. It only states that those judges afforded transitional protection have been treated in a way that causes discrimination. In fact, the judge goes further, and states that those with transitional protection have been treated better than they could have been.'

324. It was deliberately misleading to say that there was no finding of illegal treatment, when the judges' discrimination claim had succeeded.

325. The update explained that the MOJ might appeal; it might offer the same protection to all judges, at a cost of £80m; or it might remove transitional savings completely, with a saving of £28m. Mr Fittes was unable to say where these figures came from. The document stated:

> 'Unfortunately if this latter course is taken, some members of the pension scheme lose out. Ultimately it would mean no member of the pensions' scheme will gain from the claimants' win, in this ET.'

326. It concluded:

> 'What is the PFEW doing? "We continue to monitor the situation," said Mr Fittes. "We continue to believe that transitional protections are a good thing and are deeply disappointed that this case may have consequences that the litigants did not anticipate, and that would cause pension scheme members to lose money. We believe it is important that we act in the best interests of as many of our members as possible. We believe transitional protections offer a better pension for more members. The ET decision is only binding on the judges, not on any other employers - although it may be referred to in other ET cases. If the Ministry for Justice appeals, then that Employment Appeal Tribunal (EAT) decision would have to be followed by other ETs, (albeit it would not be binding if it could be proved the facts of the case differed sufficiently). The judges' position is different in many respects from the police position. However, it remains to be seen whether -- in fighting the one common element of schemes, the transitional protection -- the litigants have opened the door to poorer pension provision in the public sector."'

327. Although much of this is unobjectionable, parts of it, in particular the last sentence, sought to lay the blame for any adverse consequences for its older members of the pensions litigation, at the feet of the litigants, including the PPC group.

328. The statement that the Respondent was 'monitoring the situation' suggested that it was seeking legal advice. That was misleading: there is no record of Mr Fittes seeking advice at this time from Mr Sturzaker, who seems to have disappeared from the scene altogether.

329. On 19 January 2017, Mr Broadbent responded angrily online:

> 'The tone of the PFEW's release is very negative and in my opinion also insights [*sic*] older officers to question the validity of our challenge. Some have bitten and the comments section is knitted with fear, bitterness and resentment towards the challenge.'

330. He also criticised the Respondent for not making it clear that the litigation was likely to take many years and so any changes were not imminent. He went on:

> 'It has finally come to light that the PFEW actively lobbied for transitional protections instead of finding a fairer more equal way to spread the pot of money available so that everyone benefited to some degree. Instead of choosing a path of equality which did not discriminate, they chose a path of self-preservation and segregation. It is not we who have walked blindly into the hands of government, but our so-called representative body, who failed to see the divide this emotional subject would cause.'

331. We were taken to other email responses from unprotected officers, cancelling their subscriptions and expressing anger at the Respondent's position in relation to the PPC. Mr Fittes was plainly expecting this reaction: he offered to draft responses for similar communications 'that are bound to come in'. In one

of those responses, he wrongly stated that the Respondent had 'engaged with [the PPC group] since they started'.

332. As for the reaction of protected officers, Mr Paul Deller, General Secretary of the Met Police Federation JEC wrote:

> 'I am completing a C2 to sue Lee Broadbent and Leigh Day Solicitors for the removal of my transitional arrangements.'

Though flippantly expressed, we think the anger was genuine. Mr Fittes accepted in cross-examination that the Respondent's messaging had led protected officers to believe that they were about to lose their protection.

333. In an email of 19 January 2017, Mr Paul Hopwood (of Warwickshire and West Mercia Police) gave his summary:

> 'Clearly speaking to colleagues who have been afforded some protection under TP, the National Federation statement in respect of this is most concerning and could potentially result in huge losses for those concerned. I understand the needs to put something out, but this is seen by some as scaremongering, when in fact it has huge implications […] This is a divisive issue and one with far reaching consequences.'

334. Notwithstanding the outcome in *McCloud*, Mr Fittes continued to refuse to reconsider its lack of support, funding or engagement with PPC.

335. Mr Hopwood asked if the Respondent would be sitting down with the PPC group and their advisers. Mr Fittes replied:

> 'We have met with Leigh Day the Challenge Group and their QC. The judges ruling hasn't changed the legal position; this is around the policy decisions of what to do with those advices.'

336. Mr Fittes added that he would 'fight to keep' the transitional provisions. It was wrong to say that 'the judges ruling hasn't changed the legal position': although a first instance decision, the Respondent knew that the Government's failure to make out its justification defence was a significant development; in his letter to Leigh Day (see below) Mr Fittes wrote: 'as you now state, the ruling for officers may be similar'.

Allegation 9.3.3 – '16 January 2017, following the ET's judgment on the judicial pensions claim [Leigh Day's] invitation to meet was declined by Mr Fittes by letter dated 27 January 2017'

337. Meanwhile on 16 January 2017, Mr Benson of Leigh Day had emailed the Respondent, inviting it to meet to discuss the judgment in *McCloud* and the PPC. He wrote:

> 'As you will be aware the decision in relation to judicial pensions was handed down today. A lot of the evidence put forward by the government and by their witnesses is the same evidence that applies to your members. Indeed comments were made during the hearing by the government witnesses that confirmed their evidence was wider than just the judiciary and changes to their pensions.
>
> The finding that younger judges have been treated less favourably will have a read across to the treatment of your younger members. I know when we discussed there was a view from some on your team that the new pension maybe beneficial rather than

> detrimental but I think it's clear from the judgment that such a defence will fail if pursued by the respondent in the police pensions case.'

338. On 22 January 2017, Mr White, in his capacity as the Respondent's chair, tweeted:

> 'not sure I believe LD [Leigh Day] acting in interests of as many members as possible. Only motivation is fees.'

Later the same day, as part of the same thread, Mr White he tweeted:

> 'the lawyers are motivated by money, wasn't suggesting @CopsAgainst, we disagree but their motivation is justice.'

339. On 27 January 2017, Mr Fittes declined Mr Benson's invitation to meet:

> 'We completely understand that as a business, you have seen an opportunity to offer what some police officers will see as a lifeline. However, as a police officer staff association, we have a duty to act in the best interests of the majority of police officers.'

340. We find that this was a veiled slur on Leigh Day's motives; it is consistent with Mr White's more explicit remarks; we think it probable that it was part of their agreed strategy.

341. Mr Fittes now stressed what he referred to as the 'overall merits of the case and the longer-term consequences of the ruling', thereby moving away from his earlier emphasis on the legal advice the Respondent had received (which predated the *McCloud* judgment). He stated that, notwithstanding the outcome in *McCloud*, the Respondent's 'perspective' had not changed.

342. The Respondent's refusal to engage with Leigh Day, when the potential benefit to the majority of its members in doing so ought to have been obvious to it, reflected its unwavering commitment to the transitional provisions, whatever the developments in the parallel litigation.

343. On 27 January 2017, Leigh Day wrote separately to the Respondent, objecting to Mr White's tweets:

> 'Leigh Day is proud to act for individuals and to hold the government to account -- this is our job and we work hard to ensure that the rule of law is upheld. Our primary objective in this case is to challenge discriminatory provisions introduced by the government.'

<u>Allegation 9.13: The meeting on or about 31 January 2017 between Mr White (PFEW Chair and Mr Taylor (Chair, Essex Federation) and PPC Claimants</u>

344. On 31 January 2017, a meeting took place between Mr Deex (of the PPC group), Mr White and Mr Taylor (Chair, Essex Federation). This allegation is specific to Mr Deex and can only be relevant as background: the other Claimants were unaware of the meeting; none of the alleged discriminators were present.

345. Mr Deex challenged Mr White and Mr Taylor as to the particular discriminatory effect of the transitional provisions on officers in his age group (19 to 24). They could not answer his questions. He concluded that no analysis had been done as to the extent to which his cohort stood to win or lose. He left the meeting

feeling frustrated, unsupported and angry. In fact, as we now know, no analysis had been done in relation to any cohort.

The ET judgment in the firefighters' case

346. On 14 February 2017, the judgment in the firefighters' case was promulgated. The Tribunal dismissed the claims on the basis that the transitional provisions were a proportionate means of achieving a legitimate aim.

The March 2017 internal strategy document

347. On 3 March 2017, the Respondent circulated an internal document entitled 'Pensions Communication strategy'. The document identified the key messages which the Respondent wanted to get across, including:

> 'That our legal advice was that a challenge to the introduction of the scheme was unlikely to be successful. That the ruling on the Judges' case means that there is a chance that the transitional arrangements that the PFEW fought for will be removed for everyone meaning that the protections we fought for are then lost […] That officers who have signed up to the challenge and then withdraw may be subject to legal costs […] That if anything fundamental does change we will review our current position.'

348. The plan was that multiple channels of communication would be used to target the different audiences, including 'proactive posting of information on social sites involved in the challenge – Cops Against, Pensions Challenge etc.' There was no suggestion that the Respondent might engage positively with the PPC group; there was no reference to presenting a balanced view of the substance of the challenge.

349. Mr Fittes confirmed that his aim was to put his position 'as strongly as possible'. We accept Ms Jolly's submission that this was 'a defensive battle strategy to promote the Respondent's own policy, which was to fight to protect the transitional provisions at all costs.'

Allegation 9.12: Police Pensions – CARE (2015) Scheme FAQs document dated March 2017

350. Around the same time, the Respondent published 'Police Pensions – CARE (2015) Scheme FAQs' and 'Pensions timeline'.

351. The documents stated that 'the basis of the original legal advice received has not changed and our stance remains the same' and 'based on our legal advice we do not consider that a challenge would be successful'. In context this misleadingly suggested that fresh legal advice had been taken in the light of the two ET judgments in the parallel litigation.

352. In response to the question 'if Federation legal advice is wrong, will you fund a legal challenge for all officers?' the answer given was:

> 'No. The legal advice is just that- advice- and while we have taken that on board, we do not believe that a challenge based on transitional protections is in the best interests of most members. The debate is not confined to a legal argument, with a number of factors to be considered. The judges' ET ruling was against the transitional protections put in place, stating that those given the protections had been treated better than could be justified based on the evidence.'

353. The Respondent was covering both bases: relying on legal advice, while emphasising that such advice would not ultimately determine its position.

354. The document said this about the *McCloud* judgment:

> '17. Is It right that the Judges' ET ruling said they had been treated better than they needed to be?
>
> Correct. At no point was it indicated that anyone was treated worse than they should have been, and in the case of comparing someone with transitional protections with someone without any transitional protections, the ruling stated that those with protections had been treated better than they needed to have been.'

355. We find that this would suggest to some readers that there had been no finding of discrimination in *McCloud*. The document also repeated the suggestion that 'the ruling potentially leaves a lot of people worse off and no one better off' and 'a challenge could mean that the transitional protections we had fought for could be removed', again without mentioning the crucial fact that the appeals were likely to take some years to conclude. This was scaremongering.

356. By saying that the judges' case 'could have an influence' on other first instance cases deliberately understated the position: it was highly likely that it would.

357. The document also reproduced the 2014 statistics (para 164), showing the breakdown of members by protected/tapered/unprotected categories, even though they showed the position as it was some five years earlier. It continued to assert that these showed that the majority of members benefitted, even though Mr Fittes' own estimate, some eighteen months earlier, was that they benefitted only around a third of members (para 168). This was deliberately misleading.

358. On 7 March 2017, Mr Laurence Brown (South Wales Police) emailed Mr Fittes:

> 'Sec, I want you to fight tooth and nail to protect my tapering on the 87 scheme. I am not happy that the Leigh day challenge may effect [*sic*] my tapering. How long will their challenge take? I am on tapering until Aug 2020 and due to retire March 2023 . I will be absolutely distraught if I get clobbered. I need the pension challenge to pad out to at least then! If it happens I will be shafted twice and that will be too hard to take.'

359. Mr Fittes did not respond to say that any changes would be likely to take place some years hence.

Allegation 9.3.4 – [The Respondent's response to Leigh Day's] letter of 10 March 2017 and the conduct alleged in it. The Respondent replied on 21 March 2017

360. On 10 March 2017, Mr Benson of Leigh Day wrote to the Respondent, objecting that these documents were scaremongering and, while acknowledging that the Respondent did not want to be involved in the PPC litigation, asked that it 'refrain from making statements that are intended to cause confusion or anxiety to our current or potential clients.'

361. We record at this point that, between March and July 2017, Mr Fittes was dealing with very difficult events in his personal life, which resulted in some periods of absence from work. Understandably, in our view, his ability to recall work events from this period was impaired.

362. Mr White dealt with the reply to Leigh Day's letter. He rejected a draft which included the phrase: 'from our perspective this correspondence chain is now closed' (even though he described it as 'firmly shutting the door, which I accept'), asking for something 'softer'. It is clear from this private exchange, however, that the Respondent had no intention of keeping the position under review, as it continued to maintain in public.

363. On 21 March 2017, Mr White replied on behalf of the Respondent, denying that the information it circulated was, or had ever been, intended to cause concern or anxiety:

> 'We seek to ensure that all our members have a rounded understanding of their pay and pensions, and the likely outcomes of any course of action - be that litigation, or engaging in the consultation process, or indeed a combination of both. For that reason, we must continue to inform our members of our position, setting out what we believe is the right route to take, and our rationale for so doing.'

364. There was nothing wrong with that as an aspiration, but it did not translate into action: the Respondent did not provide its members with a 'rounded understanding' of the 'likely outcomes'; it provided a skewed and misleading narrative, emphasising unlikely outcomes, with the overriding objective of protecting the transitional provisions.

Allegation 9.14: Ian Rennie's comment in November 2017

365. On 27 November 2017, Mr Rennie, who by then was retired but still doing some work as a consultant to the Respondent, delivered an ill-health and medical retirement training package on its behalf.

366. Mr Galbraith-Marten reminds us that the evidence about this incident is hearsay and we approached it with caution. However, there is sufficient corroboration in the contemporaneous documents (which Ms Jolly analyses persuasively in her closing submissions), and Mr Rennie's own evidence was so implausible (at one point stating that he knew nothing about the PPC), that we are satisfied that it occurred as alleged.

367. At the meeting Mr Rennie said that the PPC litigants had collective responsibility for the costs of the litigation which could run into millions and advised members of the group to 'get out now'. His remarks were repeated by a Federation rep (Richard, surname unknown) on social media and came to the attention of the PPC team and Leigh Day.

368. He made his remarks in the course of carrying out the functions he was authorised by the Respondent to do. We are satisfied that he was acting as its agent in this context and that, as the former General Secretary, those present would have regarded him as speaking on its behalf. The Respondent was liable for his conduct, whether or not it knew or approved of it.

Allegation 9.3.5 – '[Leigh Day's letter of] 30 November 2017, following the alleged incident involving Ian Rennie (issue 9.14). The Respondent failed to engage with a request to discuss the PPC'

369. On 30 November 2017, Leigh Day wrote to the Respondent about Mr Rennie's comments at the training session. It repeated its offer to discuss the case with the Respondent, so that it could provide more accurate information to its members. Mr Fittes replied, on 6 December 2017, that he was confident that Mr Rennie had not made the comments, observing that the Respondent's position on the pensions challenge remained unchanged and turning down the offer of a discussion.

The response to the parallel litigation in the EAT: December 2017 to November 2018

The EAT judgment

370. On 14 December 2017, the Employment Appeal Tribunal (EAT), Sir Alan Wilkie presiding, heard the conjoined appeals in *McCloud* and *Sargeant*. Judgment was handed down on 29 January 2018: the ET's decision in *McCloud* was upheld; the appeal against the ET's decision in *Sargeant* was allowed and the case remitted to the same Employment Judge to re-consider proportionality; permission to appeal to the Court of Appeal was given in both cases.

Allegation 9.15: 'the Respondent's reaction to the EAT judgment in the parallel litigation'

371. On 29 January 2018, the Respondent put out a brief holding statement about the EAT judgment. It contained nothing positive about the outcome. It said that the Respondent would 'now need to look closely at the judgments [and] examine the minutiae to see whether there are any implications for our members'. This clearly suggested that the Respondent would be seeking legal advice. There is no record of Mr Fittes doing so. He agreed in cross-examination that there was no one in his team who was qualified to examine the legal reasoning of the judgment.

372. In his witness statement Mr Fittes stated that there was 'nothing in the EAT judgment which changed [the Respondent's] position or warranted [its] taking further legal advice at this point in time – it was another stage in the process'. That was, in our judgment, an extraordinary statement. The EAT judgment was plainly a game-changer. Any responsible body in the Respondent's position would immediately have sought fresh legal advice to establish whether its position was sustainable (Mr Fittes accepted that he 'probably' should have done so). Instead, the Respondent continued to tell its members that it was right not to change its position. In our judgment that was reckless and irresponsible.

373. On 6 February 2018, the Respondent produced a briefing paper on the EAT judgment. As to the firefighters' case, it stated (paragraph 2.5):

> 'In our view there is nothing in the EAT judgement that would lead us to alter our policy position. Despite the fact that our original position was that the new scheme should only

> apply to new joiners, when it became clear that this position was not achievable, PFEW supported the transitional arrangements because they meant that more of our members were protected for longer. This was a major contributing factor in our decision not to back the pensions challenge. This remains our position. At this point in time our view is that there would be nothing to be gained by seeking further legal advice on the matter.'

374. The same position was adopted in relation to *McCloud* (at paragraph 3.5).

375. On 15 February 2018, the Respondent published an update and an article. The update stated that the Respondent had been considering the impact of the judgment and quoted Mr Fittes as saying:

> 'There is nothing in the judgments which changes the Federation's policy position or that warrants us taking further legal advice at this point, but we will continue to monitor the situation'.

It explained:

> 'So, the legal challenges hinged on one aspect alone: in order to justify the age discrimination caused by the transitional arrangements and therefore make them legal, it was necessary for the Government to demonstrate that they were a proportionate means of achieving a legitimate aim.'

There was no reference to the fact that the EAT had upheld the ET's decision to reject the Government's justification defence in *McCloud* and remitted the *Sargeant* case to be reconsidered on this issue. That was crucial information and should have been provided.

376. Again, there was nothing in either document to suggest a positive outcome for the PPC group. The article restated the Respondent position that it was important to act 'in the best interests of as many of our members as possible' and its belief that 'transitional protections offer a better pension for more members'. There still had been no assessment of how many people remained protected this stage. The article continued to distinguish the judges' position from that of police officers.

<u>Allegation 9.16: 'Police Pensions' FAQs document dated February 2018, including the 2017 FAQs</u>

377. The Respondent also relaunched its 2017 FAQs with nine additional questions. We make the same findings in relation to this document as we did under Allegation 9.12. We note that the Respondent continued to rely on the same historic 2012/2014 statistics, which were now a further year out of date.

<u>The February 2018 internal briefing paper</u>

378. On 26 February 2018, the Respondent produced a more detailed, internal briefing paper on the EAT's judgments for the INB. In relation to the appeal to the Court of Appeal, the following was said:

> 'The Government [has] so far struggled to demonstrate an analytical approach to the proportionality question which might mean they would struggle to meet the more rigorous test and thus fail to legitimise the direct age discrimination attaching to the introduction of the transitional arrangements, which would then be unlawful.'

379. This is the first reference in any internal document to the Government facing any difficulties with its arguments; the same point was not made in documents sent to members. Elsewhere in the same document, the following passage appeared:

> 'In our view there is nothing in the EAT judgement that would lead us to alter our policy position. Despite the fact that our original position was that the new scheme should only apply to new joiners, when it became clear that this position was not achievable, PFEW supported the transitional arrangements because they meant that more of our members were protected for longer. This was a major contributing factor in our decision not to back the pensions challenge. This remains our position. At this point in time our view is that there would be nothing to be gained by seeking further legal advice on the matter.'

380. We infer that the Respondent considered that there was 'nothing to be gained' by obtaining fresh legal advice because it knew that such advice was likely to be difficult to reconcile with its preferred position of continued support for the transitional provisions.

381. By now, some 14,000 officers had signed up to the PPC; those unprotected officers not yet involved (perhaps some 65,000) might have been well advised to protect their position, especially as to limitation. In our judgment, the Respondent was failing in its duty towards all its unprotected members.

382. On 27 April 2018, a stay of the PPC litigation (*Aarons*) was ordered by EJ Snelson in London Central ET.

383. In August 2018, Mr John Apter became National Chair of the Respondent. In campaigning for the position, Mr Apter told Mr Broadbent that he would want to work with the PPC team if he was elected. He said that, although he was not involved in the original decision-making, he 'did feel we should have worked more closely with you guys back in the day'.

384. On 1 September 2018, the INB was replaced by the National Board and the INC by the National Council.

Mr Duncan's tenure as National Secretary

385. On 30 September 2018, Mr Fittes retired as General Secretary. On 1 October 2018, Mr Alex Duncan became the Respondent's National Secretary. He had been involved with the INB since 2014 and had been head of civil claims from 2016. Thus, if an individual member had applied for funding about a pensions case, his team would have considered it (had a decision not already been taken that such cases would not be funded). Mr Duncan confirmed that he was never asked to determine any question relating to the funding of the PPC during his tenure as head of civil claims.

386. There was a full handover between Mr Fittes and Mr Duncan, including a briefing on the Respondent's position on the pension reforms. Mr Duncan also inherited the Leatherhead team which had supported Mr Fittes.

The response to the parallel litigation in the Court of Appeal: November 2018 to June 2019

McCloud in the Court of Appeal

387. Between 5 and 9 November 2018, the Court of Appeal heard the appeals in *McCloud* and *Sargeant*.

388. In November/December 2018, after the hearing but before judgment was handed down, the Respondent published 'The legal challenge by judges and the firefighters' union – latest update', which included the following:

> 'We monitored progress in the initial Employment Tribunal and continue to follow the appeals for both firefighters and judges. We've summarised the course of events below. Alex Duncan, PFEW National Secretary, said: "There has been nothing in the judgements so far that has changed the Federation's policy position or warrants us taking further legal advice at this point, but we will continue to monitor the situation."'

389. Mr Duncan told the Tribunal that he reviewed the previous legal advice and decided that it did not need updating (even though it predated the parallel litigation). He took a positive decision to maintain the Respondent's existing position. Indeed, the words ascribed to him in the passage set out above are precisely those ascribed to Mr Fittes after the EAT judgment in February 2018 (above at para 372). The document then stated:

> 'What has the PFEW been doing?
>
> We continue to believe that transitional protections are a good thing and are deeply disappointed that this case may have consequences that the litigants did not anticipate, and that would cause pension scheme members to lose money. We believe it is important that we act in the best interests of as many of our members as possible. We believe transitional protections offer a better pension for more members.'

390. The messaging was exactly the same as under Mr Fittes' leadership; there was still no analysis of how many members stood to gain or lose.

391. The document referred to the transitional provisions as 'a mechanism that was lobbied for by unions – including us – across the public sector to protect members'. It incorporated a quotation from Mr Fittes ('the ET ruling was on a narrow part of pension legislation and ruled against a provision that unions across the public sector had fought for').

<u>Allegation 9.17: 'The statement by Mark Emsden (Suffolk Police Federation General Secretary) in Suffolk Police Federation Magazine in December 2018</u>

392. In December 2018, Mr Mark Emsden (General Secretary, Suffolk Police Federation) wrote the following in its magazine:

> 'For any of you who would like to throw some money away there is always the pension challenge group who will be happy to take you chase [*sic*, *presumably 'take your cash'*] I am sure.'

393. Although expressed in more robust language than the Respondent used, we find that this mirrors a theme already adopted by the Respondent: that Leigh Day (and by extension the PPC group) were driven by cynical commercial imperatives.

394. Mr Galbraith-Marten correctly points out that none of the eight Claimants whose cases we are hearing at this stage referred to this in their statements. It remains relevant, however, as background evidence of the Respondent's underlying strategy.

The judgment of the Court of Appeal in *McCloud* and *Sargeant*

395. On 20 December 2018, the Court of Appeal handed down judgment in *McCloud* and *Sargeant*. The Court held (at [233]):

> 'We have found that in both the judges' and firefighters' cases the manner in which the transitional provisions have been implemented has given rise to unlawful direct age discrimination. In neither case could the admitted direct age discrimination be justified. In the judges' case we see no error in the reasoning of Judge Williams either in his assessment of aims or means. In the firefighters' case we take the view that there were no legitimate aims and since we are satisfied that the contrary conclusion would not be open to an employment tribunal, we have made that determination ourselves and not remitted the case, save for the determination of remedy.'

396. Applications were made by the respondents in the litigation for permission to appeal to the Supreme Court.

Allegation 9.18: 'Following the Court of Appeal decision in the parallel litigation, the Respondent continued to portray the PPC in negative terms and failed to recognise the nature, impact or value of the Court of Appeal decision on its members, in particular those in the PPC'

397. Allegation 9.18 refers to a number of documents, two of which are identified below in italicised subheadings.

Allegation 9.18: 'email from Alex Duncan to National Board and National Council, "Court of Appeal Ruling – Judges' and Firefighters'", 21 December 2018

398. The Respondent's immediate response to the Court of Appeal judgment was more balanced than it had been previously. On the day judgment was handed down, Mr Duncan wrote to the National Board and the National Council, saying that it was 'both lengthy and complex, but nonetheless, a positive outcome for those engaged in the process'. He observed that 'at every stage we have stated that we would review our position dependent on developments' and, as a result, he had decided that the Respondent would seek further legal advice from different Counsel and would meet those involved in the PPC and Leigh Day after Christmas. In the event, there was no meeting with the PPC/Leigh Day.

399. An initial statement released on the day observed cautiously that 'today's announcement seems like good news, but we need to digest the full judgment and of course we will continue to keep our position under review'. An update was posted on the Police Federation website which, unlike the internal communication, made no reference to the outcome being positive for the PPC group but repeated some earlier, more negative but not positively misleading, comment, for example: 'the PFEW believes that the success of this challenge could have unintended consequences to the detriment of public sector workers'.

The internal meeting on 8 January 2019

400. On 8 January 2019, the Principal Officers of the Respondent held a meeting to discuss the Court of Appeal judgment. The previous day, Ms Donnelly circulated a pack of documents for the meeting, which we find was prepared

under Mr Duncan's direction and represented his views. There are no minutes of that meeting.

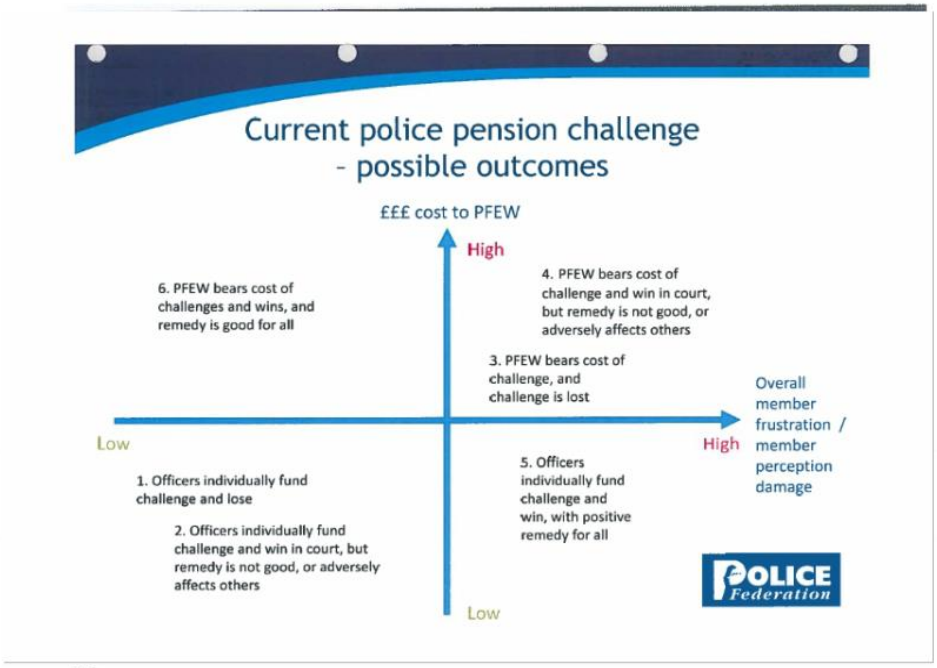
401. One of those documents was a Research and Policy Support Paper. That document repeated the claim, which by now was long out of date, that nearly half of the Respondent's members had benefited from the transitional provisions.

402. There was also a PowerPoint presentation which posed the following questions:

> '1. Getting the best deal for members: Has our underpinning position changed? Do we still believe that transitional protections, in the way designed, are worth having? Would we still want to argue that these are legitimate aim? (They give extra protection to around half our members, closest to retirement) OR are we prepared to about-face on this, to appease those members who weren't given the transitional protections, but he did get accrued rights (also about half…) – and if so, to what likely gain?
>
> 2. If we hold the current line, in favour of transitional protections, and not the current pension challenge, would we actually want to support the HO if they argue for them, or simply stay quiet? What are the Home Office likely to do about this?
>
> 3. If we want to take *any* challenge now on pensions, what would it look like? It would not have to be the one currently being undertaken…'

403. This repeats the, by now, wildly misleading statistic that the transitional provisions continued to give protection to around half the Respondent's members. We noted the adoption of the language of 'appeasement', usually associated with enemies. No less striking is the fact that the possibility was canvassed of the Respondent's supporting the Home Office if it continued to defend the transitional provisions in relation to police officers. This was developed in the slide below.

404. There was then a slide containing the following chart:



405. The vertical axis represented cost to the Respondent; the horizontal reputational risk to it. Point 5 indicated that the Respondent regarded a win for the PPC, with positive benefit to all, as low in cost but high in reputational risk, whereas if that win adversely affected others or the remedy was not good, the reputational risk was much less (Point 2). The Respondent's focus was on the potential dangers to itself, rather than the potential benefits to its members. The overall message of this slide is: the worse the result for the PPC, the better the result for us (and *vice versa*).

406. There was another slide showing proposed questions to Counsel, one of which was whether it might be possible for the Home Office to argue a different rationale for the legitimate aims of the transitional provisions (that 'those closest to retirement had a stronger basis for a legitimate expectation') and, if so, whether it would succeed.

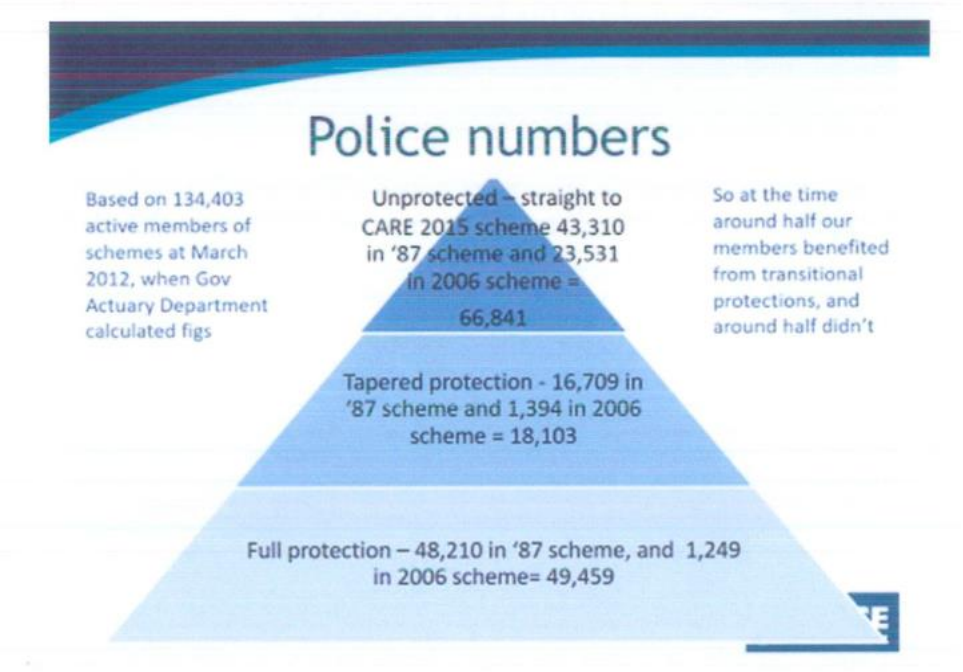
407. Two things emerge from this: firstly, that even after the Court of Appeal decision, the Respondent's focus remained on protecting the position of older officers; secondly, that it was hopeful that the Home Office might have a stronger basis for defending the PPC claims than it did in the parallel litigation, a remarkable position for a staff association to adopt in relation to litigation brought by well over 10% of its own members and whose outcome might benefit the majority of other members.

Allegation 9.18: the Research & Policy Support Briefing Paper dated 16 January 2019

408. On 16 January 2019, the Respondent's briefing paper *'The Judges' and firefighters' pensions challenge: The Court of Appeal ruling, and background'* was circulated to the National Board and National Council. The paper stated that 'around 67,000 of our members benefit from transitional protections, by having either full or tapered protections'. The Respondent knew that figure was not true in January 2019; it was deliberately misleading.

409. The pack included a table showing 'the legal story so far', setting out the headline findings and conclusions in the judges' and firefighters' cases in the ET, EAT and Court of Appeal with a commentary below: 'unfortunately what this tells us is that the case is finally balanced, with differing arguments winning the day at different points'. The obvious point was not made that a unanimous Court of Appeal judgment carries more weight than two divergent first instance decisions, nor was there mention of the fact that the Government had led no evidence on justification in either case. This was an attempt to spin the history of the proceedings in the hope of making the Respondent's position appear less isolated.

410. Included in the briefing was the following diagram, which had also been part of the internal slide pack:



411. The obvious anomaly was that the larger numbers were at the top and the lower numbers at the bottom, whereas the graphic gave the impression that the opposite was true, i.e. that the majority was protected. Mr Duncan's evidence was that 'a different shape might have been preferred by some'. We find that this was a crude attempt to distract the reader from the underlying figures.

The NB meeting in January 2019

412. On 23/24 January 2019, a meeting of the National Board took place. There was no discussion of the matters set out in the internal briefing paper. According to the minutes Mr Duncan referred to the judges' and firefighters' cases and the fact that the decision of the Supreme Court as to whether to entertain a further appeal was awaited. He also said:

> 'The government could negotiate a satisfactory outcome rather than go to ET. Should they lose they have been very clear that they would pull the transitional arrangements.'

He accepted in cross-examination that there was no documentary record of the government having indicated such a position. He maintained that it was an off-the-record comment by an unidentified senior member of the civil service; that they had said that this was the 'likely outcome' (rather than the certain outcome as he appears to have told the Board and Council). We found that evidence implausible.

Allegation 9.19: Police Federation Official Podcast with Mr Duncan and Mr Apter in January 2019

413. In January 2019, Mr Duncan and Mr Apter took part in an 'official podcast' which covered police pensions. Mr Apter made some positive comments about the PPC group:

> 'I have been the first to say a win obviously for those involved in the challenge is a good thing. It is a positive thing.'

414. Mr Duncan said:

> 'But it is worth noting that with the exception of the FBU, no other union has adopted a different position to us. And it is on the grounds that if some of your members can have a better deal, in an ideal world you have a better deal for everyone but if actually you can only get it for some of them, do you refuse it and have everyone at the lowest possible position or do you take what you can, when you can?'

Even at this late stage, and even after the Court of Appeal judgment had found that younger members of public sector pension schemes had been subjected to discrimination, Mr Duncan was still prepared to argue that there was a case to be made for putting that to one side, if some residual benefit could be obtained for older members.

Fresh legal advice in early 2019

415. On 23 January 2019, the Respondent took advice in conference from Mr Robin Allen QC, instructed by Mr Cooper of Slater and Gordon. We did not have sight of the instructions. Mr Allen's advice was later summarised by Mr Cooper in an email of 6 February 2019. He advised that the outcome in the parallel litigation strengthened the prospects of success for the PPC. The transitional provisions in the firefighters' scheme were very similar to those in the police scheme. He confirmed that it was open to the Home Office to seek to justify age discrimination on different grounds from those presented in the firefighters' case, if there was evidence to support the position, but whether they would do so was a matter of conjecture. The Home Office had lost in *Sargeant* not only because they presented no evidence to support their stated justification, but also because of their failure to answer the point that it was the younger firefighters who required the protection, rather than those near retirement age; the older firefighters had already accrued pension under the old scheme more advantageous than any new firefighter could realistically achieve.

416. Surprisingly, Mr Duncan could not recall whether the Respondent had taken steps to discover what justification the Home Office was relying on in defending the PPC. He accepted he could simply have asked Leigh Day. We find that he cannot have known, otherwise Mr Allen would undoubtedly have dealt with it.

417. As part of his summary of Mr Allen's advice, Mr Cooper set out in table form what the likely impact of the final outcome in the parallel litigation would be on the PPC (whether it was likely to be withdrawn or progressed further). We infer that the Respondent sought this advice so that it could consider its next move, including mitigating the reputational risk to it of success by the PPC.

418. Mr Cooper also referred to how the fees were structured in the PPC:

> 'It is important to emphasise that in progressing the existing challenge, Leigh Day are almost certainly doing so on the basis that they will be paid a percentage of what claimant members secure on success. It is unclear though as to on what that

> percentage is based. Is that based on compensation to date or any future losses as well (whether secured through compensation or any improvement in the pension).'

The easiest way of finding out would have been to ask Leigh Day, but it chose to keep its distance.

419. Mr Cooper also referred to Mr Allen's advice on time limits, which was that there were three points from which time might run: the introduction of the transitional provisions in 2015; the date of the member leaving the service; or the date on which losses had been crystallised on the retirement of the member. Mr Allen advised that the answer to that question would be determined by the Supreme Court in another case[5] but he was reasonably confident that the decision would be that time ran from retirement.

420. Mr Cooper then observed that it may be beneficial to seek further advice from Counsel as to the remedy for claims being progressed, based on different hypothetical claimants. He suggested instructing Ms Dee Masters, a barrister in the same chambers as Mr Allen, to provide that advice.

421. There was then an email from Ms Donnelly to Mr Cooper about the instructions to be sent to Ms Masters. Ms Donnelly asked that the question in relation to time limits be framed as follows:

> 'The position on the timing of complaints. We would like this question to be much more specific than "when will the impact crystallise" as we are conscious that is subject to the Miller ruling, and so we can't expect a firm answer. Specifically then, we want to know:
>
> - If it is an ongoing discrimination, then surely the claims could be taken at any time? (There is therefore no need to start registering any now)
>
> - If it is not, then surely the impact was when the scheme was introduced, and people are timed out already?'

We note that both proposed questions are directed at securing an answer which would mean that the Respondent would not need to issue proceedings immediately. We infer that this was its preferred approach. It is consistent with what happened in due course, as we set out below.

422. Ms Masters advised in writing on 29 March 2019. In relation to time limits, she agreed with Mr Allen that were three possible dates from which time might run. Given the current lack of clarity, it was important to lodge claims as soon as possible, so as to make it easier to secure an extension of time, if necessary. The Respondent did not follow that advice; it did not issue claims until some fourteen months later.

423. As for potential avenues for reform, Ms Masters set out four options for extending the existing transitional provisions without maintaining their discriminatory impact, the fourth of which was:

> 'to create a new transitional scheme so that the true "losers" from the move to the old pension schemes to the new pension scheme are provided some protection. This is likely to be younger rather than older members.'

[5] *Miller v MOJ* [2020] ICR 1143

Mr Duncan confirmed that this was a perspective that the Respondent had never previously considered. Ms Masters also advised that, in her opinion, the 2015 Scheme was 'far less generous than the 1987 Scheme and the 2006 Scheme' in the respects which she then set out in table form.

424. Mr Duncan and Ms Donnelly considered Ms Masters' advice and reverted to Mr Cooper with questions. Specifically, they pushed back against her advice that claims should be issued sooner rather than later, as well as her reference to the 2015 Scheme being less generous than the legacy schemes. We note the willingness to probe, by way of follow-up questions, advice which did not accord with the Respondent's preferred approach. This contrasts with the absence of any follow-up to Mr Westgate's earlier advice, which was more congenial to it.

425. Mr Cooper replied that, given the uncertain state of the law at present, Ms Masters was likely to be cautious in providing advice on this matter. In the event, the Respondent decided not to ask her for further advice.

426. Mr Duncan did not share the advice of either Counsel with the National Board at the meeting on 18/20 June 2019. His evidence was that he gave a verbal update without going into detail. We think that unlikely. If he had, it would have been minuted. The minutes of that meeting have not been disclosed on the basis that they contain no reference to the pensions issue.

Mr Small's resignation

427. On 31 March 2019, the Claimant Mr Andrew Small's service as a police officer ended; he had resigned with notice on 22 February 2019. He stopped paying the Respondent's monthly subscription. He remained a claimant in the PPC and continued to follow developments closely, including communications from the Respondent. We accept the evidence in his witness statement that he was particularly upset by its decisions in October 2019 to become an interested party in the *Aarons* litigation and, in May 2022, to begin its own group claim. He wrote to the Chief Constable of Derbyshire Constabulary, copying in the Respondent, explaining the impact the discrimination had had on him. He did not receive a response. In late June 2020, he was contacted by phone and email by representatives of the Derbyshire branch of the Respondent to say that they were calling ex-officers to let them know about the Respondent's group claim. He responded by email pointing out that the actions of the Respondent had affected his health and urging the Respondent to fund the PPC.

The meeting of 22 May 2019

428. An internal meeting of the Respondent took place on 22 May 2019. The notes to which we were taken were scrappy, in manuscript and difficult to interpret. It was not clear who made them, what kind of meeting it was or who was present. They did, however, clearly contain the following:

> 'Now v. diff. position – starting to look like win for challenge […] Fed left looking to the masses as though wrong + latest legal advice more ambiguous'.

429. Mr Duncan accepted that, by this point, a win for the PPC was looking likely and that it would leave the Respondent 'with egg on its face'.

The meeting with the Home Secretary on 12 June 2019

430. On 12 June 2019 Mr Duncan attended a bilateral meeting with the Home Secretary, then Mr Sajid Javid.

431. A briefing paper was prepared for Mr Duncan's use by his team, to which he was taken in cross-examination. He sought to distance himself from its contents, suggesting variously that the information contained within it was wrong in certain respects; that it had only been provided as background; that he would not necessarily have used the material; that he would not have had time to say most of the things it contained since he 'only had five minutes' because politicians 'have a knack of talking about trivia'; that some things might have been said 'to make us look reasonable to the Home Secretary'; and that it was not really prepared for the meeting at all but for information for Mr Apter in case he (Mr Duncan) could not attend.

432. We reject those explanations and find that the briefing paper reflects what Mr Duncan said to the Home Secretary when he met him. This was an exceptionally important meeting with a senior member of the Cabinet. We think it implausible that Mr Duncan would have accepted a briefing paper without reviewing it and satisfying himself that it was fit for purpose. We think it almost certain that he had input into it. Mr Duncan's attempts to distance himself from its contents served only to highlight how damaging some of them are. We are satisfied that Mr Duncan was untruthful in his evidence to the Tribunal about this document.

433. Mr Duncan sought reassurances from the Home Secretary that any remedy for the discrimination caused by the transitional arrangements would be an 'industrial' one, which would be applicable 'whether or not members had made a claim, or whether that claim was in time'. We find that Mr Duncan was trying to find a way around Ms Masters' advice that the Respondent should issue claims sooner rather than later.

434. Notwithstanding the Court of Appeal's judgment in *McCloud* and *Sargeant*, Mr Duncan said that the Federation supported transitional provisions 'as being in the interest of many of our members and protecting those nearest retirement'. We note the reference to 'many of our members' (no longer 'the majority').

435. He said:

> 'We have come under significant and sustained pressure from members to challenge the whole of the CARE scheme. In particular, the legal firm of Leigh Day persuaded a number of members that there is a legal challenge against transitional protections that would benefit them. A number of officers signed up to this independently. We have invested significant time and resources to trying to smooth this situation, and dissuade officers from attacking the scheme. We have provided briefings and communications, in absence of the Home Office so doing. However this has helped the government, by maintaining more positive relationships and avoiding a public spat.'

436. We find that this was an acknowledgement that the Respondent went to considerable lengths to stop its members taking legal action by way of the PPC. He also said:

> 'On that basis, while our legal advice to date has been that a challenge would not succeed, our latest advice states that we should at least take claims for members who leave service early (based on their loss, and therefore claim crystallising at that point).'

437. In making this statement Mr Duncan was disclosing the legal advice the Respondent had received in relation to claims it might bring on behalf of its members to the Government department which would be defending those claims. He went further:

> 'Meanwhile the government seems to be about to introduce an industrial resolution, as we have been told that the planned cost cap rectification has been stayed, pending the final court decision. This suggests that essentially monies will be set aside to fund an industrial resolution.
>
> This puts us in an extremely difficult position. If we tell members they should take claims, then we believe the floodgates will open, and many members will seek to claim, not fully understanding the position. Further, members will assume their claims will have more monetary value than we believe to be the case.'

438. In making these statements, Mr Duncan was disclosing privileged information and potentially giving the defendants to their claims a tactical advantage. In doing so, he breached his members' trust and acted unethically.

439. These points culminated in the following question (which Mr Duncan did accept that he asked):

> 'Given we believe it is the government's intention to provide an industrial resolution to this issue, and that a statement to that effect would help us enormously in a difficult position with members, is the Home Secretary able to give assurance that any industrial resolution will apply to all?'

440. In other words, the Respondent found itself in a position of having to ask the Home Secretary to help extricate it from the difficult position it found itself in with its own members.

The response to the Supreme Court ruling in the parallel litigation: June 2019 to May 2020

<u>The Supreme Court ruling</u>

441. On 27 June 2019, the Supreme Court refused permission to appeal the Court of Appeal's decision in *McCloud* and *Sargeant*. Mr Apter issued a short video holding statement about the ruling. Its tone was anything but celebratory; there was no acknowledgement of the positive implications of the ruling for the PPC.

442. On 2 July 2019 the Respondent issued a statement in which Mr Apter was quoted as saying that the Respondent was asking for all transitional provisions for its members to be retained until 2022 and that affected members must be levelled up to this position. The statement was greeted with fury by members, who believed that the Respondent should be fighting for them to be put back into their original pension schemes.

Allegation 9.3.6 – [Leigh Day's invitation to meet] of 3 July 2019

443. On 3 July 2019, Ms Duarka of Leigh Day sent an email to Mr Apter, suggesting that it might be helpful, given recent developments, to meet again:

> 'to discuss where we are, what we plan to do next and whether there is any scope to discuss how we might cooperate in the interests of our clients and your members […] We do hope that we are able to work with you during the final stages of this case'.

444. Ms Duarka offered to attend the Respondent's Leatherhead HQ with her colleague Mr Benson the following week. This was an open invitation without preconditions which might have led to a variety of topics, including fees, being discussed. Only by meeting them could the Respondent find out what room there was for negotiation and compromise.

445. Mr Apter replied to Ms Duarka on 10 July 2019:

> 'Many thanks for the email. I have spoken with our National Secretary, Alex Duncan and both Alex and I would welcome the opportunity to meet with you. Next week is difficult as we have some national commitments but wondered if it would make sense to meet after the Government has responded to the Supreme Court ruling. The indications are that this will be within the next couple of weeks?'

446. Given the opportunity to deny this account in re-examination, Mr Duncan said that he did have a recollection of having a conversation with Mr Apter 'but the details are fairly vague'. He could not remember whether they decided they were happy to meet with Leigh Day. We find that they did. Ms Duarka responded positively later the same day, but the Respondent then never reverted to her and no meeting took place.

447. We find that Mr Duncan blocked the meeting. He told the Tribunal that he took the view that was no point in meeting Leigh Day because the Respondent did not intend to cover any of the PPC fees. Indeed, he went further and said that he would not meet with Leigh Day because certain of the PPC claimants had expressed hostility to the Respondent and he would not 'separate out' Leigh Day from them. There was not a scrap of evidence of hostility towards the Respondent by Leigh Day, which had treated the Respondent with professional courtesy throughout. One thing is clear: Mr Duncan viewed the PPC claimants and Leigh Day as intertwined, and he was determined to have nothing to do with either of them.

448. We accept Ms Jolly's submission that a staff association, properly supporting those (by now) 14,000 of its members who had signed up to the PPC, would surely have wanted to know that the best outcome would be achieved for them, and how that could be done while advancing the interests of the wider affected membership. Even at this point Mr Duncan continued to hold the PPC and Leigh Day at arm's length, treating them, as the Respondent had almost since the inception of the challenge, as its adversaries, to be outmaneuvered.

<u>The Respondent's official response to the Supreme Court ruling</u>

449. Meanwhile, on 4 July 2019, the Respondent's official response to the Supreme Court judgment was posted online. The Respondent announced that it was 'prepared to bring any appropriate legal claims on behalf of its membership if

its expectations are not met by the government following the latest development over pensions.' It quoted Mr Apter's statement without correction.

450. There was also some suggestion that Mr Apter had publicly stated that the Respondent would be paying the PPC legal fees. The only support for this is in a redacted email from a member of the PPC to colleagues, couched in highly generalised terms. We decline to make a finding on such scant evidence.

451. Mr Duncan set out his position on the issue of funding the PPC in an email of 4 July 2019 (nearly a week before the National Council meeting referred to below) to the chair of Leicester Federation:

> 'We do not retrospectively fund cases which we have declined funding for not least because we have not agreed the fee structure or rates charged. PFEW obtained a number of legal views in respect of the transitional arrangements and these consistently gave poor prospects of success. In line with the funding criteria the decision to refuse funding was taken. I am aware that some now state those who provided the advice were wrong but that is not entirely accurate. Poor prospects does not equate to no prospects. PFEW like any organisation with a finite budget has to make decisions on a daily basis regarding whether a case should be funded. Those decisions are taken in line with the funding criteria and the information available.'

452. On 5 July 2019, the Respondent issued a statement, clarifying and apologising for Mr Apter's statement of 2 July 2019.

Allegation 9.21: 'Website article: "Collective pensions statement", dated 10 July 2019

453. Mr Duncan asked his communications team to put together a statement setting out the Respondent's proposed collective position; this was decided upon by him. It included a brief statement that the Respondent would not be funding the PPC. It was duly prepared in advance of the National Council meeting on 9/10 July 2019 but not circulated at the outset.

454. The issue of funding the PPC was not on the agenda, but Mr Duncan knew that Mr Richard Cooke (West Midlands Federation) was going to raise it because he told him so. Mr Duncan told the Tribunal that, so far as he recalled, he did *not* convey his own strong view that the Respondent should not fund the PPC. He said that he was listening to the debate and would not have wanted to lengthen it. We found that implausible, especially given the view he had expressed in the email to the Leicester Federation quoted above. We think it probable that he gave a very clear lead and the National Council, except Mr Cooke, fell into line.

455. Mr Cooke, who had no access to the information known to Mr Duncan and Mr Apter, argued that the Respondent should cover the legal fees of PPC; he believed that the Federation 'shouldn't have any member discriminated against out of pocket'.

456. There were no papers or discussion documents relevant to the question, even though it was an important and sensitive issue. That was probably because constitutionally, this was not a decision the National Council was entitled to take; it was a decision for the National Board. The Council's role was to hold the Board to account, not to set strategy or policy. Although members of the

National Board sit on the National Council in a non-voting capacity, they were separate bodies.

457. Mr Duncan did not share with the National Council the fact that there was a pending invitation to meet Leigh Day, at which discussions could have taken place about fee arrangements and support for both PPC claimant and affected non-claimant members alike. He told the Tribunal that he may not have received Leigh Day's letter before the National Council meeting. He had: Mr Apter emailed it to him on the day it arrived. Mr Duncan could not have shared with the Council information about Leigh Day's funding arrangements because he did not know in any detail what they were. There was no discussion about the rights and wrongs of retrospective funding, nor about affordability within the budget. Nor did he tell the Council about Ms Masters' advice that claims should be issued on behalf of members not already in the PPC as soon as possible.

458. There was a discussion about the issue, which is barely minuted, after which 'an indicative poll' (a show of hands) was taken: everyone but Mr Cooke voted against paying the PPC fees. The vice-chair, Mr Che Donald, said that anybody could bring a paper on a later occasion for a more formal vote, if they wished; no one did.

459. The National Council agreed that a collective statement should be put together and communicated to members. The draft which, as we have already found, had been prepared before the meeting was circulated early in the evening on the first day to give the Council members an opportunity to propose amendments. There is nothing to show that they did so. The Council approved it on the second day.

460. Also on the second day, Mr Cooke proposed that the question of funding the PPC should be put to a vote of the membership; that suggestion was not adopted.

461. Mr Apter doubled down on maintaining a party line on these issues and discouraging descent. He is minuted as saying:

> 'the importance of having a joined-up voice on this issue cannot be stressed enough. The issues are all addressed in the FAQ document, our position remains unchanged and we need 43 branches plus the National Board signing up to this statement.'

462. On 10 July 2019, the Respondent posted the 'Collective pensions statement' online. It referred to the National Board and National Council having discussed the issue over the previous two days. That was positively misleading: there had been no National Board meeting since June; another meeting did not take place until September 2019.

463. The document began:

> 'We are listening to you. We are listening to your Representatives.'

and stated:

> 'We have previously made it clear we would not paying the private legal fees for the 'Pension Challenge'. This position remains unchanged.

> Once the Government proposes a remedy - which is likely to be a protracted process and potentially affect all public sector pensions - if it becomes necessary for us to mount a legal challenge on behalf of all police officers in England and Wales then we stand ready to do so. it may be that no one has to submit claims.'

Allegation 9.20: "Pensions FAQs - July 2019" published after the Supreme Court ruling on 27 June 2019

464. On 10 July 2019, the Respondent published 'Pensions FAQs – July 2019', stating again that it would not be paying the private legal fees of those in the PPC. It referred to the PPC as 'the private challenge that was taken by some officers', a statement which failed to reflect the numbers of those involved.

465. The document referred to the earlier decision not to fund the case as being taken 'in accordance with our governance process'. It also stated that it would not be funding the PPC because 'the challenge did not meet our fund rules'. In fact, the Respondent has never been able to point to a specific decision, let alone the application of the appropriate governance process or funding rules, taken on a particular date by a named individual. That was positively misleading. There was no mention of the recent invitation from Leigh Day to have a discussion as to whether there could be an arrangement on fees. The document reused misleading statistics suggesting that a majority of members had benefited from the transitional provisions.

466. The Respondent continued to rely heavily on the legal advice it had been given:

> 'We were against the introduction of the CARE scheme, but all the legal advice stated that the introduction of the scheme was lawful: and indeed, that fact has never been challenged by anyone […] We obtained legal advice throughout the process. When the new pension scheme was introduced, a group of officers (Pensions Challenge) decided to put in their own legal challenge to the transitional arrangements. The Federation's legal advice strongly advised that a challenge was unlikely to be successful.'

467. That was misleading: it omits the important information that the Respondent had not taken legal advice on the parallel litigation, or on the basis on which the PPC claims were advanced, until 2019, after the Court of Appeal decision.

468. The document then stated:

> 'Can the police cases still go to court?
>
> We believe it is now unlikely that the police claims that have been taken, and stayed by Leigh Day, will ever go to court.'

469. Mr Duncan told the Tribunal that he believed the government would concede the PPC cases. He was unable to explain to the Tribunal why this key fact was omitted. We find it was omitted because it would have pointed to a victory by the PPC. It was phrased the way it was (slyly, in our view) to give the impression that, far from being victorious, the PPC was redundant; even the phrase 'and stayed by Leigh Day' (rather than by the Tribunal) implies an admission of defeat. That is consistent with other communications from around this time (for example, emails to members from the Branch Secretary of Thames Valley Police Federation, who was also a member of the National

Council), suggesting that the PPC had not achieved anything; the achievement was solely that of the judges and firefighters.

470. Many members responded angrily to the Respondent's decision not to fund the PPC. One officer wrote:

> 'I still have great concern and upset in regards to the Feds stance that they will not consider paying the legal fees now they have jumped on the back of the hard work of the Pension Challenge/Leigh Day have done along with the judges and FBU.'

471. It was also plain to Mr Duncan that there was confusion among members as between the industrial remedy to the pension scheme as a whole, which would be applied to all, and the compensation for discrimination (injury to feelings), which would only apply to those who had brought claims. He asked Ms Donnelly to give some thought to this and she made a number of observations, one of which was:

> 'you might want to leave it alone, on the basis that there is no certainty in anything, save we actively dissuade people from taking us, then if they are the only ones who gain, we have egg on our face. But given the Treasury statements that seems unlikely, and alternatively you may want to try and stop people wasting money on Leigh Day'.

472. In the same response she also referred disparagingly to Leigh Day 'touting for business'.

473. Mr Duncan accepted in evidence that he did not want to bring claims if matters were going to be resolved without the need to do so. It is difficult to see how he could reasonably have believed at this point that the non-PPC Claimants could ever have been awarded injury to feelings in respect of Tribunal claims they had not brought. Indeed, later in his evidence before us, when dealing with the decision to intervene in the proceedings Mr Duncan stated: 'we wanted people to be remedied but we were very aware that the Tribunal only had jurisdiction over claims before them.'

474. The Respondent subsequently did put out a statement on the remedy point, expressing the view that any awards for injury to feelings were likely to be low and that the costs of bringing a Leigh Day claim might not be covered by those awards. In doing so, it was intervening in the PPC remedy in a way which might prejudice the position of its own members, for example in relation to any settlement discussions.

<u>The Government's response to the Supreme Court judgment</u>

475. On 15 July 2019, the Government released a statement saying that it would fully engage with the Employment Tribunal to agree how the discrimination would be remedied:

> 'As 'transitional protection' was offered to members of all the main public service pension schemes, the government believes that the difference in treatment will need to be remedied across all those schemes. This includes schemes for the NHS, civil service, local government, teachers, police, armed forces, judiciary and fire and rescue workers. Continuing to resist the full implications of the judgment in Court would only add to the uncertainty experienced by members. The matter will be remitted to the Employment Tribunal in respect of the litigants in the firefighters and judicial pension schemes. It will be for the Tribunal to determine a remedy. Alongside this process,

> government will be engaging with employer and member representatives, as well as the devolved administrations, to help inform our proposals to the Tribunal and in respect of the other public service pension schemes.'

476. On 1 August 2019, the Government conceded liability in the PPC. On 21 October 2019, the chief police officers conceded liability.

477. On 20 August 2019, the Respondent issued a statement following a letter that had been sent by Leigh Day on 2 August 2019 to clarify that remedy would apply to all and compensation only to those with a claim.

478. There was a National Board meeting on 4/5 September 2019. Mr Duncan did not raise the issue of funding the PPC at that meeting and so the National Board never formally discussed the issue.

Allegation 9.22: 'Joint application by the Respondent, the Scottish Police Federation and the other police Associations to become interested parties in the PPC and the claims made therein'

479. On 1 October 2019, a meeting of the SAB took place. The Home Office representative, Mr Amar Pannu, explained that the Government was not in a position to provide more than general observations on the remedy proposals at that stage, in part because it was constrained by the litigation process. It was now plain to the Respondent that it did not have a seat at the table on the question of remedy because it was not a party to the ongoing litigation. Mr Duncan pointed out 'the tension between the case being argued on behalf of a small group before the Tribunal and the need for the staff associations to represent the interests of all their members'. The Tribunal notes the familiar characterisation of the 14,000 members of the PPC as 'a small group'.

480. It was suggested that the staff associations might consider whether they could be heard as interested parties in litigation. The Respondent decided to go down this route. It did so without informing Leigh Day/the PPC, who found out only when the application was made by the Respondent and the other police staff associations to London Central ET on 7 October 2019, which advanced the following position:

> 'The remedies the Tribunal decides upon are likely to influence the remedies proposed to those police officers who have not joined these proceedings. Moreover, the Home Office and other relevant parties will not engage with the associations until the Tribunal has reached its decision. The police associations have a clear legitimate interest in these proceedings and wish to participate in order to ensure the best outcome for their members.'

481. In making the application on behalf of all the applicant associations, Mr Paul Epstein QC observed that the associations 'may have a valuable perspective to bring, particularly in relation to senior officers (who seem to constitute a small proportion of the Claimants)'.

482. On 16 October 2019, the Respondent issued 'Pensions further update' in relation to its application for 'Interested Party' status. It told its members that:

> 'The tribunal has the ability to award additional compensation for hurt feelings over and above the remedy. We do not expect this to be high. Nonetheless we will seek for it to

> be applied to all affected officers, not just current claimants. It is for the tribunal to decide what, if any compensation it will apply for hurt feelings.'

483. EJ Snelson disabused them of the notion that non-claimants could be included in awards for injury to feelings in his subsequent order. We note that the Respondent continued, improperly in our view, to talk down the likely level of such awards, which was consistent with its pattern of disparaging the PPC.

484. In the same document, the Respondent wrote that:

> 'Should it become necessary, officers have until three months minus one day after the tribunal to make claims, and these can be taken without use of a legal firm'.

Given that both Mr Allen QC and Ms Masters had advised on the position in relation to time limits, the Respondent knew that that was legally wrong and misleading. We note that it was consistent (1) with a preference for indicating that there was no rush in issuing proceedings (again, contrary to Ms Masters' advice) and (2) with the thrust of the messaging that Leigh Day's involvement was redundant. By this date, the Respondent had already had legal advice from Mariel Irvine solicitors (who had lodged the intervention application). Of course, when the Respondent issued its own proceedings, it did so through a firm of solicitors (Penningtons Manches Cooper ('Penningtons')).

485. The document also wrongly suggested that Leigh Day was not representing members of the 2006 NPPS and that this was part of the reason why it was seeking to become an interested party.

486. At no point in these communications did the Respondent give credit to the PPC or Leigh Day for the success of the PPC and its potential benefits to the wider membership. As a result, the application caused considerable upset within the ranks of the PPC. We were taken to an example (which Mr Duncan acknowledged was not untypical) of the reaction to the Respondent's new approach in an email from a member, who wrote on16 October 2019:

> 'It looks like the fed want to jump onboard the hard work and success that the pension challenge has done. They also want all officers to benefit from any remedy. I don't have any problem with that but I am concerned that those that have taken the risk and gamble will actually have gained the least because we'll have to pay the legal fees. Wouldn't it be fairer if the Fed now offered to pay all legal fees so that all officers benefit and speak to the highly successful pension challenge team to agree the way forward. It is going to take a while for the fed to win back police officer's trust but this would be a start. I am concerned that if the fed are involved in the ET they will not seek the best result for those in the challenge. The better the result the worse the feds position in this process will look. I totally trust the pension challenge team to seek the best result for those in the challenge. Once that is sorted the fed, using their own funding, and not mine can seek a similar result for those not in the challenge. At the moment if the fed attend the ET I'll be funding that. How crazy is that!'

487. On 28 October 2019, there was a preliminary hearing for case management in the PPC at London Central ET, at which EJ Snelson granted the Respondent and other Police Staff Associations interested party status, notwithstanding the objections raised on behalf of the PPC Claimants, which he described as 'puzzling'; he concluded that the staff associations 'have a plain interest in the proper disposal of the remedy claims in these proceedings.' However, the Judge ordered that their involvement (beyond a watching brief) would be

strictly limited to the important, but narrow, question of the proper formulation of the final declaration. At the same hearing he made an interim declaration that the PPC Claimants were entitled to be treated as members of the appropriate legacy schemes. The Respondent did not inform its members that they had been granted an interim remedy which amounted to levelling-up.

488. It was only after this hearing, on 28 October 2019, that the government privately informed the Respondent that the interim declaration would be extended in due course to all the Respondent's affected members, although it still did not specify what the final shape of that declaration would be. To that extent, they were given advance confirmation that there would be an industrial remedy, a fact which was not announced publicly until 25 March 2020. It is plain that the reason why that was made at that point was because the PPC had secured an interim declaration, although Mr Duncan was reluctant to acknowledge that in his evidence before us.

489. On 4 November 2019, Mr Apter tweeted that the Respondent would not be covering the PPC fees.

National Council meeting in November 2019

490. There was a National Council meeting on 13/14 November 2019, at which Mr Duncan did not recognise that there was any benefit from the success of the PPC, nor did he communicate the advice the Respondent had received from Ms Masters some nine months earlier that the non-PPC members should issue proceedings as soon as possible to protect their position. The Respondent was doing everything possible to avoid bringing claims for other younger members, we infer because they feared it would be characterised as a humiliating U-turn.

491. Among the documents prepared for the National Council meeting was a SWOT analysis which identified the PPC as a 'threat' to the Respondent. In discussion at the meeting Ms Emma Carter (Bedfordshire Federation) observed that, although it was listed at the lower end, 'this could be the biggest threat'. Asked why the PPC was identified as a threat, Mr Duncan replied 'we had a group of members clearly unhappy with the Federation, it was not a good place for us to be in'.

492. It was put to him that the Respondent viewed the PPC/Leigh Day through hostile eyes as a group that could do the Respondent immense reputational damage, which he denied. There is ample evidence that this was the Respondent's view and had been from the outset. As far back as August 2015, the Surrey Branch Board Secretary, Mr Simon Moxon, had written an email in which he said:

> 'They [Leigh Day] are far from the reputable [*sic*] and for a firm like this to humiliate PFEW by winning a case really would destroy our already bruised and battered reputation completely.'

Remedies in the firefighters' and judges' cases

493. In the meantime, the Court of Appeal had remitted the parallel litigation to the Employment Tribunal to determine a remedy for the PPC claimants. On 18

November 2019, the Employment Tribunal made an interim order that those members who had been transferred to the 2015 Scheme, were entitled to be treated as though they had been members of their old scheme throughout. The FBU described this as a 'landmark victory with implications across the public sector.'

The SAB meeting in January 2020

494. In January 2020, the Government provided a paper to members of SAB setting out proposals for remedy. On 13 January 2020, there was a meeting of the SAB. Mr Pannu said that the government 'intends to extend the same treatment to all members of public service pension schemes (whether claimants or not) who are in the same legal and factual position as the claimants'. Mr Duncan observed that it was unclear precisely what this meant and emphasised that the Respondent needed to 'protect the position of their members, whether or not they were claimants.' Still the Respondent did not take steps to issue claims for the affected members who were not part of the PPC (some 60,000 officers).

495. On 21 February 2020, the Respondent published 'Update on the remedy to remove discriminatory provisions from the police pension schemes' and 'FAQs – remedy to discrimination'. Although the PPC was briefly mentioned, no credit was given to the PPC group or Leigh Day.

Allegation 9.24: 'The Respondent failed to respond in a timely manner to Leigh Day's 5 March 2020 letter to the Respondent, including the request to cover the Claimants' costs associated with the PPC'

496. On 5 March 2020, Leigh Day wrote to Mr Apter, requesting on behalf of their clients (who by now numbered some 15,000 officers) the reimbursement of their fees for the PPC:

> 'PFEW has decided not to support the claims over the years for various reasons including:
>
> - The litigation had no merit;
> - The litigation would have adverse impact on protected members if won;
> - The police pensions claim was different to judges;
> - The Police Federations would keep matters under review.
>
> Clearly, the position in relation to this litigation has now changed and the reasons for not supporting the claims have fallen away.
>
> Given that this litigation is arguably the most significant employment tribunal claim brought to benefit the wider police membership, it is reasonable and just that the PFEW now agree to pay the legal costs incurred in these cases by your members.
>
> To date, the average cost per client in these claims is approximately £1000 inc VAT which includes costs incurred to obtain actuarial advice and calculations on losses. We would agree to finish these claims and any appeals and to agree a costs cap with you if you agree to cover the costs of our clients' fees.'

497. On 6 March 2020, Mr Broadbent tweeted, calling on the Respondent to fund the PPC. The next day, Mr Apter tweeted:

> 'It's been raised formally with us so we will deal with the request […] The decision not to fund the challenge was made a number of years ago, not last year. As I say, we've received a fresh formal request for funding so it will go through a process. FYI I am not the decision maker, we have a council (your local Fed are a part of that), and a board.'

498. This was a clear statement by the Respondent's Chair that a fresh, formal decision on funding would be taken by the National Board and National Council.

499. On 11 and 12 March 2020, a National Council meeting took place. Mr Duncan made no reference to Leigh Day's letter, nor to Ms Masters' advice (a year earlier) to issue proceedings promptly.

500. On 13 March 2020, Mr Duncan issued an update on the website, stating that 'throughout this process … we have made it clear we would not be paying the private legal fees for the 'Pension Challenge'. This position remains unchanged'. That was, of course, not the fresh, formal decision on funding the Chair had promised. We find that it is evidence of Mr Duncan blocking any consideration of funding the PPC.

501. Mr Duncan decided that the Respondent should not reply to Leigh Day's letter. His explanation was that there was no point in the absence of a material change of circumstances. In fact, the thing which had not changed was his implacable opposition to the PPC/Leigh Day; to reply promptly would be to legitimise them; the decision not to do so reflected his hostility towards them.

502. On 25 March 2020, the Government released a pensions update, stating that detailed proposals to address the unlawful age discrimination identified by the Court of Appeal in the parallel litigation would be published later in the year and would be subject to public consultation. The proposals would allow relevant members to make choices as to whether they accrued service in the legacy or reformed schemes for periods of relevant service, depending on what was better for them. Members of schemes with relevant service would not need to make claims in order for the eventual changes to apply to them. This was the industrial remedy; there was no promise of compensation for injury to feelings.

The launch of the Respondent's own legal challenge to the transitional provisions: May 2020 onwards

Allegation 9.25: 15 May 2020 press release "PFEW to launch Compensation Claim against Government"

503. On 15 May 2020, the Respondent announced that it had instructed Penningtons to issue proceedings in respect of a compensation claim against the Government on behalf of members who were the victims of discrimination and suffered any injury to feelings as a result of the introduction of the 2015 Scheme ('the Penningtons claims'). FAQs were provided. The statement confirmed:

> 'The claim is to ensure members who have not already submitted a claim in respect of pension discrimination are also considered for any compensation the court considers appropriate for the distress caused by the discriminatory changes.'

504. There is a tone-deaf quality to this statement (and indeed to Mr Duncan's evidence before the Tribunal) as the Respondent, having previously not expressed any sympathy for the discrimination experienced by the PPC claimants, now proclaimed its commitment to principles of fairness and non-discrimination and the benefits of a group action ('We needed to ensure that members were treated fairly and, on that basis, we considered a group action was the most appropriate way to proceed'). Had these statements been accompanied by any acknowledgment that the PPC claimants had been right, had suffered the same discrimination and had fought it without support from the Respondent, the message might have been more palatable. As it was, there was no recognition of the fact that the Penningtons claims were riding on the success of the PPC (see below). There was no acknowledgment at any stage that the Respondent had let any of its members down.

505. We note also Mr Duncan's evidence that, once the consultation with the government about remedy was underway, the Respondent:

> 'had an internal team working on pension matters, including a lawyer, as well as obtaining advice from external specialists, lawyers and QCs throughout, as and when needed…This included specialist advice regarding public law, discrimination, and taxation, as well as advice on all broad aspects of the remedy.'

The contrast with the sporadic recourse to legal advice we have described above is striking.

506. There is no documentary record of the decision-making process which led to the bringing of those claims. Mr Duncan accepted in evidence that the decision was 'initially' his: he did not consult the National Board or the National Council. Mr Duncan confirmed that he had been given a 'pretty strong' indication from Government that the remedy period would not end before April 2022. Thus, the Penningtons claims were launched, safe in the knowledge that very few older members would be adversely affected by the removal of the transitional protections.

507. In an email of 18 May 2020, Mr Simon Kempton (the Respondent's Treasurer) wrote to a Federation rep:

> 'One of the things that's been considered is raising subs sufficiently to allow us to fund the Pension Challenge. But that would mean raising them by £12/month per member to cover the £18,000,000 expected costs, which would probably be a big ask, particularly for those who've recently joined and for whom the pension issue is nothing to do with them.
>
> One thing that I've considered is giving a rebate to Challenge members equivalent to the amount that we're spending per head on the PFEW action, but this would only be worth around £3 per officer, total. This is because the total cost for the PFEW action, to cover over 50,000 officers, is expected to be in the region of £160,000. To be honest, as angry as people might be with the Federation (bearing in mind this was all decided long before any of us were in post) I don't understand why they're not asking questions about how expensive the LD challenge appears to be.'

508. Mr Kempton's email is evidence that some thought had been given by him to the possibility of funding the PPC around this time. Mr Duncan's evidence was that Mr Kempton must have done this exercise off his own bat; it was certainly not on his instruction. Contrary to Mr Apter's public undertaking, Mr Duncan did not refer the question to the National Board or Council, or to any officer charged with taking a decision by reference to the funding rules. He obdurately maintained his stance, and that of his predecessors, of refusing even to consider funding the PPC. He told the Tribunal that he recognised that the PPC claimants would be at a disadvantage compared to the Penningtons claimants and that he was content for that to continue.

509. In an email later on 18 May 2020, Mr Kempton forwarded an email from a member and observed that 'Leigh Day, Broadbent et al have been very successful in their propaganda war. Many of our members have, it would appear, being taken in now face these large bills.' Again, the language and tone of this is consistent with the Respondent treating the PPC/Leigh Day as its adversary.

510. Although we heard some suggestion that, had the Respondent agreed to fund the cost of the Leigh Day action, it would have exhausted its total national reserves, it was later confirmed that the Respondent did not rely on this as the reason for the decision not to fund the PPC. There was certainly no documentary evidence before us to substantiate the claim, even though the Tribunal left the door open for the Respondent to adduce it.

511. There was no suggestion in the press release that the PPC claimants might be able to switch to the Penningtons litigation. Mr Galbraith-Marten is, of course, right that a switch would have been necessary: they could not bring the same claims twice, represented by two firms of solicitors. However, we find that, at this stage, the option of switching was not on the table. We infer that from the email of five days later, 20 May 2020, from Mr Martin Buhagiar to the senior team, including Mr Apter and Mr Duncan, in which he forwarded further draft FAQs and observed: 'we need to decide whether we name them [the PPC claimants] or simply allude to them'. It is implausible that the Respondent could have decided to extend an offer to PPC claimants to be involved in the Penningtons action, if they had not yet decided whether they could bring themselves to mention them by name. This is another example of the Respondent treating the PPC as the enemy within.

512. We find that, in making the announcement on 15 May 2020 in the way that he did and making no attempt to involve, or offer representation to, PPC claimants, Mr Duncan was blocking any avenue of support or recognition for the PPC claimants.

<u>Response from members to the Penningtons claims</u>

513. The Claimants gave compelling evidence in their statements as to their dismay on discovering that the Respondent had chosen to support officers who had not previously brought claims, but not to support those officers who had brought claims through Leigh Day. They regarded it as another deliberate attempt to foster the divide between those officers who had previously challenged the transitional provisions and those who had not.

514. Mr Duncan was also taken to a sample of responses from the membership more widely, which we accept was likely to be representative. The following extracts give a flavour of the anger expressed by members who had engaged with the PPC:

> 'Now it is looking likely that those of us who have "stuck our heads above the parapet" so to speak are going to have to pay for everyone else who have sat back and done nothing. The changes did discriminate and the Fed should have been protecting its members.
>
> […]
>
> As a paying subscribing member I am being treated differently to my colleagues, I have spent countless hours worrying about pension changes, impact on my life, future, retirement and funding options of a private claim. A private claim was the only option available as the PFEW would not support a challenge and as I have previously stated supported the transitional protections and discrimination believing they were a good thing.
>
> […]
>
> I find this very upsetting as not only have we been discriminated against by the government, it now feels I am being discriminated against by the Federation. I feel you allowed those of us from younger service and minorities to represent ourselves and them once we are no longer your financial problem you have chosen to now legally represent everyone else with the same money I've paid in.
>
> […]
>
> In 2015 I joined the Pension Challenge because the very organisation I paid every month to protect me, failed me. Not only did it fail me, it actually sought to discourage me from taking any such action and spread misinformation about the integrity of the Pension Challenge.
>
> […]
>
> I feel as if I am being personally punished for not taking your incorrect advice and being left to pay my own legal fees to Leigh Day, whilst all my colleagues who were scare mongered into not pursuing those claims now benefit from the outcome of the legal challenge against the government that we undertook and at the same time will be funded by yourselves using the subs I've contributed towards for the past 15 years.'

<u>The substance of the Penningtons claims</u>

515. The Respondent brought claims on behalf of around 40,000 officers, all of whom were in the unprotected or tapered groups (Groups 2 and 3). The claims were of age, sex and race discrimination against the forty-three chief officers of the police forces in England and Wales and the Secretary of State for the Home Department. They related to the discriminatory effect of the transitional provisions. By the time those proceedings were issued, the Respondent accepted that both tapered and unprotected officers had been subjected to unjustified direct age discrimination because of the transitional provisions.

516. The Respondent applied for all claims to be stayed pending the outcome of the PPC litigation because they raised essentially the same issues. Although reluctant to do so, Mr Duncan eventually accepted in cross-examination that the PPC had benefitted the Penningtons claimants, who no longer needed to undertake 'part of the journey', as he put it. That acknowledgement had never

previously been made by the Respondent, at least in public. We note that, even in his witness statement, Mr Duncan's evidence was that it was the judges' and firefighters' cases which had benefited the Penningtons claimants, observing: 'in fact, I would go as far as saying that the PPC was not necessary at all'.

517. We have no doubt that the PPC paved the way for the Penningtons claims. The fact that the government knew that there were claims by police officers (and workers in other sectors) waiting in the wings must have had an influence on its decision to provide an industrial remedy. We accept the Claimants' submission that the Respondent was piggybacking on the PPC, without acknowledging that it was doing so.

518. In its grounds of resistance, the Secretary of State relied on the fact that the Penningtons claimants had brought their claims after the two ministerial statements accepting the outcome in *McCloud* and confirming that steps would be taken to address the difference in treatment across the public sector. It put the Claimants to proof that they had suffered injury to feelings.

519. In their grounds of resistance, the chief officers pleaded that:

> 'it is obvious that the Claims are brought as a direct result of the success of the *Aarons* litigation [the PPC]: in *Aarons*, the Respondents admitted that the transitional provisions are discriminatory on grounds of age (acknowledging that the decision of the Court of Appeal in *The Lord Chancellor & Anor v McCloud & Ors* [2018] EWCA Civ 2844 ("*McCloud*") applied by analogy). The present Claimants now seek to monetise that concession.'

520. The chief officers also pleaded that the Penningtons claimants were not entitled to injury to feelings and that their claims were bought out of time. In our view, the Respondent had jeopardised the position of its own members by not issuing claims earlier and exposing them to these potential defences.

521. On 20 May 2020, Mr Duncan and Mr Donald engaged in a Q&A video discussion to address questions raised about the Penningtons action. Mr Duncan continued to rely on the fact that the Respondent had had advice that a challenge to the pension reforms had poor prospects of success, without mentioning that it had taken no legal advice on the PPC or the parallel litigation. Nor did he acknowledge that the limited scope of the Penningtons action was only possible because issues had already been resolved as a result of the PPC.

<u>Allegation 9.26: Q&A video with Mr Donald and Mr Duncan dated 20 May 2020</u>

522. In a Q&A video on 20 May 2020, Mr Duncan took the opportunity to comment on why the Respondent had not challenged the transitional provisions. Again, he relied on the legal advice the Respondent had received. Again, he gave the misleading impression that the Respondent had reviewed that advice as the PPC and the parallel litigation progressed ('at various milestones, court hearings, decisions by courts etc.').

523. In the same video, Mr Duncan only members who had not already lodged a claim could join the Penningtons claim 'because you can't claim twice for the

same issue'. There was no mention of the possibility of transferring from Leigh Day to Penningtons, or any other arrangement.

524. Nor was there any acknowledgement of the fact that the Penningtons action built on the achievements of the PPC in securing from the Government the concession on liability in relation to police officers.

Allegations 9.27 to 9.30: Communications in May and June 2020 about the Respondent's compensation claim

525. In an email of 2 June 2020 from the Respondent's Pension Claims Team, members were told that if they wished to change their legal representatives from Leigh Day to Penningtons, they were entitled to 'make an application for legal assistance in the usual way'.

526. This required PPC claimants to go through a different, and more onerous, process from that required of non-PPC members. That is consistent with an extract from the Respondent FAQs on its website (quoted in an email to Mr Hendry on 23 June 2020) which stated:

> 'If you have already issued a claim in the Tribunal, you cannot issue a second claim. Equally, you should not withdraw that claim with a view to issuing a new claim as part of the PFEW Pensions Compensation Claim. Both of these would be an abuse of process.
>
> If you have already issued a claim and wish to apply to PFEW for funding of that claim and to be represented by Penningtons Manches Cooper, such applications will be considered on a case by case basis, taking into account, but not limited to, the following:
>
> • Your eligibility for PFEW funding
>
> • The PFEW's funding criteria, including a costs/benefit analysis
>
> • Such further conditions and parameters of funding as PFEW considers appropriate and reasonable in the circumstances,
>
> • Practical considerations, including the timing of any such application and proposed change in legal representation so as to cause the least amount of disruption to the timetable of an existing claim and other claims being pursued.
>
> It should be noted that if you are already being legally represented in your claim, you will be responsible for making arrangements to terminate your retainer with your current representative and settling any outstanding fees with them, if and when PFEW funding is confirmed.'

527. It is plain from this that the Respondent had no intention of facilitating a smooth transition for PPC claimants.

528. In subsequent communications to the membership in May/June 2020, the Respondent took no positive steps whatsoever to build bridges with the PPC group; on the contrary, it maintained the distance it had always cultivated, while seeking to sell its own group action to its membership as a whole as a 'success story' for the Respondent (para 537 below). In a second video Q&A on 18 June 2020, Mr Duncan announced that the Respondent had received around 23,000 applications to join its group action. He emphasised the efforts to which the Respondent was going to communicate all the affected officers who might benefit from it, including those who had retired.

529. Mr Duncan also confirmed in this discussion that the Respondent 'will be' (i.e. it was not already in place) giving the PPC claimants the opportunity to change their legal representation, but he emphasised that this would not mean that the Respondent would 'pick up retrospectively the bill that's incurred that obviously predated the Police Federation having any involvement in that claim'. According to Mr Duncan, the Respondent's solicitors would take over as legal representative in the existing *Aarons* litigation of those Leigh Day claimants who wished to switch to Penningtons. The Respondent took no steps to liaise with Leigh Day (or indeed the leadership of the PPC group) to explore the practicalities of this for PPC claimants.

530. The Respondent continued to emphasise that it would not make any contribution to the funding of the PPC. Of course, members of the PPC were contributing to the Penningtons claims by way of their subscription fees, yet they had to pay themselves in full for the work done so far in securing the concession on liability.

531. Nor did the Respondent make any acknowledgement that its own group action was piggybacking on the PPC; it continued to ascribe the success exclusively to the judges and firefighters.

532. We accept Ms Jolly's submission that, even after it had aligned itself with the PPC's legal position, the Respondent continued to conduct a communications battle with it. Its aim was clearly to do what it could to enhance its own reputation, while doing nothing to legitimise the PPC group. We find that the Respondent's approach in the period from May 2020 onwards caused very considerable, and justified, hurt and upset to the Claimants and further aggravated the existing division between them and non-PPC members.

533. Mr Duncan was unable to tell the Tribunal whether any of the PPC claimants did, in fact, change legal representation.

<u>Allegation 9.31: In letters dated 10 July 2020 and 10 August 2020, the Respondent denied all acts of discrimination and refused to pay the Claimants' legal costs in the PPC</u>

534. On 29 May 2020, Leigh Day sent a 'Letter Before Action' to the Respondent.

535. On 10 July 2020, on Mr Duncan's instruction (and without the question being referred to the National Board or the National Council), Kennedys provided the Respondent's formal response to Leigh Day's 'Letter Before Action'. The Respondent denied discrimination and stated that it would not fund the PPC.

536. We accept Mr Galbraith-Marten's submission that, in doing the former, it was taking reasonable steps to preserve its position in litigation. There was no detriment in that respect. We consider that the position is different in relation to the refusal to fund the PPC. We return to that issue in our conclusions.

537. On 24 August 2020, an internal draft communications plan about the Penningtons action was circulated. It noted that 43,000 members had applied to join. The author wrote that it was 'essential that we keep applicants regularly updated and communicate this success story for PFEW.' Mr Duncan

explained that the Respondent had never previously undertaken a claim for that number of people and that the sheer logistical achievement was regarded as a success story. He also acknowledged that the PPC had involved 'a fair amount of work'.

538. On 27 August 2020, Mr Duncan and Mr Donald appeared in a Q&A video in relation to the government's Consultation Paper. Mr Duncan stressed that the Respondent's focus was still on 'the entire membership', including older members 'who were originally given assurances that they would be protected on the grounds of age'. He said that part of the reason the Respondent applied to be an interested party was to make sure that no decisions would be taken which would inadvertently affect the older, protected group.

539. On 2 November 2020, a preliminary hearing took place in the PPC, at which the final declaration was determined:

> 'In relation to all existing claimants, it is declared that pursuant to section 61 of the Equality Act 2010:
>
> > (a) paragraphs 11 (2)(b), 11 (3)(b) or 14(2)(b) of Schedule 4 to the Police Pensions Regulations 2015 are of no effect and that accordingly;
> >
> > (b) all existing claimants have been entitled to full transitional protection for the purposes of the Police Pensions Regulations 2015 with effect from 1 April 2015.'

<u>Allegation 9.32: The West Midlands Police Federation "Police Pension Survey"</u>

540. On 15 November 2020, the West Midlands Police Federation issued 'Police Pension Survey'. It was put to Mr Duncan that this was the type of survey that the Respondent could have done to decide whether to contribute to the Leigh Day costs.

<u>Allegation 9.23: The Respondent did not at any point in the PPC concede or accept that the Claimants' actions had been of benefit to the wider membership and instead portrayed the Claimants as pursuing an individual choice which jeopardised the financial interests of other members</u>

541. As for accepting that the Claimants' actions had been of benefit to the wider membership, the single example the Respondent could point to was Mr Apter's comment in January 2019 (para 413). In our view, that remark was an exception. There is no doubt that, as the Claimants allege, the Respondent consistently portrayed the Claimants as pursuing an individual choice which jeopardised the interests of other members. That was one of its central messages.

542. The Respondent's position remains as set out in Mr Galbraith-Marten's closing submissions that 'the immediate benefit' to the wider membership resulted from the *McCloud* litigation and the concession by the government that a remedy would be applied across all public sector pension schemes. This ignores the central point: that the Respondent was able to take a short-cut to

compensation for injury to feelings as a result of the concession on liability for discrimination secured in respect of younger police officers by the PPC.

Allegation 9.33: The Respondent continues to refuse to support, fund or meaningfully assist the Claimants in respect of the PPC despite now recognising the validity of the Equality Act 2010 claims

543. The Respondent maintains to this day its refusal to fund the PPC in any way. No cogent explanation has been provided by the Respondent as to why it did not agree to make any contribution whatsoever to the fees incurred by the PPC claimants, even if it was not prepared to cover them in full. Nor has it explained why it did not consider offering any non-financial support or assistance to the PPC at any stage, even after it aligned itself with its legal position. No approach was ever made to Leigh Day to explore common interest or discuss common strategy. It is illustrative, in our judgment, of the hostility with which the Respondent views the PPC group and Leigh Day; it continued to treat them as the enemy within up to the point at which these proceedings were issued.

THE LAW

Discrimination by a trade organisation

544. The Respondent is a trade organisation within the meaning of s.57 EqA.

545. Section 57(2) provides:

> **(2) A trade organisation (A) must not discriminate against a member (B)—**
>
> **(a) in the way it affords B access, or by not affording B access, to opportunities for receiving a benefit, facility or service;**
>
> **[…]**
>
> **(d) by subjecting B to any other detriment.**
>
> **[…]**
>
> **(5) A trade organisation (A) must not victimise a member (B)—**
>
> **(a) in the way it affords B access, or by not affording B access, to opportunities for receiving a benefit, facility or service;**
>
> **[…]**
>
> **(d) by subjecting B to any other detriment.**

Direct age discrimination

546. S.13 EqA provides:

> **(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.**

547. S.23(1) EqA provides for the comparison required for direct (and indirect) discrimination, in order to determine if there has been less favourable treatment:

> **On a comparison of cases for the purposes of s.13 […] or 19 there must be no material difference between the circumstances relating to each case.**

548. S.5 EqA is also relevant and provides 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.**

549. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment'. The requirement that this hypothetical worker is a reasonable person means that an unjustified sense of grievance cannot amount to a detriment (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL at [35]).

550. The EAT in *Warburton v Chief Constable of Northamptonshire Police* [2022] ICR 925 at [51] observed:

> **'Although the test is framed by reference to "a reasonable worker", it is not a wholly objective test. It is enough that such a worker would or might take such a view. This is an important distinction because it means that the answer to the question cannot be found only in the view taken by the employment tribunal itself. The tribunal might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.'**

551. Age discrimination can arise where there is only a small difference in age between the person treated less favourably and his comparator. This is most likely to arise where the employer applies a particular age as a cut-off for some benefit or the imposition of some detriment. The person reaching the cut-off age may be subject to less favourable treatment whereas a person who is only a few weeks or months short of the cut-off age may not (*Citibank v Kirk* [2022] EAT 103 at [62]).

552. There are two broad categories of direct discrimination cases: cases in which the reason for the treatment is indissociable from the protected characteristic; and cases which turn on the mental processes of the alleged discriminator.

553. The distinction was identified in *James v Eastleigh Borough Council* [1990] 2 AC 751, in which the House of Lords held that, because the Council, in determining the basis for free entry to a local authority swimming pool,

adopted the criterion of state pension age (then 60 for women and 65 for men), which directly discriminated between men and women, it followed inevitably that any other differential treatment of men and women which adopted the same criterion must equally involve sex discrimination. The ostensible reason for the treatment (state pension age) was indissociable from sex. Such cases were distinct from cases in which the alleged discriminator 'is motivated by an animus against persons of the complainant's sex, or otherwise selects the complainant for the relevant treatment because of his or her sex' (*per* Lord Goff at p.772D).

554. In *R (Coll) v Secretary of State for Justice* [2017] 1WLR 2093, a case concerning the provision of approved premises ('AP') for high-risk prisoners being released on licence, the fact that there were only six APs for women, as opposed to ninety-four for men, meant that women were far more likely than men to be placed in APs far from home from. It was inevitably harder to place women close to home than men. Being required to live in an AP a long way away from home was a detriment. The Supreme Court held that this was treating the claimant less favourably than a man because of her sex. The Secretary of State argued that there could not be direct discrimination because, unlike in *James*, there was not exact correspondence between the disadvantaged class and the protected characteristic: not all women suffered the detriment, some were placed close to home. The Supreme Court disagreed. It was not necessary to show that all female prisoners would suffer the detriment; it was enough that some would. What all the women suffered from was the much greater risk of being sent to an AP far from home. The 'exact correspondence' test is only relevant where the criterion used by the alleged discriminator is not a protected characteristic but a proxy for it (the situation in *James*). In this case there was no doubt what the criterion was, it was sex.

555. In *Chief Constable of West Midlands Police v Harrod* [2015] ICR 1311 in the EAT, Langstaff J had earlier produced a similar analysis in the context of Regulation A19 of the Police Pension Regulations 1987, which permitted the force compulsorily to retire police officers with entitlement to a full pension of two thirds of their average pay. It had been pleaded as indirect discrimination; Langstaff J observed (*obiter* at [49-50]) that it ought properly to be regarded as direct discrimination:

> **'The classic case of [indirect] discrimination arises where an apparently neutral criterion affects a number of people sharing a protected characteristic to an extent which is disproportionate to the way it affects others who do not have the same characteristic. The criterion here was to have achieved two-thirds average pensionable pay. This was not age-neutral, for no officer could achieve it unless that officer had first served for 30 years. Since the earliest age of entry to a force is 18, no one under 48 could have had the criterion applied to them. Accordingly, application of the criterion inevitably distinguished between those under 48 and those over 48; those under 48 could not be retired by application of regulation A19, whereas, depending on length of service, those over 48 could be. Where a criterion inevitably distinguishes between individuals on the basis of age (as, for instance, did the requirement for free entry to a swimming pool based on pensionable age, though condemned in *James v Eastleigh Borough Council* [1990] ICR 554; [1990] 2 AC 751, for being discrimination on the ground of sex) to apply it is to discriminate directly; it is where a criterion disproportionately,**

> **though not inevitably, applies to people of a particular age group that the discrimination is indirect […] Though it may be said that those over 48 are not all, nor inevitably, included in the group of those subject to regulation A19, since not all may have served for long enough, it is entirely permissible to see the group constituted by those over the age of 48 as being at risk of inclusion, whereas those under 48 could not be. This is a difference entirely and directly defined by age. It leads me to think that the discrimination here would properly have been identified as direct.**
>
> **A threshold provision such as the one in question here cannot easily fall foul of section 19 of the Equality Act 2010. That is because section 19(2) defines a PCP as discriminatory if "A applies or would apply it to persons with whom B does not share the characteristic …". There is no question in a threshold case such as the present of the forces applying the criterion to anyone under the age of 48, since it simply could not do so. Thus, if any comparison were to be drawn for the purposes of determining if there had been indirect discrimination, it would have to be between those over the age of 48: yet this was not the comparison which I understand was envisaged in the present case.'**

556. If a person knowingly adopts, or takes action on the basis of, another's discriminatory conduct, that person will also commit an act of discrimination. In *R v CRE, ex parte Westminster City Council* [1984] ICR 770, the Council rescinded the appointment of a black road sweeper after an objection was raised by the trade union. Whilst the objection was ostensibly on the ground of the employee's poor attendance record, the officer who took the decision had reason to believe that the true reason was the employee's race, and that a failure to revoke the appointment would result in industrial action. A non-discrimination notice issued against the Council by the CRE was upheld by Woolf J (as he then was). He explained that a finding of discrimination could be made without any racial prejudice being ascribed to the decision-maker (at pp.779-780):

> **'There can be no doubt that, on the material before the commission, if Mr. Edward had not been black, he would not have been objected to by the union branch official. There is therefore a clear connection between the objection which could properly be treated by the commission as being associated with racial prejudice and the revocation of Mr. Edward's offer of employment. However, as Mr. Irvine rightly points out this is not in itself sufficient to establish that Mr. Edward was necessarily discriminated against on racial grounds. Mr. Rolfe could still have made an independent decision on the basis of Mr. Edward's qualifications and the question is not whether Mr Edward was discriminated against but whether Mr. Rolfe discriminated against Mr. Edward. So far as this is concerned, on the material before the commission, I have come to the conclusion that the commission were entitled to take the view that Mr. Rolfe was taking a different course in respect of someone who was black, albeit with the greatest of reluctance, which he would not have taken if he was white because he knew that if he did not do so the result would be industrial action which could have serious consequences for the staff agreement. As I interpret the Race Relations Act 1976, it is not a justification for what would otherwise be an unlawful discrimination to rely on the fact that the alternative would be possible industrial unrest. If the position were otherwise it would always be possible to frustrate the objects of the Act by threatening industrial action. This is not a case where the staffing procedure agreement laid down any fixed requirement such as existed in the first example I cited. So far as Mr. Rolfe was concerned Mr. Edward was adequately qualified. He was quite prepared to engage him as a refuse collector in the southern area. *He knew that the objections which were being made were being made on the grounds of colour and in this case the commission, on the material***

> ***before them, are entitled to take the view that by yielding to the objection he was in effect making the objections his own*** **[...]' (emphasis added)**

557. Equally, if that person, as a matter of fact, takes the action solely for different, non-discriminatory reasons, he will not commit an act of discrimination, even though he knows that the conduct of the other person was tainted by discrimination. Lord Woolf explains at p.777:

> **'However, I fully accept that you can have discrimination on racial grounds without there being an intention to discriminate on that ground. I would illustrate what I mean by two examples which were cited in argument. The first is a situation where it is a requirement of employment that an employee should be of a specified height. By mistake an employer engages an employee who is black who is below the required height. A racially prejudiced fellow employee complains to the employer that the black employee should not have been employed because he is not of the required height. His motive for making the complaint is racial but the employer when the error is drawn to his attention terminates the black employee's employment solely on the ground that he is not of the required height. The fellow employee had a racial motive but that had not influenced the employer and although the employer had discriminated against the employee this was not on a racial ground but solely on the ground of height. This would not amount to racial discrimination.**
>
> **The other example is where an employer in a hairdressing salon wishes to employ a black hairdresser for the first time because he is anxious to do what he can to dissipate racial prejudice. He finds that all his customers are withdrawing their custom, that the black employee is being subjected to abuse and there is a risk that his business is going to collapse. He therefore reluctantly terminates the black employee's employment partly motivated by a desire to save the business from collapse and partly in order to save the black employee from further distressing incidents which re likely to damage race relations rather than improve race relations. In this case although the employer's motives are wholly unobjectionable he is clearly treating the black employee less favourably on racial grounds and is clearly guilty of unlawful discrimination under the Race Relations Act 1976.'**

558. If treatment is 'because of' a protected characteristic, it does not matter that the discriminator did not intend to discriminate or acted from a benign motive. In *Amnesty International v Ahmed* [2009] ICR 1450 at [33] Underhill J said this:

> **'In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. *James v Eastleigh Borough Council* [1990] ICR 554 is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful—namely that pensioners were entitled to free entry to the council's swimming-pools—was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it, at p 574 f, "gender based". In cases of this kind what was going on inside the head of the putative discriminator—whether described as his intention, his motive, his reason or his purpose—will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in *James v Eastleigh Borough Council* decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.**

559. In *Amnesty* (at [34]), Underhill J developed the distinction between the *James* category of cases and cases such as *Nagarajan v London Regional Transport* [1999] ICR 877, in which:

> **'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'.**

560. In *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065, the House of Lords highlighted the distinction between the 'reason why' question and the ordinary test of causation, *per* Lord Nicholls at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

561. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan* at p.886). However, the fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the reason for that treatment (*Ahmed* at [37]).

562. In a 'mental processes' case the conventional approach to considering whether there has been direct discrimination is a two-stage process: considering first whether there has been less favourable treatment by reference to an actual or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic.

563. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

564. A continuing policy can constitute treatment for the purposes of s. 13 EqA and, in particular, can constitute discrimination in the way in which access is afforded to, or opportunities are granted to receive, benefits, facilities and services and/or a detriment, as prohibited by s. 57(2)(a) and (d) EqA.

565. The relevant law was summarised by Brooke LJ in *Rovenska v General Medical Council* [1998] ICR 85 (at p.92), in a passage recently endorsed by the Court of Appeal in *Parr v MSR Partners LLP* and others [2022] ICR 672 at [43]:

> **'It was an important part of [counsel for the General Medical Council's] case that the appeal tribunal failed to take into account the fact that the cases on which it relied were all decided in relation to section 4 of the Act of 1976 or section 6 of**

> **the Sex Discrimination Act 1975 [the predecessors to s. 13 EqA 2010] … In those cases the discriminatory act complained of is not a one-off act of refusal: it arises out of the way in which the employer affords his or her employees access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or out of the employer refusing or deliberately omitting to afford the employees access to them. In these circumstances the courts have held that, if an employer adopts a policy which means that a black employee or a female employee is inevitably barred from access to valuable benefits, this is a continuing act of discrimination against employees who fall into these categories until the offending policy is abrogated.'**

Justification

566. If less favourable treatment because of age is established, the Respondent may seek to show that the treatment was a proportionate means of achieving a legitimate aim.

567. The approach to justification in direct age discrimination cases is different in one important respect from the approach in other contexts (including indirect age discrimination). In *Seldon v Clarkson Wright & Jakes* [2012] ICR 716, Baroness Hale says this (at [50]):

> **'(2) If it is sought to justify direct age discrimination under article 6(1),[6] the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness" (*Age Concern* [2009] ICR 1080 and *Fuchs* [2012] ICR 93).**
>
> **(3) It would appear from that, as Advocate General Bot pointed out in *Kücükdeveci* [2011] 2 CMLR 703, that flexibility for employers is not in itself a legitimate aim; but a certain degree of flexibility may be permitted to employers in the pursuit of legitimate social policy objectives.**
>
> **(4) A number of legitimate aims, some of which overlap, have been recognised in the context of direct age discrimination claims: (i) promoting access to employment for younger people (*Palacios de la Villa , Hütter* and *Kücükdeveci*); (ii) the efficient planning of the departure and recruitment of staff (*Fuchs*); (iii) sharing out employment opportunities fairly between the generations (*Petersen, Rosenbladt* and *Fuchs*); (iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (*Georgiev* and *Fuchs*); (v) rewarding experience (*Hütter* and *Hennigs*); (vi) cushioning the blow for long serving employees who may find it hard to find new employment if dismissed (*Ingeniørforeningen i Danmark*); (vii) facilitating the participation of older workers in the workforce (*Fuchs*; see also *Mangold v Helm* (Case C-144/04) [2006] All ER (EC) 383); (viii) avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job, which may be humiliating for the employee concerned (*Rosenbladt*); or (ix) avoiding disputes about the employee's fitness for work over a certain age (*Fuchs*).**
>
> **(5) However, the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so. Measures based on age may not be appropriate to the aims of rewarding experience or protecting long service (*Hütter, Kücükdeveci* and *Ingeniørforeningen i Danmark*).**

[6] Article 6(1) of Council Directive 2000/78/EC ('the Framework Directive')

> **(6) The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen (*Fuchs*).**
>
> **(7) The scope of the tests for justifying indirect discrimination under article 2(2)(b) and for justifying any age discrimination under article 6(1) is not identical. It is for the member states, rather than the individual employer, to establish the legitimacy of the aim pursued (*Age Concern*).'**

568. At [55], Baroness Hale observed:

> **'It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it.'**

569. At [56], she distilled two broad categories of legitimate aim from the authorities: intergenerational fairness and dignity.

570. Once the legitimate aim has been identified, the court must carry out the following exercise (*per* Baroness Hale at [59-62]:

> **'59. The fact that a particular aim is capable of being a legitimate aim under the Directive (and therefore the domestic legislation) is only the beginning of the story. It is still necessary to inquire whether it is in fact the aim being pursued. The employment tribunal, the Employment Appeal Tribunal and the Court of Appeal considered, on the basis of the case law concerning indirect discrimination (*Schönheit v Stadt Frankfurt am Main* (Joined Cases C-4/02 and C-5/02) [2003] ECR I-12575 ; see also *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213), that the aim need not have been articulated or even realised at the time when the measure was first adopted. It can be an ex post facto rationalisation. The Employment Appeal Tribunal [2009] 3 All ER 435, para 50, also said:**
>
> > **"A tribunal is entitled to look with particular care at alleged aims which in fact were not, or may not have been, in the rule-maker's mind at all. But to treat as discriminatory, what might be a clearly justified rule on this basis would be unjust, would be perceived to be unjust, and would bring discrimination law into disrepute."**
>
> **60. There is in fact no hint in the Luxembourg cases that the objective pursued has to be that which was in the minds of those who adopted the measure in the first place. Indeed, the national court asked that very question in the *Petersen* case [2010] All ER (EC) 961. The answer given, at para 42, was that it was for the national court "to seek out the reason for maintaining the measure in question and thus to identify the objective which it pursues" (emphasis supplied). So it would seem that, while it has to be the actual objective, this may be an ex post facto rationalisation.**
>
> **61. Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned. Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance**

> **management measures in place, it may not be legitimate to avoid them for only one section of the workforce.**
>
> **62. Finally, of course, the means chosen have to be both appropriate and necessary. It is one thing to say that the aim is to achieve a balanced and diverse workforce. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end. It is one thing to say that the aim is to avoid the need for performance management procedures. It is another to say that a mandatory retirement age of 65 is appropriate and necessary to achieving this end. The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so.'**

571. A respondent may rely on several aims at the same time; the aims relied upon may be linked to each other or may be relied upon in the alternative (*Fuchs v Land Hessen* [2012] ICR 93 at [44 and 46]).

572. The fact that a measure does not achieve the aim it is said to pursue may demonstrate that this was not in fact the true objective pursued. In *National Union of Rail, Maritime and Transport Workers v Lloyd* [2019] IRLR 897 (at [44-45]), one of the aims relied upon for a rule that elected members of the NEC had to complete their three-year terms before the age of 65 was 'intergenerational fairness'. The statistics provided to the tribunal did not demonstrate that the rule had any effect in ensuring a mix of generations on the NEC.

573. Even where pay protection or transitional arrangements can be shown to be in pursuit of a legitimate aim, in circumstances where the discriminatory impact of the arrangements was known or suspected, a justification defence is unlikely to be made out if those responsible for agreeing the provisions failed to apply their minds to, or make any attempt to avoid or reduce, that discriminatory effect.

574. This is clear from the case law arising from pay protection arrangements introduced after changes to remove sex discrimination in public sector pay schemes: see for example *Redcar and Cleveland Borough Council; Middlesbrough Borough Council v Surtees (no. 2)* [2009] ICR 133 (at [121-123]):

> **'On the other hand, it noted that the pay protection scheme had been the subject of negotiation with the representatives of the comparators but there was no evidence that the views of the women had been taken into account. The tribunal was of the view that Redcar had simply not applied its mind to the discriminatory effect of the exclusion of the women claimants from pay protection. Even after the event, no evidence had been given as to why the women could not have been included in the scheme. No evidence had been given as to the likely cost of including the women claimants.'**

575. Where a respondent seeks to justify the operation of what would otherwise amount to discriminatory scheme or policy, it is the task of the ET to conduct a critical evaluation of the scheme in question (*per* Pill LJ in *Hardy and Hansons Plc v Lax* [2005] ICR 1565 at [32]). As the test is objective, there is no requirement that the justification must have consciously and contemporaneously featured in the employer's mind (*Cadman v HSE* [2005]

ICR 1546, CA), but an otherwise discriminatory policy, which the employer cannot show to be either necessary or appropriate, cannot sensibly be thought to balance the harm.

Does the 'social policy objective' requirement apply in non-employment cases?

576. The Respondent's position is that there is no requirement that the legitimate aims be 'social policy objectives' in cases such as this; because this is not an employment case, it does not fall within the scope of the Framework Directive; references to 'employment policy, labour market and vocational training objectives' have no relevance in the context of the relationship between a trade organisation and its members.

577. In his written closing submissions, Mr Galbraith-Marten referred us to the supplement to the EHRC Employment Code, which contains examples of permissible legitimate aims in the context of direct age discrimination (essentially those identified by Baroness Hale in *Seldon*). He continues as follows:

> 'Plainly none of those is applicable in this case. Indeed, it is not possible to identify any social policy objectives of a public interest nature that would be applicable to the relationship between a trade organisation and its members. In the usual case of a trade union and its members, the relationship is governed by the contract of membership and is a matter of purely private law. The fact that the PFEW is a creature of statute does not make a material difference because the Tribunal is concerned with the statutory interpretation of s. 13 read together with s. 57 rather than with its application to any particular body.
>
> Whilst the UK has chosen to extend the scope of the protection against discrimination required by the Directive to members of a trade organisation, the logic behind the decisions of the CJEU, imported into the decision of the SC in *Seldon*, simply does not apply. In the premises the usual test for the justification of indirect discrimination is the only one that can apply to the direct discrimination claims.
>
> This does mean that the scope of justification for direct discrimination will differ as between employment claims and non-employment claims but that is not a reason to reject this submission. The test for justification of direct discrimination in relation to the supply of services covered by Part 3 of the Equality Act must also be different.'

578. Ms Jolly responded in oral closing submissions as follows.

579. Article 6 of Council Directive 2000/78/EC ('the Framework Directive') provides as follows:

> **Justification of differences of treatment on grounds of age**
>
> **1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a**

> **legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.**
>
> **Such differences of treatment may include, among others:**
>
> **(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;**
> **(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;**
> **(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.**
>
> **[…]**

580. Article 3(1) provides:

> **1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:**
>
> **[…]**
>
> **(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.**

581. Paragraph 5 of the recital provides:

> **(5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.**

582. Ms Jolly submitted that article 3(1)(d) disposes of Mr Galbraith-Marten's submission without need for more. However, she also relied on the judgment of the EAT (Soole J presiding) in *RMT v Lloyd* (see above at para 572), a detriment claim under s.57 EqA concerning a branch secretary of the union, whose nomination for election to its National Executive Committee for a three-year term was blocked because he fell foul of a rule that a nominee must be able to complete the full period of office before reaching the normal retirement age. The union relied on three 'social policy objective' legitimate aims, including intergenerational fairness. Soole J expressly applied *Seldon*, citing paragraph 55 of Baroness Hale's speech at [22] and describing her speech as 'the relevant law' at [48]. He concluded that the ET had rightly accepted that intergenerational fairness was capable of being a legitimate aim, but it did not accept that it was a legitimate aim in the circumstances, nor a true aim of the rule in question.

583. Ms Jolly also referred us to *X v Mid-Sussex CAB* [2013] ICR 249 SC (*per* Lord Mance at [26]):

> '**Council Directive 2002/73/EC (OJ 2002 L269, p 15) replaced articles 3, 4 and 5 of Directive 76/207 with a single reformulated article 3 applying the principle of equal treatment on grounds of sex in relation to the same four fields, (a) to (d), as appear in article 3 of Directive 2000/78 (with minor amendment of (c)). The four additional fields included in the Race Directive were not included in the newly formulated article 3 of Directive 76/207. The reformulated article 3 was explained by the Commission of the European Union in its report on the application of Directive 2002/73 (COM(2009) 409 final) as a limited expansion of the previous scope of Directive 76/207:**
>
> > **"Directive 2002/73/EC broadened the scope of Directive 76/207/EEC, in particular by prohibiting discrimination in the conditions governing access to self-employment and membership of and involvement in workers' or employers' organisations or any organisations whose members carry on a particular profession, including access to the benefits such organisations provide (article 3(l)(a) and (d)). The problems in transposing those provisions in some member states have consisted mainly in a failure to include self-employment and membership of and involvement in workers' or employers' organisations among the areas covered by the prohibition on discrimination."'**

584. Finally, Ms Jolly argued that the fact that the present proceedings are a private law matter is immaterial: so was *Seldon*.

585. We have concluded that the same principles apply in a direct age discrimination case concerning the relationship between staff association and its members as in the employment context. We accept Ms Jolly's submission that such relationships are expressly covered by the Directive by Article 3(1)(d). The EAT proceeded on that basis in *Lloyd* and we are bound by that decision.

586. Mr Galbraith-Marten sought to distinguish *Lloyd*, conceding that the social policy objective requirement might apply in s.57 EqA but only in cases such as *Lloyd*, when the relationship is 'akin to employment'. There is no authority for that proposition. He referred us to the case of *Ligebehandlingsnævnet (acting on behalf of A) v HK/Danmark and another* [2022] IRLR 791. We agree with Ms Jolly that, if anything, that case assists the Claimants: it is a case about protection in respect of involvement in an organisation of workers; nowhere does it say that that protection is confined to quasi-employment relationships; on the contrary, the Court expressly endorses a purposive approach to the Directive (at [50-52]).

587. In any event, we do not accept Mr Galbraith-Marten's central premise, that social policy objectives are inapplicable to disputes arising out of relationships such as these. We can see no reason why, for example, a staff association might rely on an aim of intergenerational fairness in contexts other than those relating to appointments to roles within the organisation (the context in *Lloyd*).

Victimisation

588. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **[…]**

589. The Equality Act 2010 Code of Practice on Employment provides at para 9.11:

> **'Victimisation does not require a comparator. The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act'.**

590. The same definition of 'detriment' as applies in direct discrimination also applies in victimisation.

591. The Tribunal must determine whether the relevant decision was influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (*Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830). The protected act need only be a 'significant influence' on the decision (*Nagarajan*).

592. In cases where the alleged detriments arise in the context of legal proceedings, the authorities have drawn a distinction between a situation where an employer, sued by an employee, follows a particular course of conduct to protect its position in the proceedings, and a situation where the employee is subjected to a detriment because they have brought the proceedings.

593. In *Khan* the claimant, a police officer, made a complaint of race discrimination against the Chief Constable. While those proceedings were pending, he applied for a job with another police force. The Chief Constable refused to provide him with a reference because of the outstanding proceedings and he brought a fresh complaint of victimisation. The Tribunal upheld that complaint but the House of Lords in due course allowed the Chief Constable's appeal. Lord Nicholls said at [31]:

> **'Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take**

> **steps to preserve his position in the outstanding proceedings. Protected act (a) ("by reason that the person victimised has—(a) brought proceedings against the discriminator … under this Act") cannot have been intended to prejudice an employer's proper conduct of his defence, so long as he acts honestly and reasonably.'**

594. In *St Helens MBC v Derbyshire* [2007] 3 All ER 81 female catering staff chose not to accept an offer to settle their equal pay claims and subsequently claimed victimisation when their employer sent letters to them trying to persuade them not to proceed. Baroness Hale said at [37-38]:

> **'The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a "detriment" or, in the terms of the Directive, "adverse treatment"? But this has to be treatment which a reasonable employee would or might consider detrimental. As my noble and learned friend, Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, 349, para 35: "An unjustified sense of grievance cannot amount to 'detriment'…" There are some things that an employer might do during a discrimination claim which cannot sensibly be construed as a detriment or adverse treatment. Ordinary steps in defending the claim and ordinary attempts to settle or compromise the claim do no one any harm and may even do some good.**
>
> **But these were no ordinary attempts to settle the claim. It is worthwhile emphasising how the employment tribunal put it in para 4(d) of their reasons:**
>
> > **"The letter of 19 January 2001 contained what was effectively a threat. It spelt out a danger that the applicants might deprive children of school dinners, and that they might cause redundancies among their colleagues. It amounted to an attempt to induce the acquiescence of individuals despite the view of their union. It was more than a matter-of-fact reminder of what might happen if they went on with a complaint… It is directed against people who were in no position to debate the accuracy of the respondents' pessimistic prognostications. The reaction to such a letter may be, even where there is a well-justified belief in the justice of one's case, surrender induced by fear, fear of public odium or the reproaches of colleagues. Such a reaction, although prompted by emotion, is reasonable in the sense that it is a normal, sane human response to the prospect of an unpleasant consequence realistically perceived. Thus the letter was intimidating."**
>
> **The tribunal had already pointed out that the warnings of dire consequences had been sent, not only to the women who were pursuing their claims, but also to all their colleagues in the catering department, and incurred for them "some odium" from colleagues, as well as causing some of them distress.'**

595. Lord Neuberger agreed and explained the process tribunals should adopt in considering claims such as this at [68]:

> **'In my judgment, a more satisfactory conclusion, which in practice would almost always involve identical considerations, and produce a result identical, to that in *Khan*, involves focusing on the word "detriment" rather than on the words "by reason that". If, in the course of equal pay proceedings, the employer's solicitor were to write to the employee's solicitor setting out, in appropriately measured and accurate terms, the financial or employment consequences of the claim succeeding, or the risks to the employee if the claim fails, or terms of settlement which are unattractive to the employee, I do not see how any distress thereby induced in the employee could be said to constitute "detriment" for the purposes of sections 4 and 6 of the 1975 Act, as it would not satisfy the test as formulated by Brightman LJ in *Jeremiah*, as considered and approved in your Lordships'**

> **House. An alleged victim cannot establish "detriment" merely by showing that she had suffered mental distress: before she could succeed, it would have to be objectively reasonable in all the circumstances. The bringing of an equal pay claim, however strong the claim may be, carries with it, like any other litigation, inevitable distress and worry. Distress and worry which may be induced by the employer's honest and reasonable conduct in the course of his defence, or in the conduct of any settlement negotiations, cannot (save, possibly, in the most unusual circumstances) constitute "detriment" for the purposes of sections 4 and 6 of the 1975 Act.'**

596. We also note the passage in the speech of Lord Hope (at [23]):

> **'In a case of this kind, where the conduct was due directly to the fact that the employees had brought proceedings against the employers under the 1970 Act, some latitude must be given to the right of the employers to argue their point of view and, if they can, to achieve a compromise. The fact that they wanted to dissuade the employees from pressing their claims to an adjudication does not, of itself, mean that the employees were being victimised.'**

597. Although the reasons for reaching their conclusions differed, the majority accepted that a respondent who acted honestly and reasonably in arguing their point of view would not be committing an act of victimisation. That test has been subsequently applied and remains good law.

598. In *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] ICR 1226, which is a whistleblowing detriment case and so analogous to a victimisation case, the claimant made a series of protected disclosures. The respondent sent letters which, effectively, set out its response to the claims made by the claimant in his disclosures and implying that he had made specious, unjustified and unsubstantiated complaints. Even though that rebuttal also contained misleading statements which constituted a detriment to the worker, it did not follow that the reason for making the statements was the fact that the worker had made the protected disclosure. The respondent's objective had been, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information the claimant had chosen to put in the public domain, which both explained the need to send the letters and the form in which they were cast; and that, in so far as the claimant was adversely affected as a consequence, it was not because he was in the direct line of fire, and the trust's action that had resulted in a detriment to him had not been 'on the ground that' he had made protected disclosures.

Indirect age discrimination

599. The concept of indirect discrimination is set out in s.19 EA 2010:

> **(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.**

600. The provisions in s.23 EqA relating to the comparative exercise apply equally to indirect discrimination.

Are direct and indirect discrimination mutually exclusive?

601. In *R (on the application of E) v Governing Body of JFS* [2010] IRLR 136, Baroness Hale said (at [57]):

> **'Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in Elias, at paragraph 117, 'The conditions of liability, the available defences to liability and the available defences to remedies differ'. The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.'**

602. In *Black and Morgan v Wilkinson* [2013] EWCA Civ 820, Lord Dyson MR held (at [24]) that, the first instance judge having decided that there had been unlawful direct discrimination, it was not open to her to consider whether the same facts amounted to indirect discrimination. However, having heard full argument on indirect discrimination, Lord Dyson went on to state that if for some reason this were not direct discrimination, in his judgment it would still have been one of indirect discrimination. Lord Dyson also referred to the principal difference between the two causes of action being the availability of a justification defence.

603. Of course, that difference does not apply in age discrimination cases. We note that in the *Coll* case referred to above (para 554), a direct sex discrimination case in the context of the provision of separate services for men and women, in which a defence of justification is available (para 26, sch.3 EqA), Baroness Hale again held (at [43]) that:

> **'conduct cannot at one at the same time be both direct and indirect discrimination. The finding that this is direct discrimination, albeit potentially justifiable, rules out a finding of indirect discrimination.'**

604. Accordingly, there is authority which is binding on us that claims of direct and indirect discrimination on the same facts are mutually exclusive.

Liability for agents

605. Liability for agents is governed by s.109 EqA. In *Unite the Union v Nailard* [2019] ICR 28, the Court of Appeal upheld a finding of the ET that a union's lay officials acted as its agents applying *Kemeh v Ministry of Defence* [2014] ICR 625, in which Elias LJ stated that the effect of what is now s.109(2) is that 'the principal will be liable wherever an agent discriminates in the course of carrying out the functions he is authorised to do'. That formulation effectively

equates the circumstances in which a principal may be liable for the acts of an agent with the 'course of employment' test governing the liability of employers for the acts of their employees.

606. S.109(3) EqA provides that the principal will be liable for an act of discrimination by its agent, irrespective of whether it knew or approved of it.

The burden of proof in discrimination cases

607. The burden of proof provisions are contained in s.136 EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

608. The operation of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[7] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

609. The burden of proof provisions should not be applied by the Tribunal in an overly mechanistic manner: see *Khan v The Home Office* [2008] EWCA Civ 578 *per* Maurice Kay LJ at [12]. The approach laid down by s.136 EqA will

[7] *Madarassy v Nomura International plc* [2007] ICR 867, CA

require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the Tribunal is able to make positive findings on the evidence one way or another, the provisions of s.136 will be of little assistance: see *Martin v Devonshires Solicitors* [2011] ICR 352 at [39], approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 at [32].

Time limits in discrimination cases

610. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

611. S.4 EqA provides that, in the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something when s/he does an act inconsistent with doing it, or if s/he does no inconsistent act, on the expiry of the period in which s/he might reasonably have been expected to do it.

612. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

613. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that tribunals should not take too literal an approach to determining whether there has been conduct extending over a period. Addressing the approach in earlier authorities, Mummery LJ held (at [52]):

> **'The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.'**

614. In *South Western Ambulance Service NHS Foundation Trust v King* [2020] IRLR 168 at [21], Choudhary P said:

> **'*Hendricks* demonstrates that there are several ways in which conduct might be said to be conduct extending over a period (or, as it is sometimes called, a 'continuing act'). One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment. Another example given in para. 48 of Hendricks is where separate acts of**

> **discrimination are linked to one another and are evidence of a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected and isolated acts. In both these examples, the continuing act arises because of the link or connection between otherwise separate acts of discrimination.'**

615. In a 'policy, rule or practice' case time does not begin to run until the policy, rule or practice is abrogated (*Barclays Bank v Kapur* [1991] ICR 208). In *Cast v Croydon College* [1998] IRLR 318 the Court of Appeal held (*per* Auld LJ at [28]):

> **'Although Bristow J concluded that passage by referring to a limitation period of three months from the abrogation of the policy, I do not think that he was suggesting that a complainant could rely on the continuance of a policy long after she had left her employment. In the case of such a policy still in existence at that date, time runs from then. That is certainly how Browne-Wilkinson J regarded the matter in the following passage from his judgment of the Employment Appeal Tribunal in *Calder v James Finlay Corporation Ltd* [1989] IRLR 55, at 56, 10:**
>
> > **'By constituting a scheme under the rules of which a female could not obtain the benefit of the mortgage subsidy, in our judgment the employers were discriminating against the applicant in the way they afforded her access to the scheme. It follows, in our judgment, that *so long as the applicant remained in the employment of these employers* there was a continuing discrimination against her. Alternatively, it could be said that *so long as her employment continued*, the employers were subjecting her to "any other detriment" within s.6(2)(b). Once this conclusion is reached, in our judgment it follows that the case does fall within s.76(6)(b). The rule of the scheme constituted a discriminatory act *extending over the period of her employment and is therefore to be treated as having been done at the end of her employment* ...' (my emphasis).'**

616. A single act, for example a decision not to appoint a person to a post, does not 'extend over a period' merely because it has continuing consequences (*Amies v ILEA* [1977] ICR 308).

617. On the other hand, where a decision is taken in response to the repetition of an earlier request (whether or not it was made on the same facts as before), time runs from the later decision, if it resulted from a further consideration of the matter and was not merely a reference back to the earlier decision (*Cast v Croydon College* [1998] ICR 500 at pp.513-514).

618. The EAT in *Robinson v Royal Surrey County Hospital NHS Foundation Trust* and others UKEAT/0311/14/MC at [65] held that conduct extending over a period may comprise acts that, taken individually, fall under different sections of the Equality Act 2010. Although such an assessment would always be fact-specific, in that case, for example, it was considered that complaints of direct discrimination and failure to make reasonable adjustments might be regarded as conduct extending over a period.

619. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. Time limits are to be observed strictly in ETs. There is no presumption that

time will be extended unless it cannot be justified (*Robertson v Bexley Community Centre* [2003] IRLR 434 at [23-24].

620. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgement, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

621. This is a broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances. Some factors are likely to be relevant in all cases; HHJ Auerbach summarised them in *Wells Cathedral School Ltd v Souter* (2021) EA-2020-00801 at [31-33].

622. Failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278 at [16]). There is no requirement for exceptional circumstances to justify an extension (*Pathan v South London Islamic Centre,* UKEAT/0312/13/DM at [17]).

Relationships that have ended

623. S.108 EqA provides:

> **(1) A person (A) must not discriminate against another (B) if—**
>
> **(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and**
>
> **(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.**
>
> **[…]**
>
> **(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.**
>
> **(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.**

624. These provisions apply to cases brought under s.57 EqA, which prohibits discrimination in the context of the relationship between a staff association and its members.

625. For a case to come within these provisions, it must be shown that both s.108(1)(a) and (b) are satisfied on the facts (*Ford Motor Co Ltd v Elliott* [2016] ICR 711).

626. As for s.108(7) EqA, the Court of Appeal held in *Jessemey v Rowstock Ltd* [2014] IRLR 368 that the sub-section must be read in context and there was no doubt that victimisation arising out of a relationship which has come to an end is proscribed by the EqA.

CONCLUSIONS

The discriminators

627. The period before 1 April 2015 (when the 2015 Scheme came into force) is relevant as background only; none of the discrimination claims relate to that period. The background is relevant because key decisions were taken during Mr Rennie's tenure, which were later adopted and pursued by Mr Fittes and Mr Duncan. Only one of the pleaded allegations is made against Mr Rennie (Allegation 9.14 at para 365 onwards) in respect of an act which occurred during Mr Fittes' tenure.

628. We accept the Claimants' submissions that, in relation to each of the allegations/issues, the decisions were taken and/or approved by Mr Rennie, Mr Fittes or Mr Duncan. Mr Fittes was at least prepared to admit that he was the ultimate decision-maker during his tenure. Mr Rennie's and Mr Duncan's attempts to distance themselves from key decisions were implausible (see, for example, para 99 onwards, para 431 onwards). We have also made findings above (e.g. paras 90, 134 and 138) as to the top-down nature of the decision-making, and the lack of meaningful scrutiny, within the Respondent organisation.

629. Mr Galbraith-Marten submits that the Respondent cannot be liable for the hostile treatment some of the Claimants received from colleagues who perceived them to be threatening their benefits under the transitional provisions. That submission mischaracterises the detriment alleged, which is not the antagonistic conduct itself but the actions of the Respondent which increased the risk of such conduct ('the Respondent create[d] division and ill-feeling towards [the Claimants]'). For that, the Respondent may be liable.

Detriments

630. Although separated out from each other in the list of issues, there is considerable overlap between Issues 7, 8 and 9, as will be apparent from the repetitions below.

<u>Issue 7: Did the Respondent actively seek to deter and obstruct the Claimants from pursuing the police pensions challenge?</u>

631. Mr Fittes accepted that the effect of the Respondent's approach during his time as General Secretary was to deter potential claimants from joining the PPC. We have concluded that this was not only its effect, but also its purpose, during both his and Mr Duncan's tenures. We have concluded that the Respondent actively, and consistently, sought to deter the Claimants from joining and pursuing the PPC. It did so by:

    631.1. timing communications to pre-empt meetings with, and recruitment by, the PPC group (Allegation 9.1, 9.6);

    631.2. downplaying the potential benefits to PPC claimants, if their claims succeeded (Allegations 9.1, 9.11);

631.3. overstating the costs risks to officers who had signed up/were considering signing up to the PPC (Allegations 9.1, 9.4, 9.14);

631.4. emphasising that the PPC could damage the benefits and long-term interests of all officers, including older officers who benefited from the transitional provisions (Allegation 9.1, 9.5, 9.6, 9.11);

631.5. refusing/failing to engage with the Claimants' legal advisers, Leigh Day between 6 October 2015 and the date of issue of these proceedings (Allegation 9.3 and its sub-issues, 9.24);

631.6. suggesting that Leigh Day was a disreputable law firm and/or was acting improperly (Allegations 9.3.3, 9.17); and

631.7. Mr Rennie exaggerating the risk of costs and encouraging members to 'get out' of the PPC group (Allegation 9.14).

Issue 8: Did the Respondent create division and ill-feeling towards them for pursuing the police pensions challenge?

632. As for Issue 8, the Respondent's witnesses accepted that there was division and ill-feeling on the part of some officers against the PPC claimants. There was extensive, unchallenged evidence that the Claimants were exposed to anger and hostility, in particular from some older officers who were concerned about the effect of a successful legal challenge on their pensions. That treatment ranged from accusations of selfishness to marginalisation in the workplace and verbal threats. By way of example only, Mr Broadbent recalled being targeted by older officers approaching him in the parade room, accusing him of damaging their pensions. At the more extreme end, Mr Watling recalled an officer of inspector rank saying to him: 'if anything happens to my pension because of you, I will burn your house down with your family inside.' He did not take the threat literally but felt the force of the anger behind it.

633. We are satisfied that the Respondent knew that its consistent use of the tactics referred to below created, or fostered, division and ill-feeling towards those officers who chose to join the PPC, specifically:

633.1. exaggerating the risks of success in the PPC to protected officers, including by failing to explain that the anticipated length of the litigation reduced the risk to many and, even if the Government levelled down, it was likely to affect a very small number of officers, rather than a majority (Allegation 9.1, 9.5, 9.11, 9.12, 9.16);

633.2. omitting relevant information and/or providing wrong or outdated information about the numbers who were likely to be at risk (Allegations 9.1, 9.11, 9.12, 9.16, 9.18, 9.20);

633.3. characterising those who had already signed up as a marginal and/or selfish group of private individuals (Allegations 9.3 and its sub-issues, 9.4, 9.20);

633.4. suggesting that the PPC had been a redundant exercise (Allegations 9.20; 9.27-9.30);

633.5. announcing support for, and action on behalf of, those affected officers who had not joined the PPC, while offering no support or recognition to PPC claimants and/or requiring PPC claimants who wanted support to make a formal funding application (9.25; 9.26; 9.27-9.30).

Issue 9: Did the Respondent campaign, communicate and present a distorted, misleading and inaccurate assessment of the Claimants' legal claims, the costs and financial consequences of those claims, and group litigation in general, as well as the impact on other members?

634. We are satisfied that the Respondent consistently presented a distorted and/or misleading and/or inaccurate assessment of the Claimant's legal claims by:

634.1. giving legally incorrect information, including in relation to the parallel litigation (Allegations 9.11, 9.12, 9.16, 9.22);

634.2. omitting relevant information, including in relation to the parallel litigation (Allegations 9.1, 9.2, 9.11, 9.12, 9.15, 9.16, 9.18);

634.3. giving the misleading impression that the Respondent's negative assessment of the merits of the PPC was based on updated legal advice, when it was not (Allegations 9.1, 9.5, 9.6, 9.11, 9.12, 9.16, 9.20; 9.26);

634.4. failing to give a balanced account of the nature of the challenge (Allegation 9.1 and the allegations listed above).

635. It did the same in relation to the costs and financial consequences of the PPC claims on claimants:

635.1. overstating the costs risks to officers who had signed up/were considering signing up to the PPC (as above);

635.2. exaggerating the risks of success in the PPC to protected officers, including by failing to explain that the anticipated length of the litigation reduced the risk to many (as above);

635.3. giving inaccurate information about group litigation in general (Allegations 9.5, 9.6).

636. It did the same in relation to the alleged impact of the PPC on other members by:

636.1. exaggerating the risks of success in the PPC to protected officers, including by failing to explain that, even if the Government levelled down, it was likely to affect a very small number of officers, rather than a majority (as above);

636.2. omitting relevant information and/or providing outdated information about the numbers who were likely to be at risk (as above);

636.3. suggesting that those on tapered protection suffered no loss (Allegations 9.6).

Issue 10(a): Did the Respondent refuse to provide any financial support (whether in whole, part or conditional) for any equality challenge to the transitional provisions by its members and/or the police pensions challenge by the Claimants from 2015?

Issue 10(b) Did the Respondent refuse to consider provision of any financial support (whether in whole, part or conditional) for any equality challenge to the transitional provisions by its members and/or the police pensions challenge by the Claimants from 2015?

Issue 10(c) In respect of 10(a) and 10(b), if the tribunal finds that there was such refusal, was this on an ongoing and continuing basis (as the Claimants contend), or was the decision not to support such a challenge a one-off decision (as the Respondent contends)?

Issue 10(d) Did the Respondent refuse to reconsider and/or overturn its initial policy (as alleged by the Claimants) or decision (as alleged by the Respondent) not to provide financial support for the Claimants, in particular: (i) After the judgments at the ET, EAT and Court of Appeal in the parallel litigation; (ii) After the Secretary of State for the Home Department and others' concession that there had been unlawful age discrimination in the parallel litigation; (iii) When the Respondent announced it would issue discrimination claims for its wider membership in May 202; (iv) In response to specific requests by the Claimants' lawyers to pay or contribute as confirmed by Kennedys on 10 July 2020.

637. The issues/sub-issues under Issue 10 are also different facets of the same issue.

638. 10(a) is not disputed. The Respondent has never provided financial support to any extent for the PPC. Until 15 May 2020, when it launched its own claims, it did not provide support for any equality challenge to the transitional provisions.

639. As for 10(b), there is ample evidence that, contrary to the Respondent's repeated assurances that it would keep the position under review, the General/National Secretaries had a closed mind to supporting/providing any financial support for the PPC, even when the Respondent's legal position was fully aligned with that of the PPC: see in particular paras 507-508 above.

640. Turning to 10(c), there is ample evidence from every stage in the chronology set out above in our findings of fact of a policy of support for/protection of the transitional provisions (by way of example only, paras 208, 299, 347, 355, 373, 391). Both Mr Rennie and Mr Fittes accepted that the Respondent had such a policy and pursued it throughout their tenure. Mr Duncan took over that policy (paras 389-391) and did not depart from it until the decision in May 2020 to launch the Penningtons action.

641. Mr Fittes accepted in cross-examination that there was a policy that the Respondent would not support a legal challenge to the transitional provisions; he supported that policy because 'it is difficult as an organisation to support something we didn't agree with'. He said as much at the time, in the October 2016 Q&A (para 299): 'we're not going to attack something that we actually believe in and that's one of the main reasons why we don't support the challenge'. In the internal briefing paper of February 2018 (para 373), after the

EAT judgment, the Respondent wrote that it 'supported the transitional arrangements because they meant more of our members were protected for longer. This was a major contributing factor in our decision not to back the pensions challenge. That remains our position.' It also remained the position under Mr Duncan's leadership.

642. As for whether there was a policy not to fund/consider funding the PPC, the Respondent asserts that there was a 'one-off decision'. Mr Fittes' evidence was that the correct position was that funding decisions should be made in the first instance by the Deputy General Secretary; the Respondent's rules state that it is for the National Board to determine matters in relation to funding Legal Assistance.

643. Mr Galbraith-Marten was unable to identify when exactly such a decision was taken, by whom and under what process. The only submission available to him was that the Respondent 'communicated the decision not to support its own challenge to any part of the pension reforms, nor to fund the Leigh Day challenge, in or around September 2015'. We note the careful wording: the point of communication is identified, rather than the point of decision-making. The Respondent has never identified who is said to have taken the decision, under what process and on what date. The only other candidate for a one-off decision was the show of hands at the National Council in July 2019 (para 458). That was not a decision taken in accordance with the Respondent's processes: it was an informal, indicative vote; Mr Donald expressly left open the possibility of a formal decision in the future, which never took place.

644. We have concluded that there was no one-off decision not to fund the PPC, certainly not one conducted by reference to the Respondent's funding criteria or governance processes. Rather, there was an ongoing policy not to fund, or even to consider funding, the PPC, which grew out of the Respondent's policy of support for/protection of the transitional provisions, which predated the PPC by some three years. When the PPC group came into existence, the Respondent opposed it, and refused to consider funding it, because its aims were antithetical to its own policy (see, for example, paras 308-309, 352, 362).

645. The policy of not even considering funding the PPC continued under Mr Duncan's leadership. If anything, he was even more obdurate in his pursuit of it, blocking further discussion with Leigh Day about fees (para 445-447), repeatedly stating his opposition to funding the PPC (e.g. paras 451, 463, 465, 530), giving a strong steer to the National Council that funding should not be considered (para 454 onwards); and not responding formally to Leigh Day's request for funding of 29 May 2020 until 10 July 2020 (para 535).

646. The policy also survived the decision to bring the Penningtons challenge. Mr Duncan disregarded the Chair's public commitment to refer the issue for consideration by the Respondent's governing bodies and by reference to the funding rules (paras 507-510). He maintained the policy up to the point at which these proceedings were issued (and beyond). The Respondent remained wedded to it, whatever the changes in circumstances, and no matter how unpopular it became with a large number of its members.

Issue 10(e) Did the alleged conduct in paragraph 7-9 above become more pronounced around the time of each of the stages in paragraph 10[(d)][8] above

647. We have concluded that, so committed was the Respondent to supporting/protecting the transitional provisions, and so entrenched was its opposition to the PPC, that, as time went by and the parallel litigation worked its way through the courts, the Respondent chose to disregard the obvious signs that it was likely to find itself on the wrong side of the argument.

648. Part of the reason for this was something that it had known from very early on: that failing to challenge arrangements which later turned out to be unlawful would be a reputational disaster for it within its own membership. As that disaster approached, instead of changing position, the Respondent redoubled its efforts to sell its position to its members and to maintain its oppositional stance to the PPC and to the individuals and their legal representatives who had brought it.

649. In the Tribunal's view, it displayed extraordinary intransigence, as its position became ever more illogical: defending transitional provisions which benefited ever fewer members, while ignoring their discriminatory impact on the majority. As the parallel litigation progressed, the Respondent insisted that success for the judges and firefighters would not necessarily mean success for the PPC (para 356). After the Court of Appeal judgment, the Respondent actively considered the possibility of supporting the Home Office's position in the litigation or 'staying quiet' (para 402). It circulated ever more misleading information (paras 408-410, 412). It sought advice as to whether there was still a possibility of defeat for the PPC, despite the success of the parallel litigation (paras 407 and 415). Mr Duncan adopted a position in discussion with the Home Secretary that conflicted with the interests of his own members in the PPC group (paras 430-440). After the decision of the Supreme Court, he blocked a meeting with Leigh Day to which Mr Apter had agreed (para 447). He and others suggested to members that, in fact, the PPC had achieved nothing; any benefit to the membership as a whole was the achievement of the judges and firefighters; it was suggested that the PPC was redundant and would 'not go to court' without explaining that this was because the case was likely to be settled (paras 468-469).

650. We accept that the Respondent's attempts to undermine the PPC became more pronounced over time.

Issue 11 Has the Respondent refused to recognise the role of the Claimants in pursuing the police pensions challenge in bringing positive benefit to the wider membership from 2015 on an ongoing and continuing basis

651. We repeat our conclusions above.

652. The Respondent took no significant steps during the material period to recognise the role the Claimants played, by pursuing the PPC, in bringing positive benefits to the wider membership. Even when the Respondent

[8] The updated List of Issues refers to para 10(c) here but this is obviously a mistake.

decided to apply for interested party status in the PPC, it gave no credit to the PPC. Nor did it do so after it initiated its own challenge on 15 May 2020, which piggybacked on the PPC, and was stayed pending its outcome.

653. The single exception is Mr Apter's brief, positive comment about the PPC in a January 2019 podcast after the Court of Appeal judgment (para 413). Mr Duncan immediately countered with a negative perspective (para 414).

Issue 12 Has the Respondent used some or all of the Claimants' membership fees to fund legal proceedings for other members to pursue the same remedy the Claimants pursued using private funds (POC paragraph 84h, & GOR paras 17(h))?

654. It is not disputed that the Respondent has used some of the Claimants' membership fees to fund the Penningtons action.

Issue 13: Does any or all of the conduct at Issues 7-12 above amount to detrimental treatment of the Claimants (the alleged detrimental treatment)?

655. We are satisfied that each of the eight Claimants was subjected to the treatment identified in Issues 7-11 above. We reminded ourselves of the evidence which each of the Claimant's gave in his/her witness statement as to detriment. It is a matter of record and we do not summarise it here.

656. Mr Galbraith-Marten made specific submissions as to the eight individual Claimants in relation to the question of time limits. Apart from the submissions on Issue 12, which we deal with immediately below, he did not distinguish between them for the purposes of the detriment issue. We consider that to be a sensible approach in circumstances where there was no challenge to the evidence given by the Claimants as to the detriment they suffered as a result of the Respondent's conduct.

657. In light of all the evidence, we have concluded that a reasonable worker would or might take the view that the Respondent's conduct, as set out above, was to his/her detriment. The sense of grievance which the eight Claimant witnesses articulated in their evidence was, in our judgment, justified.

658. As for Issue 12, Mr Galbraith-Marten submits that only those Claimants who were contributing members of the Respondent at the material time can rely on the use of their subscription fees to fund the Penningtons challenge as a detriment to them. This submission relates to two of the eight Claimant witnesses: Mr Watling stopped paying the voluntary subscription to the Respondent in around October 2016; Mr Small's service as a police officer ended on 31 March 2019 and he stopped paying the subscription around that time.

659. Ms Jolly submits that members' fees cannot be divided purely by reference to the year in which they were paid; it is not right, she argues, that the Tribunal can only uphold Issue 12 when the member in question was contributing immediately before the statement was made that the Penningtons claims were being issued; Mr Watling and Mr Small both contributed fees during the currency of the PPC.

660. We prefer Mr Galbraith-Marten's submissions on this issue. In our judgment, the detriment relied on must logically be the individual's sense of grievance that the Respondent was using his/her money to pay for someone else's claim. For that sense of grievance to be justified we consider that it must relate to contributions that were at least recently made by the individual. When a person stops paying into a scheme, he no longer has a stake in the way its funds are spent. Mr Watling had stopped contributing more than three years earlier; Mr Small more than a year earlier. The money that was being spent was no longer theirs.

661. To be clear: we do not think that this argument has application to any of the other detriments. Both Mr Watling and Mr Small remained members of the PPC group; Mr Watling remained a (non-subscribing) member of the Respondent and so the relevant relationship subsisted; Mr Small was an ex-member of the Respondent and so was potentially covered by the provisions in s.108 EqA relating to relationships which have ended.

662. Insofar as the Respondent's policies of support for the transitional protection and opposition to/refusal to consider funding the PPC subjected members of the PPC group to detriments, they applied to Mr Watling and Mr Small; they gave rise to a (justified, in our view) sense of grievance which was no less than that experienced by the other Claimant witnesses. We accept the evidence they gave to that effect.

663. In Mr Small's case, we concluded that the discrimination arose out of, and was closely connected with, the relationship with the Respondent which had ended. As we go on to conclude, it had its roots in the Respondent's policies and practices identified above. It was motivated, in part at least, by hostility to the fact that those of the Respondent's members who had chosen to join the PPC and complain of age discrimination, contrary to its wishes.

664. As for whether the discrimination alleged would have contravened the EqA, if it had occurred during the relationship, it obviously would; it did in relation to the seven other Claimant witnesses. Other than the fact that they were still in an ongoing relationship with the Respondent, and Mr Small was not, there were no material differences between them and him.

Direct age discrimination

The *James/Nagarajan* issue

665. As we set out above (para 552 onwards), there are two kinds of direct discrimination cases: cases where the reason for the treatment is inherent in the treatment ('a *James* case'); and cases where the act is rendered discriminatory by the mental processes of the person who did it ('a *Nagarajan* case'). Ms Jolly says that this case belongs in the former category, Mr Galbraith-Marten in the latter.

666. Mr Galbraith-Marten devoted most of his oral submissions to this point. He accepted that, if it is right that age was inherent in all the detrimental treatment set out above, making this a *James* case, no further enquiry would be required into the 'reason why' the Respondent acted as it did; the only issue would be

whether the treatment could be justified. He argued that the 'reason why' question was key. He submitted that none of the acts about which the Claimants complain were determined by factors which were indissociable from age. For example, where the acts related to the publication of a document by the Respondent, or a refusal to meet Leigh Day, it could not be right that, in his words, 'the only possible explanation for them was age'; an enquiry into the 'reason why' each decision was taken is required.

667. We observe that there is no requirement, even in a *James* case, that the protected characteristic be 'the only possible explanation' for the treatment. There may always be more than one reason for any given treatment; if one of those reasons is non-discriminatory, but the other is indissociable from the protected characteristic, or even significantly influenced by it, it is discrimination.

668. Mr Galbraith-Marten accepted that age was an inherent part of the transitional provisions themselves. The Court of Appeal in *McCloud* had confirmed that their application was discriminatory, and Mr Galbraith-Marten was clear that the Respondent does not seek to revisit that decision. How could it in the light of its own challenge to the provisions?

669. However, he argued that, even if discrimination by the employer was self-evident, there needs to be an enquiry into the reason why the Respondent acted as it did. Further, he argued that just because it was apparent that the transitional provisions treated people of different ages differently did not mean that they were unlawful; justification was the issue. The Respondent positively believed that they were justified: they had been agreed between the government and the trade unions; the Respondent had received legal advice to say that they were. Even after the Court of Appeal decision, there was still the prospect of an appeal to the Supreme Court; the Respondent adopted a 'wait and see' stance. After the Supreme Court decision, the Respondent changed its position. In brief, at the time the Respondent made its decisions, it was not self-evident that the transitional provisions were unlawful; its treatment was not necessarily because of age.

670. In her oral reply to these submissions, Ms Jolly argued that Mr Galbraith-Marten's approach ignored the Respondent's active support for the transitional provisions. The Respondent consistently, and actively, took steps to support and protect the transitional provisions, knowing that the scheme treated its younger members less favourably because of age. Adopting that position was inherently less favourable treatment because of age. The burden passes to the Respondent to justify that treatment.

671. We remind ourselves that *James* and *Nagarajan* represent two different approaches to the 'because of' limb of the test for direct discrimination; they have nothing to add to the other limbs of the test which, in the context of age discrimination, include a justification defence. At this stage of the analysis, we are focusing solely on the reason for the treatment, not whether it can be justified.

Issue 17: Did the Respondent support, promote and/or protect transitional arrangements for the older Groups 1 and / or 2 through the adoption and maintenance of an overarching policy to that effect

Issue 19: Did the Respondent take steps to protect the transitional arrangements which provided pension protection for Groups 1 and/or 2? The Claimants rely on any or all of the steps defined as the alleged detrimental treatment in paragraphs 7-13 above, whether individually or cumulatively

Issues 18 and 20: If so, did that constitute less favourable treatment because of age

672. There is no dispute that the transitional provisions constituted a scheme grounded in differential treatment based on age. Mr Galbraith-Marten accepts as much (para 668). We accept Ms Jolly's detailed analysis of how those criteria worked in practice (at paragraph 545.1-545.9 of her closing submissions). They were intrinsically linked to an individual's proximity to retirement. Whether they were in Group 2 or 3, each of the eight Claimants was excluded from full protection. In each case, the reason for that exclusion was age. The transitional provisions were self-evidently less favourable treatment because of age.

673. From the point at which the pension reform framework was agreed in 2012 up to the point on 15 May 2020 when the Respondent announced its own challenge to the transitional provisions, the General/National Secretaries pursued a policy of supporting and protecting the transitional provisions. They did so because of the benefits they afforded older officers, closest to retirement. They all knew that the same arrangements treated younger officers (those in Groups 2 and 3, including the Claimants) less favourably because of their age. Even after the Court of Appeal decision in the parallel litigation, when the Respondent was advised to issue proceedings on behalf of its younger members, it 'held the line', delayed and sought reasons not to do so. It continued to prioritise the interests of the - by now very small - residual group of older officers who benefitted from the transitional provisions.

674. We accept Ms Jolly's submission that the policy of supporting and protecting the transitional provisions necessarily and inevitably meant supporting and protecting their effect, which was to treat the Respondent's younger members less favourably than its older members, based on age-related criteria. Thus, in pursuing this policy, the Respondent knowingly supported and protected *prima facie* discrimination. Insofar as the Respondent's detrimental treatment of the Claimants was significantly influenced by this policy, it too was *prima facie* direct discrimination.

675. We have already concluded that the Respondent sough to deter and obstruct the Claimants from pursuing the PPC (Issue 7); created division and ill-feeling towards them (Issue 8); and communicated a distorted, misleading and inaccurate assessment of the PPC (Issue 9). We are satisfied that this conduct was not merely significantly influenced by the Respondent's policy of supporting/protecting the transitional provisions, it was primarily driven by it. Hand in hand with that policy went a policy of opposing the PPC at every turn. That included refusing to recognise the role of the PPC group in pursuing the

PPC (Issue 11). We have concluded that the Respondent took the view that to legitimise the PPC in any way would undermine its own policy.

676. As for the policy of refusing to fund/consider funding the PPC (Issue 10), up to the point when the Respondent announced its own challenge, this too was significantly influenced by the Respondent's policy of supporting and protecting the transitional provisions. Providing financial support for a challenge to the transitional provisions would have been incompatible with its policy of supporting and protecting them; refusing even to consider funding the PPC was an extension of that policy and so was itself *prima facie* discrimination.

677. From the point at which the Respondent announced its own challenge and abandoned its policy of support for the transitional provisions, the nexus between the Respondent's treatment of the Claimants and its support for, and protection of, the transitional provisions was broken. Thereafter the Respondent's treatment of the Claimants was not because of age. However, that is not the end of the matter; we return to the same issues in the context of victimisation.

678. As for Issue 12, although we accept that the Claimants were reasonably aggrieved by what they perceived as the unfairness of their membership fees being used to fund the Penningtons action, there was no less favourable treatment as between them and their older colleagues: all members' fees were used. Nor (self-evidently) did the Respondent use the fees because of its policy of support for the transitional provisions; it used them to challenge the transitional provisions. It did so, simply because that was how it usually funded claims on behalf of its members. Accordingly, Issue 12 fails as a claim of direct discrimination.

679. For completeness, we deal with a number of other points made by Mr Galbraith-Marten in his written closing submissions.

680. While it is right that the Respondent did not originally ask for the inclusion of transitional provisions but pressed for all officers to remain in their existing pension schemes, in the context of universal pension reform across the whole of the public sector, it must have known that its initial proposal would be rejected. As soon it was, the Respondent proposed amendments to the transitional provisions and then enthusiastically endorsed them: see, for example, the description of them as 'a good thing…something that we actually believe in' (para 299) and references to them as arrangements the Respondent had 'lobbied for' (para 330) and 'fought for' (paras 347, 355, 391). There can be no question of its active support for them.

681. Nor do we consider that the fact that they secured other improvements to the 2015 Scheme, which might benefit younger officers, assists the Respondent. Our focus must be on its conduct in relation to the transitional provisions and its response to the Claimants' challenge to them.

682. When it comes to the Respondent's concerns about the potential adverse/unintended consequences of a challenge to the transitional provisions, although this may have been a factor in the Respondent's thinking

initially, the fact that it did not change its position even when it knew those consequences were unlikely to occur (a fact which it repeatedly failed to share with its members) reinforces us in our positive conclusion that the main driver of the Respondent's actions was its policy of support for the transitional provisions to the benefit of older officers closer to retirement.

683. As for the submission that the reason why the Respondent communicated with its members as it did was because these members 'understandably wanted to know why the PFEW was not taking action and the PFEW was duty-bound to let them know', this does not explain the serious deficiencies we have identified in those communications (presumably because the Respondent does not acknowledge them). Had it chosen to, the Respondent could have explained why it was not taking action without providing inaccurate, misleading or incomplete information and creating division and ill-feeling. Its pattern of doing so was in pursuit of its policy of support for/protection of the transitional provisions.

684. Mr Galbraith-Marten also submits that '[Mr Fittes'] motivation was to inform members about, and to defend, the PFEW position and argues that this is a complete defence to the direct discrimination and victimisation claims even if (as in *Jesudason*) the Tribunal were to find the communications did not 'fairly or accurately' set out the advantages and disadvantages of the PPC.' We will deal with that submission in relation to the victimisation claim below. In the context of the direct discrimination claim, we have concluded that the content and manner of Mr Fittes' communications was primarily driven by the Respondent's policy of support for the transitional provisions. It was *prima facie* direct age discrimination.

685. Mr Galbraith-Marten's argument that the General/National Secretaries believed, initially at least, that the less favourable treatment because of age inherent in the transitional provisions was justified (and so was not unlawful discrimination) does not assist the Respondent at this stage of the analysis, when our focus is on the 'because of' limb. The Respondent may, of course, seek to justify its own *prima facie* discrimination; we return to that issue in due course.

686. In any event, we are satisfied that the Respondent's support for the transitional provisions was primarily a matter of policy. The fact that the legal advice it received, for a time at least, accorded with its policy, was encouraging but not determinative.

687. It is no answer to say that the reason why the Respondent did not change its fundamental position until 2020 was because the legal advice did not change, in circumstances where: the Respondent did not probe the anomaly in Mr Westgate's first advice of July 2012 (paras 107, 157); it did not press the Government to provide the necessary EIA, even though Mr Westgate flagged up its absence in his advice of April 2015 (para 175); it did not tell its advisers about the parallel litigation when it found out about it and seek their advice about its implications for the PPC (e.g. para 223); it relied on a summary of David Reade QC's advice without seeing the full advice (paras 228-232); it sought no further advice about age discrimination even after the judges' case

succeeded in the ET, at which point it was obviously needed; nor did it do so when the firefighters' case failed in the ET, at which point the need for legal review by specialist employment/discrimination lawyers was all the greater, given that two Tribunals had reached different conclusions; nor did it do so when judgment of the EAT in the parallel litigation was handed down. When Mr Duncan did eventually seek fresh advice (the Allen/Masters advice), he not only did not act on it, he withheld it from members, the National Board and the National Council. That is consistent with the Respondent's policy of unwavering support for/protection of the transitional provisions, which necessarily prioritised the interests of older members over those of younger members.

688. Mr Galbraith-Marten submits that the Respondent cannot fairly be criticised for not seeking updated legal advice until the Court of Appeal decision in *McCloud*. We disagree: in our judgment, it was an abnegation of its responsibility towards its younger members. Between April 2015 and January 2019, we have concluded that it avoided seeking fresh legal advice in case it suggested that an age discrimination challenge was likely to succeed, which might require it to revisit its policy of support for the transitional provisions/opposition to the PPC. It did not want to do that. Mr Fittes' evidence (at paragraph 144 of his statement) was as follows:

> 'Whilst the PPC (or more accurately the Judges' and Firefighters' cases) did succeed contrary to what might have been expected from the legal advice we took, the legal advice was just that – advice – and whilst we had taken it on board, we also did not believe that a legal challenge to the transitional protection was in the best interests of most of PFEW's members. The debate was not confined to just a legal argument. It also involved a number of other factors which I have set out in this witness statement, all of which PFEW also needed to take into account.'

689. The fact that the Respondent's motive for adopting the underlying policy may have been regarded by some as benign (better to protect the pensions of some members rather than none) is immaterial; at the 'because of' stage of the analysis, our focus must be on motivation, not motive (*Ahmed*). Motive (or rather, 'aim') may be relevant at the justification stage.

690. Finally, Mr Galbraith-Marten pursues a line of argument that the assessment of potential financial advantages versus disadvantages of a challenge to the transitional provisions shifted continuously over the material period and that this was part of the reason why the Respondent did not support the PPC. He submits that 'it was simply not possible to carry out an analysis at the time as evidenced by the fact that it took so long to devise a remedy after the final determination in *McCloud*'. That submission leaves out of account the fact that, especially towards the end of the material period, a successful outcome to the Claimants' *discrimination* challenge was becoming ever more likely to anyone with an eye to see it.

<u>Were the aims relied upon capable of being legitimate aim for the purposes of direct age discrimination?</u>

691. The Respondent relied on the following legitimate aims:

691.1. 'to improve the terms of the Police Pension Scheme for the benefit of as many of its members as it could'; and/or

691.2. 'to act in the interests of its members as a whole'; and/or

691.3. 'to utilise its funds effectively and proportionately in accordance with the legal advice it had received and in accordance with its merits-based funding rules for legal support'.

692. Mr Galbraith-Marten accepts that none of these aims fall within the category of 'social policy objectives.' Indeed, as we have already recorded, he goes further and submits that social policy objectives are not applicable in the context of the relationship between a staff association and its members, except where there is a quasi-employment relationship. We have already rejected those submissions and observed (paras 576-587) that we can see no reason in principle why a staff association might not rely on a legitimate aim based on, say, intergenerational fairness, including in a context such as this. The fact that the Respondent has not done so appears to us to reflect the fact that it would fail on these facts, rather than because of any conceptual difficulty.

693. Consequently, the Respondent's justification defence must fail and the Claimants' claims of direct age discrimination succeed.

694. If we are wrong in our conclusion that the Respondent's aims are impermissible in this context, we go on to consider whether the Respondent's justification defence would have succeeded, if they were permissible.

<u>The position if Respondent's aims were permissible: were they in fact the aims being pursued, whether consciously at the time, or recognised through *ex post facto* rationalisation?</u>

Aim 1: 'to improve the terms of the Police Pension Scheme for the benefit of as many of its members as it could'

695. The precise formulation of this aim is important: 'to improve the terms of the Police Pension Scheme…' Logically, it can only be relevant to a period when the terms of the scheme were susceptible to improvement, that is during the consultation period in 2012. It cannot be relevant to the material period of these claims, by which time the terms of the scheme had been fixed and the regulations introduced. After September 2015 (the date of the first alleged detriment) the Respondent took no measures to 'improve the terms of scheme'. Quite the opposite, it defended the existing terms of the scheme, as it had done since 2012. Its conduct was not in pursuit of this aim, whether or not it was legitimate.

696. The main focus of Mr Galbraith-Marten's submissions was on the second and third aims.

Aim 2: 'to act in the interests of its members as a whole'

Aim 3: 'to utilise its funds effectively and proportionately in accordance with the legal advice it had received and in accordance with its merits-based funding rules for legal support'

697. Mr Galbraith-Marten's global submission was as follows:

> 'It was plainly legitimate for the PFEW to act in the interests of its members as a whole. It was bound to do so. The means employed were to act in accordance with the legal advice it had received on the merits of a challenge to the transitional arrangements (as well as a broader challenge to the pension reforms) thereby utilising its funds effectively and proportionately. Such a justification is based on intuitive common sense and does [not] require or admit of further proof.'

698. We note that, in this formulation, Mr Galbraith-Marten treats the third pleaded aim not as an aim in its own right but as the means by which the Respondent pursued the second aim.

699. We also note that, although the potential relevance of this aim to the claims relating to the refusal to provide financial support to the PPC and/or to fund the PPC retrospectively is apparent, it has no relevance to the claims relating to the Respondent's hostile treatment of the PPC group. No submission was made on the Respondent's behalf that, if it subjected the Claimants to hostile treatment, such treatment could be justified as being 'in the interests of its members as a whole'. If it had been, it would have failed: the treatment was neither appropriate nor reasonably necessary to achieve the stated aim.

700. We also note Mr Galbraith-Marten's assertion that the Respondent's defence 'is based on intuitive common sense and does [not] require or admit further proof'. We agree that the aim of 'acting in the interests of its members as a whole' is self-evidently capable of being a legitimate aim. However, the burden falls squarely on the Respondent to show that, as a matter of fact, that was its true aim and that the measures adopted in pursuit of it were both appropriate and reasonably necessary to achieve it.

701. In our judgment, the Respondent has failed to discharge that burden. We have concluded that the fact that the measures taken did not, indeed could not, achieve that aim suggests that it was not the true objective pursued.

702. The Respondent's failure to conduct any proper exercise to establish what each age group stood to lose and gain by the transitional provisions, and therefore how they impacted on the membership as a whole, together with the absence of an EIA, is not a promising starting-point for the exercise of demonstrating that it was 'acting in the interests of its members as a whole'.

703. Such statistical evidence as exists undermines that contention. Already in 2012, according to its own retrospective analysis, the transitional provisions benefited 50.3% of its members, the slightest of margins. On the Claimants' analysis of the same data (which the Tribunal prefers) 63.2% of the Respondent's members were adversely affected by the transitional provisions. By the beginning of the material period, when the 2015 Scheme came into effect, any majority benefit which had existed in 2012 had been eroded to the

point where Mr Fittes' estimate was that the transitional provisions benefited only about a third of the total membership (para 168). The fact that the Respondent continued to rely on the 2012 snapshot figures long after they ceased to reflect the true position (para 377 and 465) calls into question its good faith.

704. Moreover, we have already found that during the material period the Respondent knew that the government would probably fight the litigation until the very end, which was likely to take between five and seven years, by which time those who benefited from the transitional provisions would be a tiny minority.

705. Absent any evidence that the Respondent's support for the transitional provisions and opposition to the PPC was of benefit to its members as a whole during the material period, we have concluded that this was not, in fact, the aim it was pursuing. Rather, its aim was to protect the interests of a sub-section of its membership (older members/those closest to retirement) no matter how small that group became.

706. Given this conclusion, it is not necessary to go on to consider the Respondent's submissions in relation to the legal advice and funding criteria. However, for completeness, we touch on them briefly in the following paragraphs.

707. The Respondent's reliance on legal advice as justifying the measures it took is fatally undermined by the fact that such legal advice as it took was flawed: it was provided in a statistical and evidential vacuum and without knowledge of the basis of the PPC and the parallel litigation. As a result, the advice given did not, indeed could not, grapple with key questions at all, and simply accepted the assertion that the officers who would find it most difficult to adjust were likely to be those who were closer to retirement, when the opposite was likely to be true. We have found that it deliberately avoided seeking fresh advice, when the need for it was obvious. We have already concluded that it did so because it wanted to maintain its policy of support for the transitional provisions.

708. Mr Galbraith Martin argues that, believing that the transitional arrangements to be lawful, the Respondent 'sought to extend them further (i.e. to bring more of its members within their ambit) whilst pressing for other improvements to the CARE scheme which would be of particular benefit to its younger members'. Again, and for the reasons given above, that submission can only relate to 2012, not to the material period of 2015 onwards.

709. The Respondent's reliance on its funding criteria is fatally undermined by the fact that there is no evidence that those criteria were consciously applied at any stage. We have concluded that the Respondent adopted its policy of not funding/considering funding any challenge to the transitional provisions from the outset, without meaningful consideration of the funding criteria, and maintained it, come what may. The measures it took were not driven by the funding criteria, they were driven by its policy positions; the criteria were relied on as cover.

710. The Respondent has not shown that it took the measures it did in pursuit of the aims it relies on, even if it were permissible to rely on aims which were not social policy objectives. Accordingly, its justification defence would have failed at this second hurdle, had it not already failed at the first.

Proportionality

711. Having concluded that the legitimate aims relied on by the Respondent are not applicable to these claims and that, even if they were, the Respondent has failed to discharge the burden on it to show that it took the measures in pursuit of these aims, we do not go on to consider the question of proportionality.

Victimisation

Protected act

712. The issuing of ET proceedings by the PPC group was a protected act. Further, Mr Fittes accepted that, from as early as 6 May 2015, when Mr Broadbent asked him to share information with the PPC group's legal advisers, he believed that the Claimants may bring an equality challenge; by early August 2015, the Respondent knew that Leigh Day had been instructed and that an equality challenge under the EqA was being prepared.

The relevance of the 'legal proceedings' authorities

713. Both parties devoted much of their oral closing submissions to the case law relating to the position when a respondent is alleged to have committed acts of victimisation in the course of defending legal proceedings brought against it.

714. The courts have held (in the *Khan* and *St Helens* cases: see above at paras 593-594) that a person does not commit an act of victimisation if he takes the impugned decision in order to protect himself in litigation: 'ordinary steps in defending the claim and ordinary attempts to settle or compromise the claim do no one any harm and may even do some good' (*St Helens* at [37] *per* Baroness Hale). On the other hand, an employer would be doing an act of victimisation, if it did anything that might make a reasonable employee feel that s/he was being deterred from pursuing her claim, including indirect pressure such as 'fear of public odium or the reproaches of colleagues' (*St Helens* at [27] *per* Lord Hope). This is particularly pertinent in claims where colleagues might fear the effects of the claimants' claims on their own position, such as an equal pay case (*St Helens* at [39] *per* Baroness Hale).

715. While the PPC group did have proceedings on foot in 2015-2020, they were not against the Respondent. The Respondent cannot argue that its treatment of the PPC claimants, which we have described above, was because 'currently and temporarily, [it] need[ed] to take steps to preserve [its] position in the outstanding proceedings' (*per* Lord Nicholls in *Khan* at [31]). Nor was the Respondent, in acting as it did, taking reasonable steps to settle claims against it (*per* Lord Neuberger in *St Helens* at [68]).

716. We reminded ourselves of the reasoning of Lord Neuberger in that paragraph:

> **'The bringing of an equal pay claim, however strong the claim may be, carries with it, like any other litigation, inevitable distress and worry. Distress and worry**

> **which may be induced by the employer's honest and reasonable conduct in the course of his defence, or in the conduct of any settlement negotiations, cannot (save, possibly, in the most unusual circumstances) constitute "detriment" for the purposes of sections 4 and 6 of the 1975 Act.'**

717. That is not the situation here: the Claimants had not sued the Respondent; they had sued their employer and the Home Office. They might reasonably have expected the Home Office's defence of their claims to cause them distress and worry. They had no reason to think that their own staff association would be the cause of distress and worry. On the contrary they were reasonably entitled to expect that, even if their staff association chose not to support their action, it would at least not treat them adversely for doing bringing it.

718. Thus, strictly speaking, the 'legal proceedings' cases, and the 'honest and reasonable' doctrine articulated in them, are not applicable in this case, except insofar as they illustrate general principles, which are applicable in all victimisation cases: that the 'reason why' the respondent acted as it did must be scrutinised to ensure that its motivation was the fact that the claimant had done a protected act - and not something adjacent but distinct; and that an unjustified sense of grievance cannot be a detriment. In any event, the 'honest and reasonable' doctrine is not a separate defence to a claim of victimisation in a legal proceedings case; it is merely the application of those principles in the particular context of defending legal proceedings.

719. *Jesudason*, which Mr Galbraith-Marten relied on, is also not a 'legal proceedings' case. We note that, although *Khan* is alluded to in the judgment in passing, *St Helens* is not referred to at all, nor is the 'honest and reasonable' test. The focus of the Court of Appeal is purely on the 'reason why' question: did the Respondent act as it did, in defending its position, on the ground of a protected disclosure? It concluded that it did not. Insofar as Mr Galbraith-Marten suggested in oral closing submissions that the case is authority for the proposition that a respondent is 'entitled to defend itself', whether or not it does so in the context of legal proceedings, we disagree. It is authority for the (uncontroversial) proposition that, if a respondent defends itself against criticism by a claimant who has made protected disclosures, it will act lawfully, provided it does not do so, in whole or in part, on the ground that the claimant has made the disclosures.

<u>Detriment</u>

720. We have referred above (para 597) to the differences in emphasis in the 'legal proceedings' authorities as to whether the test goes to the 'reason why' issue or the detriment issue. Even if this were such a case, we would not need to resolve that dispute because the claims would succeed on either analysis.

721. We have already concluded that the Claimants' sense of grievance in relation to the detriments was not unjustified. As we go on to explain, we are also satisfied that the Respondent's actions were significantly influenced by the fact that the Claimants had done a protected act.

722. The Claimants rely on the treatment in Issues 7-12 as the acts of victimisation.

The reason why

723. Mr Galbraith-Marten submits that there is an obvious parallel between *Jesudason* and the present case. He invites the Tribunal to find that the Respondent communicated with its members in order to set out its position on the merits of a legal challenge to the police pension reforms and to explain to its members why it had decided not to support a challenge. The Respondent says that all its communications were 'honest and reasonable' but, even if the Tribunal finds that they went too far in certain respects, that does not mean that any particular discrimination claim must succeed, notwithstanding the fact that the Claimants felt aggrieved. The critical issue is 'the reason why' the Respondent communicated with its members as it did.

724. We accept that the reasons identified by Mr Galbraith-Marten formed part of the Respondent's motivation for acting as it did. We further accept that, initially at least, its actions were significantly influenced by the legal advice it had received as to the merits of a challenge to the transitional arrangements. However, as time went by, that ceased to be a cogent explanation, for the reasons we have already given.

725. We have concluded that the Respondent's actions were also significantly influenced by the fact that the Claimants had refused to adopt the Respondent's position and had chosen instead to bring the PPC; the Respondent objected to the very fact that its own members were challenging as discriminatory the transitional provisions which it had championed since 2012 and which it continued to support and protect.

726. As the Claimants' prospects of success in their discrimination challenge increased (as the parallel litigation progressed), the Respondent's hostility to the PPC, and its treatment of the PPC group as its adversary, only increased. It regarded them as an ever-greater threat. By way of example, we remind ourselves of the analysis of potential PPC outcomes (at paras 404-405), produced after the Court of Appeal decision in the parallel litigation in January 2019, highlighting the negative consequences for the Respondent of a win and a positive remedy for the PPC; and the description of the PPC as perhaps 'the biggest threat' in the Respondent's strategy discussed at the National Council in November 2019 (at para 491).

727. We have also concluded that the Respondent was motivated, in part at least, by hostility to the PPC group and its legal representatives. We have already noted indicators that it regarded the PPC group as its adversary (e.g. paras 236, 285, 509, 511); they are far from isolated. We have found that the Respondent refused to engage with the PPC group's lawyers because it did not wish to legitimise the group and its challenge (e.g. paras 501, 532). We agree with Ms Jolly's submission that Mr Duncan's hostility towards the PPC group and Leigh Day was evident during his oral evidence: he clearly viewed them with equal opprobrium.

728. The same detriments are relied on in the victimisation claim as were relied on in the direct discrimination claim: the Respondent sought to deter and obstruct the Claimants from pursuing the police pensions challenge (Issue 7); it created ill-feeling towards them among the wider membership (Issue 8); it engaged in

negative campaigning against them (Issue 9); it refused to provide/consider providing any financial support whatsoever (Issue 10); it failed to recognise their role in securing benefits for the wider membership (Issue 11); and it used their membership fees to find its own challenge (Issue 12).

729. Mr Galbraith-Marten submits that certain of these detriments cannot logically constitute acts of victimisation: he argues that it makes no sense to assert that the reason why the Respondent refused to support the PPC, declined to fund the PPC and applied to join the PPC litigation as an interested party was because the Claimants brought the PPC, or in order to penalise the Claimants for doing so.

730. As for the last point, the application for interested party status is not alluded to expressly in Issues 7-12 as a freestanding detriment. It appears to be relied on as an example of a point at which the Respondent failed to give the Claimants any credit for the achievements of the PPC (i.e. Issue 11). With the exception of Issue 12, we are satisfied that the motivation we have identified above significantly influenced the Respondent's treatment of the Claimants.

731. We acknowledge Mr Galbraith-Marten's submission that part of the reason the Respondent did not fund the PPC was because it would not have agreed to pay Leigh Day's rates and that those rates mean that the sums involved are very large (although he no longer takes the point that paying them would have exhausted the Respondent's entire legal budget). While we acknowledge that this might be a non-discriminatory explanation as to why the Respondent did not agree to fund the PPC in full, it provides no explanation as to why the Respondent has never engaged with Leigh Day to discuss the possibility of making a contribution of any sort to the Claimants' fees. We have concluded from this, and from the Respondent's unwavering refusal to meet with Leigh Day, even after their legal position in relation to the transitional provisions became aligned, that the Respondent was significantly influenced by hostility towards the Claimants and their legal representatives because they had brought the PPC in the first place.

732. The very fact that the Respondent continued to treat the Claimants in the way it did after it had abandoned its support for the transitional provisions is, in our judgment, a strong indicator that the Respondent was motivated not only by policy difference, but also by personal animus. It continued to deny them any support whatsoever, financial or non-financial; initially at least it did not even offer them the opportunity to join the Penningtons action or switch representation to it. It did not acknowledge that the PPC had been of any benefit to its members at all. We are satisfied that this was a deliberate decision which, in part at least, reflected Mr Duncan's hostility to the PPC and Leigh Day. We find this hostility was rooted in the fact that they had brought a discrimination challenge against the wishes of the Respondent. Worse still, it had succeeded to the benefit, not only of the PPC claimants, but potentially of all the Respondent's younger cohort. This was the reputational perfect storm foreshadowed in the January 2019 PowerPoint presentation (paras 404-405). The Respondent has treated the PPC group throughout as the enemy within.

733. Accordingly, we are in a position to reach a positive conclusion that the Respondent's treatment of the Claimants in relation to Issues 7-11 was significantly influenced by the fact that they had done a protected act. Those claims of victimisation succeed.

734. As for Issue 12, this also fails as a claim of victimisation. As we have already concluded (para 679), the Respondent used the membership fees, including those of the Claimants, because that was how it usually funded claims on behalf of its members.

735. For the avoidance of doubt - and had this been a case arising in the context of litigation against the Respondent - it should be apparent form our conclusions above that we would have rejected Mr Galbraith-Marten's submission that the Respondent's communications about the PPC were 'all honest and reasonable'. Its approach went far beyond the limits of permissible action. We agree with Ms Jolly that its conduct was particularly egregious given that it was the Claimants' own staff association, whose very purpose was to protect their rights and interests.

Indirect age discrimination

736. The parties addressed the question of whether claims of direct and indirect discrimination, based on the same facts, are mutually exclusive: Mr Galbraith-Marten's submitted that they were and we accept his submission. We have referred above to authority which supports it and which is binding on us (para 601 onwards). Ms Jolly' position was that the two were not necessarily mutually exclusive but, if that was wrong, and if we were to find that something was not direct discrimination, we should go on to consider indirect discrimination in the alternative.

737. The PCPs are identified in the list of issues as follows:

737.1. supporting, promoting and/or protecting the government's deal on transitional arrangements; and/or

737.2. prioritising the protection of the transitional arrangements over any legal challenge; and/or

737.3. the decision(s) not to support, or reconsider supporting, funding or substantively engaging with the police pensions challenge and matters arising through the parallel litigation (POC paragraph 96, & GOR para 23 -26);

737.4. the practice of seeking to maintain the terms of the new police pension scheme for the benefit of as many of its members as it could (Note that the Respondent accepts and avers at paragraph 24 that it applied a PCP of seeking to improve the terms of the scheme for the benefit of as many of its members as it could but it denies that it applied a PCP of seeking to maintain the terms of the new police pension for the benefit of as many of its members as it could).

738. The only claim which has failed as a claim of direct discrimination is Issue 12: the use of the Claimant's membership fees to fund the Penningtons action. None of the PCPs above applies to that claim. Accordingly, it cannot succeed.

739. We do not consider it proportionate to undertake an alternative analysis of the indirect discrimination claims, should our analysis of the direct discrimination claims be wrong. We note that both Counsel deal with these claims relatively briefly.

740. Accordingly, we dismiss the indirect discrimination claims in relation to Issues 7-11 on the basis that they are incompatible with our conclusions on direct discrimination.

Time limits

741. The parties agree that the relevant cut-off date for primary limitation purposes, before which an act would be *prima facie* out of time, is 15 May 2020. The following matters are in time: any policies which continued to apply after that date, the Respondent's announcement on 15 May 2020 that it would be bringing the Penningtons claims; the Respondent's video of 4 June 2020 and associated documents; the Respondent's video of 18 June 2020; Kennedys letters of 10 July and 10 August 2020.

Conduct extending over a period

742. Although it is clear from *Hendricks* that the Claimants need not identify a policy, in order to establish that there was conduct extending over a period, in this case we have found that there were two policies: a policy of supporting/protecting the transitional provisions (which lasted up to 15 May 2020); and a policy of opposition to the PPC, including a policy of not funding it/considering funding it, which continued beyond the announcement of the Penningtons claims and up to the issuing of these proceedings. The victimisation in relation to the latter is, therefore, in time and capable of anchoring earlier acts, subject to our conclusions below.

743. Further, the point at which the Respondent announced its own challenge to the transitional provisions on 15 May 2020 would have been the obvious point to reach out to the PPC, given that their legal positions were now wholly aligned. It did not do so. Neither in its initial announcement (Allegation 9.25) nor in the Q&A video on 20 May 2020 (Allegation 9.26) was there any suggestion that the Claimants might be able to join its proceedings (or indeed be represented by the Respondent in the PPC, as was later offered); no acknowledgment was made that they had been right and had secured a concession as to liability which was specific to police officers (Issue 11). Its failure to do so at this crucial juncture was, in our judgment, a further detriment to the Claimants.

744. It led to a torrent of outrage against the Respondent. Only then did the Respondent offer a mechanism for representation to the PPC claimants. Even then it made no acknowledgment as to the value of the PPC.

745. To be clear: we do not consider that the change of personnel from Mr Rennie to Mr Fittes to Mr Duncan defeats this analysis. Although there were

differences of style between them, there was a remarkable continuity of approach. Key figures in the executive team remained in place throughout the material period. Insofar as they, or others within the Respondent organisation, carried out the acts referred to above, we are satisfied that they did so under the direction and/or with the approval of the General/National Secretaries.

746. We accept Ms Jolly's submission that the Respondent's acts and omissions, both those which constitute direct discrimination and those which constitute victimisation, are so intertwined that they should be regarded as constituting conduct extending over a period Because the acts of direct discrimination and victimisation had the same origins and were so closely linked, we are satisfied that this is a case where the 'conduct extending over a period' consisted of the detriments identified in Issues 7-11 under both causes of action. There was an 'ongoing situation' or 'continuing state of affairs', for which the Respondent was responsible, which survived the Respondent's eventual rejection of the transitional provisions.

747. Looking at the issue from the opposite perspective, we have concluded that it is impossible to characterise the conduct of Mr Rennie, Mr Fittes and Mr Duncan as a 'succession of unconnected or isolated specific acts' (to use the language of Choudhary P in *King* (para 614)). It all had its origins in, and was a manifestation of, the Respondent's support for/protection of the transitional provisions which, in turn, engendered its opposition to the PPC, with the concomitant refusal to fund it.

Mr Small's case

748. There is a specific issue in relation to Mr Small, who stopped being a police officer and a member of the Respondent in April 2019. Mr Galbraith-Marten relied on the passage from the judgment of Auld LJ in *Cast* at [28] (above at para 615) as authority for the proposition that in a 'policy' case, time runs from the termination of employment and, by analogy, from the termination of the membership of the staff association. We accept that submission.

749. Limitation expired in July 2019 in relation to Mr Small's claims which pre-dated the termination of his employment/membership. Those claims, and his 'post-termination claims' up to 15 May 2020, were presented out of time. We note that in his witness statement Mr Small specifically referred to the announcement of the Penningtons claims, the receipt of an email about the action which was sent out to all former members of the Respondent and the lack of any equivalent support for the PPC as having caused him acute distress.

750. We went on to consider whether it would be just and equitable to extend time in these circumstances. We had regard to the fact that the length of the extension sought is substantial and that no reason was advanced for Mr Small's delay in issuing proceedings. We considered that the explanation might be because consideration was not given by his legal adviser to the fact that different limitation considerations might apply as between existing and former members of the Federation. However, that is speculation on our part; we heard no evidence or submissions to that effect and so we did not take it into account.

751. We reminded ourselves that the failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Rathakrishnan*). We considered the balance of prejudice. The prejudice to the Claimant, if an extension were not granted, would be obvious and substantial: he would not have complaints adjudicated, which in relation to the other Claimants we have found to be meritorious. On the other hand, the usual prejudice to the Respondent (other than the risk of being held liable for his claims) does not apply in this case: the cogency of the evidence has not been affected by his delay; the Respondent has been able to defend the allegations vigorously and in detail (apart from a short period when Mr Fittes was understandably preoccupied by personal matters). We have concluded that there is no forensic prejudice to the Respondent which has defended the same allegations in relation to the other Claimants.

752. In all the circumstances, taking into account the length of the delay, the lack of a good explanation for it and our conclusions as to the balance of prejudice, we have concluded that it is just and equitable to extend time in relation to Mr Small's claims.

Employment Judge Massarella
Date: 6 June 2023

APPENDIX: FINAL AGREED LIST OF ISSUES

Background and Generic Issues

1. It is agreed that the Respondent is a trade organisation for the purposes of s.57 Equality Act 2010 (EqA2010).

2. It is agreed that the Respondent did not and has not agreed to date to provide any financial support to the 'police pensions challenge' (as defined in paragraph 1 of the POC) *(POC paragraph 84b, GOR paragraph 17b)*

3. It is agreed that the Respondent did not and had not agreed to provide any financial support for any other equality challenge by its members to the transitional provisions of the new police pension scheme established under the Police Pensions Regulations 2015 until the Respondent commenced funding legal claims for its members in May 2020 (*POC paragraph 84b and GOR paragraph 17b*).

4. It is agreed that the Claimants were more than 10 years from normal retirement age as at 1 April 2012 and are all members of Group 2 or Group 3, as defined in paragraph 16 Particulars of Claim. They contend that their comparators are in Group 1 or Group 2 accordingly.

5. The Claimants contend that they were members of the Respondent at all or some time of the material period. Such is not admitted at the date of this List of Issues but is an issue expected to be resolved, with precise dates of membership expected to be agreed, in advance of the final hearing. If not so resolved, were the Claimants, or any of them, members of the Respondent at the material time of each matter complained of (GOR para 3)?

6. Did the Claimants, or any of them, make an application to the Respondent for legal assistance to bring the claim as subsequently pursued in the police pensions challenge (GOR para 4)?

Alleged Detrimental treatment

7. Did the Respondent actively seek to deter and obstruct the Claimants from pursuing the police pensions challenge *(POC paragraph 84(a) & GOR paragraph 17(a))*

8. Did the Respondent create division and ill-feeling towards them for pursuing the police pensions challenge *((POC paragraph 84a & GOR paragraph 17(a))*?

9. Did the Respondent campaign, communicate and present a distorted, misleading and inaccurate assessment of the Claimants' legal claims, the costs and financial consequences of those claims, and group litigation in general, as well as the impact on other members? (*POC paragraph 84a, & GOR paragraph 17(a)*)?

Issues 7 – 9 are interwoven in POC paragraph 84(a). The Claimants rely on the matters set out in paragraphs 34 – 44, 46 – 68 and 70 – 80, as summarised at 9.1 – 9.33 below, individually and cumulatively, as constituting the conduct alleged in issues 7 – 9.

It is the Claimants' case:

(a) that the alleged discriminator in each instance is the General/National Secretary in post at the time, namely Ian Rennie (23 May 2008 – 23 May 2014), Andy Fittes (24 May 2014 – 30 September 2018) and Alex Duncan (1 October 2018 – 30 June 2022) and/or where set out below, the named individual;

(b) that each matter summarised below applies to each of the Claimants giving evidence in the liability trial which commenced on 6 September 2022, because they created, contributed to, and/or illustrated the detrimental treatment, summarised at issues 7 – 9 above, which impacted upon and affected all of the Claimants, as part of the Police Pensions Challenge.

(c) That where any of the matters relied upon took place at a local level, these were caused by (and illustrative of) the positioning and messaging adopted by the national level, which was cascaded down.

For clarity, it is recorded here that the Claimants also allege, in the issues below,

(d) that the conduct complained of was more pronounced at or around the time of each refusal to reconsider the funding or support position at each evolving stage of the police pensions challenge and/or parallel litigation, on an ongoing basis *(POC paragraph 84(a) and issue 10(e) below);*

(e) that the Respondent's alleged refusal to recognise the role of the Claimants in pursuing the pensions challenge in bringing positive benefit to the wider membership (issue 11 below) is manifested through the acts and communications summarised below *(POC paragraph 84(g)).*

9.1 "The Pensions Challenge: The PFEW Position" document dated 23 September 2015 [1683]; *POC paragraphs 34 – 35 and 43*.

9.2 Circulation of the summary of Neon Legal advice, September 2015 [1586] [1718]; *POC paragraph 36*.

9.3 The Respondent only met with Leigh Day once, on 6 October 2015, despite multiple attempts to keep the Respondent informed and updated on the progress of the parallel litigation and its relevance to the Respondent's members *(POC paragraph 37).* Following the 6 October 2015 meeting, the Respondent did not seek to, and did not, meet or discuss any matters with Leigh Day and refused to engage on the basis that the legal action was in the Claimants' private capacity as individuals rather than members *(POC paragraph 48).* The Claimants rely on the correspondence set out below:

9.3.1 29 November 2016 [2012], following the conclusion of the judicial pensions claim hearing in London Central ET. The invitation to meet was declined [2014] *(POC paragraphs 37, 48 and 50);*

9.3.2 15 December 2016 [2016] *(POC paragraphs 37 and 48)*;

9.3.3 16 January 2017 [2026], following the ET's judgment on the judicial pensions claim *(POC paragraphs 37, 48 and 51).* The invitation to meet was declined by Mr Fittes by letter dated 27 January 2017 [2061]; (*POC paragraph 53*);

9.3.4 10 March 2017 and the conduct alleged in it [2114]. The Respondent replied on 21 March 2017 [2138] (*POC paragraphs 37, 48 and 56*);

9.3.5 30 November 2017 [2182], following the alleged incident involving Ian Rennie (issue 9.14 below). The Respondent failed

to engage with a request to discuss the PPC [2191] (*POC paragraphs 37, 48 and 58);*

9.3.6 3 July 2019 [2573 & 2636] *(POC paragraphs 37 and 48)*.

9.4 The letter from Mr Fittes to members sent on or around 19 October 2015 [1841]; *POC paragraphs 38 - 39*.

9.5 "The Pensions Challenge: The PFEW Position" document dated 16 October 2015 [1823]; *POC paragraphs 40 and 43.*

9.6 The Q&A video with Mr Fittes on 9 October 2015 [1797]; *POC paragraphs 41 - 42.*

9.7 The Respondent emphasised, through circulars and correspondence at branch level, that the PPC could damage the benefits and long-term interests of all officers, even if the claims were successful; see [1683]; [1823] and branch-level correspondence. In relation to this issue, branch level correspondence is relied upon as background/evidential material only *(POC paragraphs 43 – 44).*

9.8 At a SAB meeting on 15 January 2016, Mr Fittes stated that the Respondent was not supporting the PPC [1907]; *POC paragraph 46.*

9.9 A pre-recorded Q&A video featuring Mr Fittes, distributed on or around 25 October 2016 (U Stream transcript [B2]); *POC paragraph 47.*

9.10 Notwithstanding the evidence, evolution and successes in the parallel litigation, the Respondent continued to refuse to reconsider their support, funding or engagement with PPC; *POC paragraph 49.*

9.11 The Respondent's communications following the judges' ET victory were dismissive, in the newsletter dated 17 January 2017 [2033]; original content at [2028]; letter to Leigh Day 27 January 2017 [2061] – [2062]; Metropolitan Police Federation News Update 15 January 2017 [2035]; West Midlands Police Federation magazine article Feb/March 2017 [2074]; *POC paragraph 52 and 53.*

9.12 Police Pensions – CARE (2015) Scheme FAQs document dated March 2017 [2093], *POC paragraph 54.*

9.13 The meeting on or about 31 January 2017 between Mr White (PFEW Chair and Mr Taylor (Chair, Essex Federation) and PPC Claimants [2070]; *POC paragraph 55.*

9.14 In November 2017 Ian Rennie (former General Secretary, who is alleged in this instance to be the discriminator) is understood to have expressed the view at a pensions seminar that the Claimants would be "advised to get out now" and to have made unjustifiable and decontextualised comments about

the potential for the Claimants to be liable for millions of pounds of litigation costs [2175] – [2191]; *POC paragraph 57.*

9.15 The Respondent's reaction to the EAT judgment in the parallel litigation dated 29 January 2018, in the update at [2391] and the article at [2392]; website update "The Employment Appeals Tribunal (EAT) rulings" 29 January 2018 [2370]; POLICE magazine article "Appeal decision still not clear cut" Feb/March 2018 [2390]; "The Legal Challenge by Judges and the Firefighters' Union – latest update from the PFEW" Nov/Dec 2018 [2435]; *POC paragraph 59.*

9.16 "Police Pensions" FAQs document dated February 2018, including the 2017 FAQs [2375] (*POC paragraph 60*).

9.17 The statement by Mark Emsden (Suffolk Police Federation General Secretary) in Suffolk Police Federation Magazine in December 2018 that "*For any of you who would like to throw some money away there is always the pension challenge group who will be happy to take you chase (sic) I am sure*." [2448]; *POC paragraph 61*.

9.18 Following the Court of Appeal decision in the parallel litigation, the Respondent continued to portray the PPC in negative terms and failed to recognise the nature, impact or value of the Court of Appeal decision on its members, in particular those in the PPC, in the Research & Policy Support Briefing Paper dated 16 January 2019 [2480]; update posted on Buzz dated 20 January 2018 [A199]; email from Alex Duncan to National Board and National Council, "Court of Appeal Ruling – Judges' and Firefighters'", 21 December 2018 [A200] and [2441]; email Police Federation of England and Wales to Tieneke Jones "PFEW to obtain further legal advice on pensions" 10 January 2019 [A204]; Police Magazine article "Appeal Court Ruling on Public Sector Pensions" February/March 2019 [2517], *POC paragraph 62*.

9.19 Police Federation Official Podcast with Mr Duncan and Mr Apter in January 2019 [2501]; *POC paragraph 63.*

9.20 "Pensions FAQs - July 2019" published after the Supreme Court ruling on 27 June 2019 [2630]; *POC paragraph 64.*

9.21 Website article: "Collective pensions statement", dated 10 July 2019 [2627]; *POC paragraph 65*.

9.22 Joint application by the Respondent, the Scottish Police Federation and the other police Associations to become interested parties in the PPC and the claims made therein [2720]; *POC paragraph 66.*

9.23 The Respondent did not at any point in the PPC concede or accept that the Claimants' actions had been of benefit to the wider membership and instead portrayed the Claimants as pursuing an individual choice which jeopardised the financial interests of other members; *POC paragraphs 67 and 77.*

9.24 The Respondent failed to respond in a timely manner to Leigh Day's 5 March 2020 letter to the Respondent, including the request to cover the Claimants' costs associated with the PPC [2886]; *POC paragraph 68 .*

9.25 15 May 2020 press release "PFEW to launch Compensation Claim against Government" [2952]; *POC paragraphs 70 – 71.*

9.26 Q&A video with Mr Donald and Mr Duncan dated 20 May 2020 (referred to in the POC as dating from around 4 June 2020) [3031]; *POC paragraph 72.*

9.27 Correspondence dating from May/June 2020 announcing the Respondent's compensation claim stating that it was for those who had not already submitted a claim: "PFEW Pensions Compensation Claim" [2954]; PFEW Pension Compensation Claim - Eligibility FAQs [2955]; email 15 May 2020: "FAQs – PFEW Pension Compensation Claim" and attached FAQs [2960]; email to Scott Hendry from Pension Claim 2 June 2020: "Pension Compensation Claim" [3087]; email from Tony Fairclough to Scott Hendry "Re: Pension Challenge" including extract from FAQs on website [3138]; page from July 2020 POLICE magazine announcing compensation claim [3145]; *POC paragraph 72.*

9.28 "PFEW Pension Compensation document" dating from May/June 2020 [2957]; *POC paragraph 72.*

9.29 "Pension Compensation Claim" Member FAQs dating from May/June 2020 [2999]; *POC paragraph 73.*

9.30 Q&A video with Mr Donald and Mr Duncan dated 18 June 2020 [3123]; *POC paragraphs 74- 76.*

9.31 In letters dated 10 July 2020 [3171] and 10 August 2020 [3222], the Respondent denied all acts of discrimination and refused to pay the Claimants' legal costs in the PPC *(POC paragraph 78).*

9.32 The West Midlands Police Federation "Police Pension Survey" [3385]; *POC paragraph 79.*

9.33 The Respondent continues to refuse to support, fund or meaningfully assist the Claimants in respect of the PPC despite now recognising the validity of the Equality Act 2010 claims; *POC paragraph 80.*

10. Did the Respondent:

(a) Refuse to provide any financial support (whether in whole, part or conditional) for any equality challenge to the transitional provisions by its members and/or the police pensions challenge by the Claimants from 2015 (*POC paragraph 84b, & GOR paragraph 17(b)*)?;

(b) Refuse to consider provision of any financial support (whether in whole, part or conditional) for any equality challenge to the transitional provisions by its

members and/or the police pensions challenge by the Claimants from 2015? (*POC paragraph 84b, & GOR paragraph 17(b)*)?;

(c) In respect of 10(a) and 10(b), if the tribunal finds that there was such refusal, was this on an ongoing and continuing basis (as the Claimants contend), or was the decision not to support such a challenge a one-off decision (as the Respondent contends) (*POC paragraph 84b, & GOR paragraph 17(b)*?

(d) Refuse to reconsider and/or overturn its initial policy (as alleged by the Claimants) or decision (as alleged by the Respondent) not to provide financial support for the Claimants, in particular:

(i) After the judgments at the ET, EAT and Court of Appeal in the parallel litigation (as defined in paragraph 3 Particulars of Claim) (*POC paragraph 84c & GOR para 17(c))*);

(ii) After the Secretary of State for the Home Department and others' concession that there had been unlawful age discrimination in the parallel litigation (*POC paragraph 84d, & GOR para 17(d)*);

(iii) When the Respondent announced it would issue discrimination claims for its wider membership in May 2020 (*POC paragraph 84e, & GOR para 17(e))*;

and/or:

(iv) In response to specific requests by the Claimants' lawyers to pay or contribute as confirmed by Kennedys on 10 July 2020 (*POC paragraph 84f, & GOR para 17(f)*)?

(e) Did the alleged conduct in paragraph 7-9 above become more pronounced around the time of each of the stages in paragraph 10(c) above litigation (*POC paragraph 84a*)?

11. Has the Respondent refused to recognise the role of the Claimants in pursuing the police pensions challenge in bringing positive benefit to the wider membership from 2015 on an ongoing and continuing basis manifested through the communications described at POC paragraph 84(a) (see issue 9 above) and the ongoing refusal to provide financial support described at POC paragraphs 84(b) – (f) (see issues 10(a) – (d) above); (*POC paragraph 84g, & GOR para 17(g)*)?

12. Has the Respondent used some or all of the Claimants' membership fees to fund legal proceedings for other members to pursue the same remedy the Claimants pursued using private funds (*POC paragraph 84h, & GOR paras 17(h)*)?

13. Does any or all of the conduct at paragraphs 7 -12 above amount to detrimental treatment of the Claimants (the 'alleged detrimental treatment')?

Victimisation – s.27 EqA2010 in conjunction with ss.57 (5) (a) and/or (d) EqA2010

14. Was the police pensions challenge (as defined in paragraph 1 POC), represented by Leigh Day solicitors as part of a group action, which the Claimants had brought, or may bring, a protected act pursuant to s27(2)(a) or (d) EqA2010? (*POC paragraph 85)*

15. Did the Respondent believe that the Claimants had done, or may do, the protected act?

16. If the Respondent subjected the Claimants to any or all of the alleged detrimental treatment, did it do so because the Claimants did such protected act or because the Respondent believed that they had done, or may do, a protected act (*POC paragraph 85*) (as the Claimants contend)?

    The Respondent contends that it was because it had taken the decision not bring a legal challenge to the transitional provisions of the new police pension scheme established under the Police Pensions Regulations 2015 (GOR 15, 16, & 17)?

Direct Age Discrimination - s.13 of the Equality act 2010 (EqA) in conjunction with s.57(2)(a) and/or (d) EqA2010

17. Did the Respondent support, promote and/or protect transitional arrangements for the older Groups 1 and / or 2 through the adoption and maintenance of an overarching policy to that effect (*POC paragraph 89*)?

18. If so, did that constitute less favourable treatment because of age (*GOR paras 19-22*)*?*

19. Did the Respondent take steps to protect the transitional arrangements which provided pension protection for Groups 1 and/or 2? The Claimants rely on any or all of the steps defined as the alleged detrimental treatment in paragraphs 7 - 13 above, whether individually or cumulatively (*POC paragraph 90*).

20. If so, did that constitute less favourable treatment because of age (*GOR paras 19-22*)*?*

21. Did any of the alleged detrimental treatment above itself constitute acts of less favourable treatment because of age (*POC paragraph 91, & GOR paras 19-22*)?

22. If the tribunal finds that any acts of less favourable treatment because of age have taken place, did the Respondent do those acts, or any of them, in pursuance of a legitimate aim or aims? The aims relied on by the Respondent are as follows *(GOR para. 19):*

    a. to improve the terms of the Police Pension Scheme for the benefit of as many of its members as it could; and/or
    b. to act in the interests of its members as a whole; and/or

c. to utilise its funds effectively and proportionately in accordance with the legal advice it had received and in accordance with its merits-based funding rules for legal support.

23. If so, can the Respondent show that its treatment of the Claimants was a proportionate means of achieving its stated legitimate aim or aims.

Indirect Age discrimination – s.19 in conjunction with ss.57(2)(a) and/or (d) of the Equality Act 2010

24. The Respondent accepts and avers that it sought to improve the terms of the Police Pension Scheme for the benefit of as many of its members as it could, and that it applied that practice to all of its members (*GOR para 23*).

25. Do the following also amount to PCPs, and if so, did the Respondent apply any of them to its members at all material times (*POC paragraph 96, & GOR para 23 -26*):

(a) Supporting, promoting and/or protecting the government's deal on transitional arrangements; and/or
(b) Prioritising the protection of the transitional arrangements over any legal challenge; and/or
(c) The decision(s) not to support, or reconsider supporting, funding or substantively engaging with the police pensions challenge and matters arising through the parallel litigation?
(d) The practice of seeking to maintain the terms of the new police pension scheme for the benefit of as many of its members as it could (Note that the Respondent accepts and avers at paragraph 24 that it applied a PCP of seeking to improve the terms of the scheme for the benefit of as many of its members as it could but it denies that it applied a PCP of seeking the *maintain* the terms of the new police pension for the benefit of as many of its members as it could).

26. Did any or all of the alleged PCPs at paragraphs 24 and 25 above put, or would they have put, the Claimants at a particular disadvantage, namely pecuniary and non-pecuniary damage as set out at POC paragraph 84 and issues 7 - 12 above, when compared with older members within Group 1 and/or Group 2 (*POC paragraph 98, & GOR para 24*)?

27. Did they put, or would they have put, the Claimants at that disadvantage (GOR para 24)?

28. If so, did the Respondent apply those PCPs, or any of them, in pursuance of a legitimate aim or aims? The aims relied on by the Respondent are as follows (GOR paras. 19, 23 and 25):

a. to improve the terms of the Police Pension Scheme for the benefit of as many of its members as it could; and/or
b. to act in the interests of its members as a whole; and/or

c. to utilise its funds effectively and proportionately in accordance with the legal advice it had received and in accordance with its merits-based funding rules for legal support.

29. If so can the Respondent show that the PCPs (or any of them) were a proportionate means of achieving its stated legitimate aim or aims.

Jurisdiction

30. Does the Tribunal have jurisdiction to hear all of the claims above? In particular:

a. Is the claim in time in respect of all allegations? If not, which allegations are out of time?
b. If any of the allegations are out of time, do any of them constitute conduct extending over a period such as to be treated as done at the end of the period?
c. If so, which particular allegations should be considered constituting a continuing act, and does such render the claim in time as regards those allegations?
d. If any of the complaints are out of time, is it just and equitable to extend time for the Tribunal to hear the complaint?

(*POC paragraph 101, & GOR 27-29*)

Remedy

31. The Claimants seek a declaration of discrimination.

32. If the Tribunal upholds any of the claims, should the Tribunal award the following to any of the Claimants,, and, if so, which Claimants and what amount:

a. Injury to feelings;
b. Financial loss comprising costs incurred by the Claimants in pursuing the pensions challenge litigation and any actuarial costs incurred;
c. Interest?

33. Did the Respondent act in a high-handed, malicious, insulting or oppressive manner? If so, did this aggravate any injury to feelings suffered by the Claimants so as to justify an award of aggravated damages?

34. Should the Tribunal make any recommendations to obviate or reduce the adverse effects on the Claimants in respect of the matters complained about and if so, what should those recommendations be?