EMPLOYMENT TRIBUNALS

Claimant: Mr R Wagener

Respondent: R1: The Cabinet Office

R2: The Commissioners of His Majesty's Revenue and Customs

Heard at: Liverpool **On:** 10,11,12 and 13 July 2023
in chambers on 16 August 2023

Before: Employment Judge Aspinall
Ms A Ross-Sercombe
Mr A Wells

Representation
Claimant: In person
Respondent: Ms Ling, Counsel

Reserved Judgment and Reasons

1. In case number 2407553-21 against The Cabinet Office the claimant's complaint of discrimination arising from disability fails. The claimant's complaint of failure to make reasonable adjustment fails.

2. In case number 2401493-22 against The Commissioners of His Majesty's Revenue and Customs the claimant's complaint of discrimination arising from disability fails and the claimant's complaint of failure to make reasonable adjustment fails. The claimant's complaint of indirect discrimination fails.

Reasons

Background

1. By a Claim Form dated 13 June 2021 the claimant brought a complaint for discrimination arising from disability under Section 15 Equality Act 2010 and failure to reasonably adjust under Section 21 Equality Act 2010 against Michael Gove, the relevant minister. The respondent defended the complaint. The claimant brought complaints in a

second Claim Form on 22 February 2022 alleging Section 15 and Section 21 discrimination and indirect discrimination under Section 19 Equality Act 2010, this time against The Commissioners of His Majesty's Revenue and Customs ("HMRC").

2. The claimant served 37 years as a civil servant for HMRC. He was diagnosed, as a young man, with Type 1 Diabetes. In the latter years of his service there was a pay freeze. A pay deal of around 13.56 % was announced in February 2021, to be paid out over 3 years from June 2020. He retired on his 60th birthday, 30 April 2021. This meant he would get only ten months of one year's pay deal and that would have an impact on his pension. His claim is that he has suffered disability discrimination in not achieving the full benefit of the pay deal on his pension.

History of the proceedings

3. There was a case management hearing on 5 October 2021 and on 21 November 2022 the Reserved Decision of Employment Judge Doyle determined the proper respondent to the first claim to be The Cabinet Officer ("CO"), and not the minister personally. The claimant's request for reconsideration of that decision was refused. He made an application to the Employment Appeal Tribunal appealing the decision of 21 November 2022 which was acknowledged on 3 February 2023. Neither party requested adjournment to await the outcome of a decision by the Employment Appeal Tribunal.

4. The claimant's second claim was brought against HMRC. The section 19 indirect disability discrimination complaint lies only against HMRC. The section 15 and section 21 complaints are brought against each respondent though pleaded slightly differently for each. In its application of the law, following the agreed list of issues, this judgment addresses the complaints against each respondent separately.

The list of issues

5. The claimant does not pursue an age discrimination complaint against either respondent. In so far as earlier pleadings intimated any such claim it is dismissed on withdrawal. In 2018 the claimant had brought an indirect age discrimination complaint in relation to the impact of the pay freeze on him on. It was struck out as having no reasonable prospect of success. There are details of that complaint below because the respondent said that what the claimant said in that case shows his thinking at that time and is relevant to his credibility as to his reason for retirement on 30 April 2021 in this case.

6. There was discussion about the indirect disability discrimination complaint in this case against HMRC. The claimant attempted to pursue an argument that he had always intended to also bring it against CO. He referred to the fact that it was mentioned in his first claim form. Ms Ling did not dispute that it was mentioned but pointed to the Agreed Lists of Issues, the two case management hearings and the lack of any pleading on the point throughout. The claimant was offered the opportunity to make an amendment application. He chose not to do so.

7. There was discussion at the outset of the hearing about the provision, criterion or practice in each section 21 complaint and the section 19 complaint. The Tribunal emphasised the importance of a provision, criterion or practice being drafted with precision. The Tribunal pointed out (i) that the particular disadvantage that the claimant

complained of, not getting the pay award reflected in his pensionable pay, was not reflected in his drafting and (ii) the something arising his section 15 complaint did not make sense and (iii) the substantial disadvantages he alleged in his section 21 complaints did not flow from the PCP's he alleged, and the particular disadvantage in his section 19 complaint was also problematic. The claimant was content, if not adamant, that his claim was drafted as he wished it to be.

8. The parties had agreed the following list of issues. The Tribunal noted when preparing this judgment that the language of the statute for Section 21 and Section 19 had not been reproduced correctly so that Section 21 wrongly referred to the claimant's disability and section 19 to disabled persons. Those words appear in brackets here with the correct language inserted by the Tribunal in italics and applied below.

Disability

1.1 The Respondent accepts that the Claimant was a disabled person for the purposes of s.6 Equality Act 2010 in respect of Type 1 Diabetes in the relevant period of 1 March 2021 to 31 May 2022.

1.2 The Respondent denies that the Claimant is a disabled person for the purposes of s.6 Equality Act 2010 in respect of Myalgic Encephalomyelitis/Chronic Fatigue Syndrome. Therefore, the Tribunal will need to decide the following:

1.2.1 Did the Claimant have a physical or mental impairment?

1.2.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

1.2.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.2.4 If so. would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

1.2.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.2.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

1.2.5.2 if not, were they likely to recur?

1.3 In respect of knowledge:

1.3.1 Did the Respondent have knowledge of or could reasonably be expected to have knowledge of the Claimant's disability or disabilities?

1.3.2 Is the issue of knowledge separable between the two Respondents?

First Claim

Failure to Make Reasonable Adjustments (Sections 20 and 21 Equality Act 2010 ("EqA")

2. Did CO("CO") apply the following provision criterion or practice ("PCP")?

- **The refusal to apply "rule 2.24" other than by way of request made by an employer coupled with confirmation of financial support**

4. Did such PCP put C at a substantial disadvantage in relation to a relevant matter compared to (someone without the claimant's disability?) *persons who are not disabled*

- **C contends that the substantial disadvantage was that his disability/disabilities prevented him from remaining in employment through to 31 May 2023**

5. Did CO know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

6. What steps could have been taken to avoid the disadvantage?

- The burden of proof does not lie with C but he contends that the reasonable adjustment would have been the application of "rule 2.24"

7. Was it reasonable for CO to have taken those steps?

8. Did CO fail to take those steps?

Discrimination arising out of Disability (section 15 Equality Act 2010)

9. Did CO treat C unfavourably by requiring him to remain in employment through to 31 May 2023 in order to benefit in terms of his pension entitlement from the pay increase made in 2021?

10. If so, was this because of something arising in consequence of any disability?

- **C contends that his disability/disabilities prevented him from remaining in employment through to 31 May 2023**

3. Can any unfavourable treatment be justified as a proportionate means of achieving a legitimate aim?

CO relies on the following as legitimate aims:

(1) To maintain consistent, transparent and certain pension

scheme rules, reflecting the service given by the individual to qualify for a certain level of pension

(2) To maintain compliance with the rules of the pension scheme and the relevant guidance

(3) To ensure the exercise of discretion under rule 2.24 is of benefit to public service and is not used for purposes beyond its scope which may, for example, incentivise disabled members of the PCSPS to leave at or before their scheme pension age in a manner that would have significant implications for all government departments and agencies

(4) To ensure that the reasons for any application for added years are supported by a business case, are clear and legitimate and that CO has the correct information, given that it is not the employer

(5) To ensure that any added years are adequately and properly funded

(6) To ensure the proper management of taxpayers' funds in accordance with the principles set out in the Managing Public Money guidance.

Limitation

12. Are there any alleged breaches of duty occurring on and/or prior to 28 February 2021 and, if so, are they prima facie out of time?

13. Do any such alleged breaches form part of a continuing course of discriminatory conduct?

14. If any matters are considered to be out of time, would it be just and equitable to extend time in accordance with the provisions of section123 of the Equality Act 2010?

Second Claim
Failure to Make Reasonable Adjustments (Sections 20 and 21 Equality Act 2010 ("EqA")

15. Did the Second Respondent ("HMRC") apply the following PCP?

- **the application of "rule 3.4" with specific reference to the interpretation of "exceptional circumstances"**

16. Did such PCP put C at a substantial disadvantage in relation to a relevant matter compared to (someone without the claimant's disability*?) persons who are not disabled*

- **C contends that the substantial disadvantage was**

that his disability/disabilities prevented him from remaining in employment through h to 31 May 2023

17. Did HMRC know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

18. What steps could have been taken to avoid the disadvantage?

19. The burden of proof does not lie with C but he contends that the reasonable adjustment would have been submitting a "business case" and/or providing appropriate financial support in support of his application under "rule 2.24"

20. Was it reasonable for HMRC to have taken those steps?

21. Did HMRC fail to take those steps?

Discrimination arising out of Disability (section 15 Equality Act 2010)

22. Did HMRC treat C unfavourably by failing to submit a "business case" and/or provide appropriate financial support in support of his application under "rule 2.24"?

23. If so, was this because of something arising in consequence of any disability?

-C contends that his disability/disabilities prevented him from remaining in employment through to 31 May 2023

24. Can any unfavourable treatment be justified as a proportionate means of achieving a legitimate aim ?

HMRC relies on the following as legitimate aims:

(1) To comply with the rules of the PCSPS and relevant guidance and not to put forward a business case that did not amount to "special circumstances" for the purposes of those rules and guidance

(2) To maintain compliance with the spirit and letter of the pension scheme rules so as not to encourage pension scheme administrators to overstep the reach of their authority

(3) To avoid setting a precedent that could possibly endorse and incentivise disabled members of the PCSPS to leave at or before their scheme retirement age and that would also have significant financial implications for HMRC and also for other government departments and agencies

(4) To maintain the financial viability of HMRC's pension obligations and costs

(5) To ensure the proper management of taxpayers' funds in accordance

with the principles set out in the Managing Public Money guidance

Indirect Discrimination

25. Did HMRC apply the following PCP?

- **the application of "rule 3.4" with specific reference to the interpretation of "exceptional circumstances"**

26. Did or would the application of such PCP put (disabled people) *persons with whom B shares the characteristic* at a particular disadvantage when compared with (people who are not disabled?) *persons with whom B does not share it ?*

27. Did the application of such PCP put C at that disadvantage in relation to a relevant matter in comparison with (persons who are not disabled?) *persons with whom he does not share the characteristic*

- C contends that the substantial disadvantage was that his disability/disabilities prevented him from remaining in employment through to 31 May 2023

28. If the other elements of indirect discrimination are found, can HMRC show that such a PCP is a proportionate means of achieving a legitimate aim?

HMRC relies on the following as legitimate aims:

(1) To comply with the rules of the PCSPS and relevant guidance and not to put forward a business case that did not amount to "special circumstances" for the purposes of those rules and guidance

(2) To maintain compliance with the spirit and letter of the pension scheme rules so as not to encourage pension scheme administrators to overstep the reach of their authority

(3) To avoid setting a precedent that could possibly endorse and incentivise disabled members of the PCSPS to leave at or before their scheme retirement age and that would also have significant financial implications for HMRC and also for other government departments and agencies

(4) To maintain the financial viability of HMRC's pension obligations and costs

(5) To ensure the proper management of taxpayers' funds in accordance with the principles set out in the Managing Public Money guidance

The hearing

Reasonable Adjustments

9. The claimant needs to test his blood sugar levels regularly. He needs breaks to do so and a fixed break between 12 noon and around 12.30 each day to manage his condition. He also has ME/CFS which he says can make him feel tired and can give him brain fog.

10. Adjustments were agreed, and managed flexibly to meet the claimant's needs, including, shorter sitting times, more breaks, an adjusted lunch break from 12 – 1pm, the support of an HMCTS first aider on hand, a meeting with the first aider to outline any intervention needed if the claimant became unwell and breaks between witnesses and extra reading time.

11. In addition to the adjustments put in place the Tribunal offered support to the claimant as a litigant in person including using clear English, avoiding any jargon or legalistic language, summarizing and explaining key points and using checking back questions and keeping a note of points made in closing submission by the respondent so that the claimant could then be directed to them in his closing submission.

Documents

12. The parties had prepared a bundle of two lever arch files of 778 pages. It did not include full GP medical records, just selected extracts and correspondences relating to the claimant's health.

13. Ms Ling submitted a Skeleton Argument and Bundle of Authorities electronically together with the Civil Service Pension Scheme Rules at the start of the case. She revised her Skeleton Argument in a second draft used in closing submissions. She had also prepared a Chronology in neutral terms. The claimant was unable to agree the Chronology. He said he would need time as he thinks there are relevant things omitted that he would wish to include. It was agreed that it would not be proportionate to allow an adjournment merely to get agreement on a chronology that could have been agreed in advance.

14. The claimant produced a document that he described as his accurate sickness record. He said that the respondent's record did not accurately record his sickness absence. The claimant said that the real extent of his absence is relevant to establishing whether he was disabled by reason of ME/CFS or not. It transpired from questioning by the Tribunal that this document which the Tribunal labelled "the Rest Record" was not a record of absence but a record, compiled very recently for the purposes of this hearing from other records the claimant had made but not previously shared with the respondent, of days when he had had to take rest periods. He had worked on those days and not been off sick or reported himself absent to his employer but had, for example, felt extreme fatigue or headache and

needed to go to bed for two hours or more during what would normally be working hours but he had worked flexibly to make up that time. The respondent did not object to the Rest Record being included. It was added at page 325A behind the respondent's sickness absence record.

Oral evidence

15. The Tribunal heard oral evidence from the claimant. He was someone who answered literally; for example when taken to a document and asked about content with the question *Do you see that ?* He answered yes. He was not agreeing its content or meaning, just that he saw it there. The Tribunal listened carefully and where necessary interjected to ensure it was recording his evidence accurately.

16. The claimant was a meticulously prepared and experienced litigant in person. The bundle of documents revealed that on 1 November 2018 he had brought a complaint in case number 2416695-18 against HRMC and HM Treasury that the pay freeze amounted to indirect age discrimination. The claimant represented himself in those proceedings. That claim came to a public preliminary hearing on 24 June 2019 and was struck out by Employment Judge Horne on the ground that it had no reasonable prospect of success.

17. The claimant gave his evidence in a precise way. He said he was surprised after being sworn in and having his statement accepted as evidence in chief to go straight to being questioned. He said he had thought there would be more time for him to state his case. He was offered the opportunity to make supplemental comment to his statement but preferred to do that in response to questions. He was allowed time and latitude in his responses under cross-examination and in an opportunity given at the end of his evidence to add anything else he wanted to say.

18. During his oral evidence the claimant said, for the first time, that he would have worked on and achieved the pay rise, retiring in June 2023 *if he had not had ME/CFS*. This was not credible because the contemporaneous documents reveal that he does not mention ME/CFS as either a reason for retirement or a health issue before his retirement or at all until October 2021. His letters to Boris Johnson and Michael Gove, when read holistically, show that his references to ill health are inextricably bound up with his life expectancy and therefore related to his diabetes as his stated reason for resignation at 30 April 2021. It is also not credible because this had not been his stated position in his first claim form in this case brought in June 2021 2407553-21 (and is only mentioned in his second claim form in this case brought in 2022, 2401493-22 case) nor in his 2018 previous litigation. In his witness statement prepared to defend the strike out application in case number 2416695-2018 for indirect age discrimination, referred to by the respondent, he said *The need for the claimant to retire at his normal retirement age stems from health issues relating to himself and a dependent relative.* This was before his ME/CFS symptoms or diagnosis. It was also not credible because the claimant accepted in cross examination that the decision to retire at 60 had been made after he did his research on life expectancy in 2012 and before 2018 and before his ME/CFS diagnosis and was made because of his reduced life expectancy.

19. The Tribunal finds that as a witness he was supplementing his evidence on motivation to retire related to ME/CFS so as to support his argument that he was disabled by reason of ME/CFS prior to his retirement. The Tribunal finds that the more credible evidence, consistent with contemporaneous documents and his actions at the time, is that he retired at 60 because he believed himself to have a

reduced life expectancy because of diabetes, he would have done this whether he had ME/CFS or not.

20. In giving evidence generally the claimant listened actively and answered with care. He knew the bundle well and took the Tribunal to relevant documents when answering questions. He had a good recollection of events and described the process of his decision making about his retirement over a number of years from 2012 culminating in a period of two months of intense, daily discussions with his wife before his retirement in April 2021. The claimant was able to refer to authorities and apply principles from those authorities to his own case and distinguish his case from authorities referred to by the respondent. He had prepared lists of questions for each witness and submitted a Skeleton Argument for his closing submissions which he then revised into a second draft.

21. Ms Martin for HMRC gave her evidence in a straightforward way. She made the decision not to exercise the HMRC discretion in the claimant's favour. She conceded that she had known that he had been diagnosed with ME/CFS when she made her decision in around December 2021 not to exercise the discretion in his favour. She apologised for the delay between making her decision and writing her Case Report and communicating that decision to the claimant in May 2022.

22. Mr Hennem for the Cabinet Office gave his evidence in a straightforward and helpful way explaining provisions other than the use of clause 2.24 that could assist employees in achieving higher reckonable service.

The Facts

Employment background

23. The claimant was as Senior Customer Compliance Officer with 37 and a half years' service for HMRC when he retired from service on his sixtieth birthday on 30 April 2021.

24. He was diagnosed with Type 1 Diabetes when he was 17. He has always managed his blood sugar levels well. In 2012 he saw a report that indicated a life expectancy reduced by as much as 15 years below national average for those with type 1 diabetes. He conducted his own research and studies and calculated his own life expectancy to be age 69. He shared his estimate of reduction in life expectancy with his consultant physician in diabetes and endocrinology Dr P J Weston on 7 August 2012. Dr Weston said it is difficult to quantify increased mortality for an individual patient but saw no reason to contradict the claimant's reasoning. The claimant from this point onwards in 2012 had decided to retire earlier than he might otherwise have done.

The Pension Scheme

25. He was a member of The Principal Civil Service Pension Scheme 1972. It provided for a normal retirement age of 60. At Clause 2.24 it provided:

The Minister has discretion to grant added years of reckonable service to a civil servant if there are special circumstances to justify this. The number of added years which may be granted will be subject to limits set out in rule 3.2 (limit on length of reckonable service). Subject to those limits the Minister may determine whether the added years are to be treated as accruing evenly over the period from

the date of entry into the Civil Service until the pension age or over such other period as the Minister may specify.

26. Rule 2.24 was originally used to grant added years within 6 months of a member joining the Scheme. It was to help new entrant / late joiners to the scheme who could not achieve full 40 years service before retirement age. It was at the request of the employer to the Scheme Manager and it was to be funded "at management's expense". In a Pay and Conditions of Service Code from 1981 the discretion was described as being for the Treasury, and later the relevant Civil Service Minister.

27. There was an Employer's Guide to the PCS Pension Scheme that gave guidance on the circumstances in which added years could be granted. The guidance at Section 3.4 entitled "Scheme Flexibilities -Reserved Decisions to be Referred to the Scheme Manager" ("The Guidance"). It said that departments (HMRC) had discretion to offer added years in certain circumstances. They included

- At 4.2 at the discretion of the Cabinet Office to aid to recruitment and or retention. (the 2.24 discretion)
- At 4.3 when the members resignation was desirable for management reasons
- At 4.4 to retain a member after retirement age

28. The Guidance provided that in the exceptional circumstances in which an employer (HMRC) wishes to buy added years of reckonable service for a member employers will need to make a business case to the Scheme Manager. If the Scheme Manager agrees the proposal they will also decide the cost of the added years. That business case and confirmation of funding would then go to the Minister / CO for the exercise of the discretion based on a "special circumstances" test.

29. There were also provisions allowing for early ill health retirement which could have augmented reckonable service and provisions for death in service and death in early retirement benefits.

The pay freeze

30. The following extract from the judgment of Employment Judge Horne, provided in the bundle for this case, sets out the factual background to the pay freeze.

> *21. It is not my task in a hearing such as this to make any contentious findings of fact. What follows is my understanding of the agreed facts, combined with facts that I have assumed, in the claimant's favour, to be true.*
>
> *22. Much of the background has been taken from a statement of agreed facts which appears in Annex 1 to the judgment of Simler P in McNeil v.*

Revenue & Customs Commrs [2018] ICR 1529. Neither party to this case suggests that any of the facts are incorrect. I have reproduced the agreed facts so far as they appear to me to be relevant:

"HMRC's Pay System – Background

1. *HM Treasury has overall responsibility for the Government's public sector pay policy, which includes defining the overall parameters for Civil Service pay and budget for all government departments. Each year, HM Treasury publishes Civil Service Pay Guidance. …*

2. *Pay for delegated grades (AA to Grade 6) has been delegated to Government departments since 1996. In line with public sector pay policy, and therefore operating within the pay guidance set by HM Treasury, HMRC submits a pay remit proposal in relation to these grades to its Minister, which for HMRC is the Treasury Minister. Following approval of the total spending allocation, and under collective bargaining, HMRC negotiates the pay settlement with the two Departmental Trade Unions (collectively referred to in this statement as the 'DTUS')…*

3. *HMRC was formed in April 2005 by the merger of two separate Government departments, Inland Revenue ('IR') and HM Customs and Excise ('C&E'). Following negotiations with the DTUS, a set of pay and other terms and conditions was implemented for staff in the new department. The new terms and conditions aligned the pay and grading systems of the former departments. They also involved an "assimilation exercise" in 2006 based upon the length of past satisfactory performance in the current grade. Further details about this assimilation exercise are given below.*

Pre-merger pay structures

4. *Prior to the merger in 2005, IR and C&E had separate delegated pay arrangements aligned with their own business needs, considering a range of factors including grading, location, staffing levels and business priorities.*

Inland Revenue pay structure

5. *As at April 2005 IR was the bigger department with approximately 77,000 people, compared to 24,000 in C&E …*

6. *IR's pre-merger grading structure mirrored the traditional Civil Service structure though the grades had different names. For example, … Grade 6 was Band B1.*

HMRC's post-merger pay structure

20. *A new set of pay, grading, terms and conditions were required for the newly merged HMRC as the former departments arrangements were so different, especially for C&E staff who would move from an eleven banded structure back to a traditional seven banded one. Transitional arrangements also had to be put in place.*

22. *Since 2005, the merged department has had seven grades below the Senior Civil Service, which reflects the traditional Civil Service grading structure … Each of the seven grades has a London and a National pay band .. with the London pay band being on average 15% higher owing to the associated costs of living in London. Each pay band has a minimum and a maximum rate of pay, with no set points (such as milestones, or incremental increases) in between…*

HMRC pay awards

28. Historically, pay awards were agreed with HM Treasury as a multi-year settlement, often covering three years at a time. This practise ceased following the public sector pay freeze (see below), so pay awards are now settled on an annual basis. To be eligible for a pay award, a person must have been in post on 1 June of the settlement year, and have completed at least 91 days paid reckonable service in the appraisal year ending 31 March, with a performance mark of Top, Good or Improvement Needed….

...

2008/09 to 2010/11 Settlement (pages 1064-1073)

38. *By 2008, pay band lengths had decreased from a combined IR/CE average of 38% (pre-merger) down to 23% …*

39. *In 2008, the overall pay settlement from 1 June 2008 to 31 May 2011 was 2.4% for each of the three years, and in 2008/09 pay offer HMRC announced that for the 2009/10 and 2010/11 pay awards, greater priority would be given to progression and further range shortening … In 2008/09, the minima for all grades increased by 3% by 4.1% on average for 2009/10, and by 4.6% on average for 2010/11. The settlement was agreed by the trade union.*

2011/12 to 2012/13 settlement (pages 1081-1087)

40. *The Government announced a two year pay freeze for public sector workforces from 2011 for those earning above £21,000 per annum, which included all … Grade 6s. The immediate pay freeze applied to all organisations and departments in the Civil Service that had not entered into legally binding pay agreements. As HMRC had already agreed a pay settlement for 2010, the pay freeze took effect from June 2011 for staff in grades AA to Grade 6…*

41. *…Following the Government's Spending Review published in October 2010, in the 2011 Autumn Statement the Chancellor of the Exchequer announced that pay awards for the public sector would average 1% for the two years following the pay freeze – 2013/14 … This was later extended to three years, i.e. to 2015/16, in the 2013 Budget …*

2013/14 settlement

42. *For the 2013 pay award, which averaged 1%, the value of the award paid to people at the pay range maximum for all grades was 0.70%. Awards greater than 1% were paid to people below the maximum, which would provide them with some movement towards the maximum*

… The maximum was frozen. The award was implemented following discussion and consultation with DTUS, rather than negotiation, as they do not have a mandate to negotiate pay settlements below 3%.

2014/15 settlement

43. *For the 2014 pay award, which again averaged 1%, the value of the award paid to people at the pay range maximum was 0.50% for Grade 7s and 6s, and 0.55% for other grades. Awards greater than 1% were paid to people below the maximum to provide them with some movement towards the maximum (see pages 1153 and 1168). The maximum of the pay range was frozen and the pay range minimum increased. For the first time, people on the 2013 minimum received the increase to the new minimum and then received the pay award. In previous years, the new minimum was applied after the pay award. As in the previous year, the award was implemented following discussion and consultation with DTUS rather than negotiation.*

2015/16 settlement

...

45. *The 1% average pay award applicable to the public sector workforce in 2013/14 and 2014/15 was extended to three years in the 2013 Budget …so it was also applied to HMRC's pay award for 2015/2016.*

46. *HMRC increased the pay range maximum for all grades by 0.5% in recognition of the fact that individuals on maximum had not received a consolidated pay increase for five years, since 2010.*

47. *The remainder of the sum available was used to pay awards of greater than 1% to individuals who were below maximum, to provide movement towards pay range maximum for each grade... As in 2014, the minimum grade increase was applied before individual pay awards were added to ensure progression within grade.*

48. *As in the previous year the award was implemented following discussion and consultation with DTUS."*

23. *I do not have corresponding figures for the pay awards across Grade 6 for 2016-2017, 2017-2018 or 2018-2019. I can, however, fairly confidently reconstruct the general pay awards from the claimant's own pay figures and the general methodology that was used from 2008 to 2016. It appears that salaries (except those at the extreme ends of the band) were increased by 1% per year from 2013 to 2017. The pay award effective from 1 June 2018 resulted in an increase of 2.33%.*

24. *Throughout his time in grade, the claimant has undertaken the full duties of a Grade 6 officer with five or more years of experience. He has been assessed against this standard in the annual evaluation of his performance. Every year, from 2013 to 2018, he has been awarded ratings of either "Exceeded" or "Achieved". He has therefore been eligible for the full consolidated pay award.*

25. *The claimant's own pay from 2013 to 2017 increased in line with the following table:*

Year	*Claimant's pay (£)*	*Grade 6 minimum (£)*	*Grade 6 maximum (£)*
2013	*58,192*	*57,573*	*67,325*
2014	*59,082*	*58,149*	*67,325*
2015	*59,626*	*58,935*	*67,662*
2016	*60,223*	*59,532*	*68,259*
2017	*60,774*	*60,127*	*68,810*

26. *It will be seen that, even if the 2018 pay award of 2.33 is replicated for 2019 and 2020, the claimant will still be several thousand pounds short of the maximum Grade 6 salary by the time he reaches the age of 60.*

27. *The claimant is a member of the Civil Service Pension Scheme. Under the rules of the claimant's particular scheme, he can retire at age 60 without any actuarial reduction in his pension. For convenience, I will refer to this age as being his "normal retirement age". For various reasons, he has a settled intention to retire at that age. Not all Grade 6 officers have that option. Many are in schemes that provide for a retirement age of 65 or 67.*

28. *Statistics produced by HMRC show that many Grade 6 officers are of the same or similar age to the claimant and receive higher salaries than he does. There are younger Grade 6 colleagues who receive lower salaries than the claimant's salary. I am not aware of any analysis of those statistics that shows whether people of the claimant's current age have, in general, higher or lower salaries than the claimant does. Nor (as far as I am aware) has there been any analysis of pay and age within the subset of Grade 6 officers who share the claimant's normal retirement age.*

29. *On 4 January 2018, the claimant made a request in writing to HMRC to increase his pay to the maximum pay for his grade with effect from 7 January 2018. His rationale was that he had taken up post as a Grade 6 five years earlier on 7 January 2013. He alleged that failure to meet his request would amount to illegal indirect age discrimination, unless it was shown that there was a business need to refuse his request or that doing so was a proportionate means of achieving a legitimate aim.*

30. *The claimant's request was refused in writing by HMRC on 7 February 2018.*

31. *The claimant commenced early conciliation with ACAS in relation to HMRC on 13 April 2018 and was issued with a certificate on 13 May 2018. He began an internal grievance against HMRC on 2 May 2018. A Decision Maker rejected his grievance on 6 July 2018. He appealed against the decision and a final adverse decision was communicated to him on 6 August 2018.*

23. In 2018 the claimant brought a claim for indirect age discrimination. In his witness statement prepared to defend the strike out application in case number 2416695-2018 for indirect age discrimination he said:

> *"The need for the claimant to retire at his normal retirement age stems from health issues relating to himself and a dependent relative."*

Spring 2020

24. In spring 2020 the claimant began to feel unwell. He experienced lethargy and nausea. He was absent from work between 6 and 9 April 2020 (4 days) for respiratory system reasons. He was also absent between 11 and 15 May 2020 (5 days) for digestive system reasons. The respondent's system also, separately, records absence from 18 May until 3 June 2020 for pandemic reasons.

25. The claimant spoke to his doctor on 5 June 2020 reporting episodic severe tiredness. He reported that he was otherwise active, doing exercise and practicing music. He was returning to work. He was concerned that he might have a faulty immune system though the doctor noted there was no evidence of this.

26. On 25 June 2020 the claimant wrote to the then Prime Minister Boris Johnson seeking redress for what he said was indirect age discrimination by moving staff extremely slowly towards the maximum pay for their grade. He cited the decision in Heskett v Secretary of State for Justice . He said:

> *"I am still on the minimum pay for my grade, which is about £8000 less than my peers. As I am disabled and have a significantly reduced life expectancy, I will be forced to retire next year, so this huge pay differential will affect every day of my life until I die."*

27. The claimant returned to work after 3 June 2020 working from home and gave effective service. In September 2020 the claimant had some blood test results. The GP texted him to say that apart from anaemia related to diabetes all his results were normal. No specific treatment, supplements or food was required, just a balanced diet. In autumn 2020 negotiations were underway for a pay deal. It was widely understood that terms to be agreed would include payment over three years.

28. On 23 November 2020 the claimant gave notice to his employer that he would retire on 30 April 2021.

29. The claimant was again unwell and his GP notes record a viral illness in December 2020. He was absent from work from 25 November 2020 until 1 December 2020 (5 days) and from 9 to 11 December 2020 (2 days) for respiratory system reasons.

30. On 29 December 2020 the GP spoke to the claimant and recorded that the claimant said he felt like he had turned a corner. There were no specific symptoms other than some headaches and dizziness. The GP advised to play things by ear. No treatment or further investigation was needed.

31. In February 2021 the pay deal was concluded. The claimant understood that there would be a pay rise worth 13.56% over three years with 3.56% being paid from 1 June 2020 and 5% from 1 June 2021 and a further 5% from 1 June 2023. On 13 February 2021 the claimant wrote to the freedom of information team at the Cabinet Office. He asked for information regarding the 13% pay offer and its impact on:

> *pension contributions,*
> *lump sums payable on retirement and*
> *pensions payable to retired HMRC staff.*

32. On 1 March 2021 the claimant wrote to The Minister for the Cabinet Office, Michael Gove. The letter is reproduced in full:

> *Dear Minister for the Cabinet office*
>
> *Last year I wrote to the Prime Minister, urging him to act to discontinue pay arrangements, which the courts have found amounted to discrimination under the Equality Act. A copy of my letter is attached.*
>
> *I was pleased, therefore, when employer confirmed last year that they would be taking action to address these injustices. Unfortunately, it was not until very recently that a pay rise of 13.56% was agreed. In addition, whilst this covered the 3 years to 31 May 2023, 10.25% of the pay rises would be made after 31 May 2021.*
>
> *Unfortunately, as a 60-year-old type I diabetic with a life expectancy of around 69, I have to retire at the end of April this year just a handful of quality years my wife and teenage daughters. As a result, I will only benefit from 2.75% of the pay rise, which will have a permanently deleterious effect on my pension.*
>
> *I have worked for HMRC for 37.5 years, most of which time has been spent labouring on the largest and most complex corporate groups in the UK. I have secured tens of millions of additional tax in time, if not hundreds of millions.*
>
> *However, in the year that I was promoted to my current grade George Osborne decided to freeze all progression pay, which created the huge disparities in pay that led to court action mentioned above. For me, this meant that I stayed on the minimum pay my grade right up to the present day.*
>
> *If I were not disabled, I would just work another couple of years to secure my maximum pay under the new pay deal. I clearly can't do that for disability -related reasons, however, and forcing me to work beyond my normal retirement age to obtain these benefits would amount to illegal age discrimination, that the Supreme Court's decision in Homer v Chief*

Constable of West Yorkshire police.

As the delegated minister I am therefore writing to ask that you make a relatively small, very important adjustment in my favour in the circumstances.

The civil service pension rules, copy of which is attached hereto, permits the Minister of The Civil Service to make adjustments in special cases as follows:

{the claimant then quoted rule 2.24}

All that I ask is that you agree that my years of service can be enhanced as if I'd worked until 31 May 2023, which would then allow my pension and lump sum to benefit from a pay offer that will otherwise be beyond my reach.

I doubt that there are any other people in my position retiring just at this time as a result of life shortening disabilities. There is clearly no danger, therefore, that exercising your discretion in this way would set a dangerous precedent.

Yours sincerely

33. Peter Spain, Head of Pensions Policy and Technical Pensions Policy, Strategy and Governance at the Cabinet office advised his colleagues on 26 February 2021 to respond to the claimant's enquiry in the following terms:

> *"Pension contributions and pensions and lump sums on retirements for HMRC staff and other civil servants are paid in accordance with the rules of the Principal Civil Service Pension Scheme and Civil Servants (And Others) Pension Scheme. We do not hold any documents relating to possible future changes as a consequence of the HMRC pay offer."*

34. A draft letter of reply on behalf of the Minister was prepared dated 17 March 2021 but not sent to the claimant.

35. On 1 April 2021 the claimant was assessed by telephone by Dr Beadsworth of the tropical and infectious disease unit at the Royal Liverpool University Hospital. His letter following the consultation was typed on 7 April 2021 and sent to the claimant. Dr Beadsworth diagnosed ME/chronic fatigue syndrome ("ME/CFS").

36. Dr Beadsworth's letter records that the claimant had reported feeling overly tired, finding it difficult to concentrate and having episodes of headache and dizziness since May 2020. The claimant had reported all over body aches after exercise or activity and occasional viral type symptoms. The claimant had told Dr Beadsworth that he was planning on retiring at the end of April 2021. On 8 April 2021 the claimant had a diabetes review with Dr Mitan and reported feeling well. He reported flu like symptoms after exercise and the doctor recommended checking blood sugar levels at those times to ensure the symptoms were not due to hypos. The GP recommended a cortisol check and only if it was low a re-referral back for further investigation. There was no need for further referral for investigation.

37. On 30 April 2021 the claimant wrote again to the Minister for the Cabinet Office noting that he had not had a reply to his letter of 1 March 2021. He informed the Minister that he had retired on terms that placed him a substantial disadvantage compared with others who did not have his disability. He said:

> *"If I had a normal life expectancy I would have worked until at least 31 May 2023, by which time my final salary would have increased to £71, 302. I would therefore ask you to agree that my lump sum and pension should be increased by the amounts shown in annex A attached."*

38. He attributes his decision to retire in this letter to life expectancy. He concluded his letter saying that he did not hear from the Minister by 31 May 2021 he would place the matter before an employment tribunal. The claimant was corresponding with his employer regarding the proper calculation of his pension benefits at around this time. On his 60th birthday on 30 April 2021 the claimant retired. On 28 May 2021 the claimant entered early conciliation with ACAS and on 7 June 2021 achieved his early conciliation certificate. On 13 June 2021 he brought his tribunal complaint.

39. On 21 July 2021 The Deputy Director of Civil Service Pensions Ms Kerrie Cureton wrote to the claimant to say that a response had been sent to him on 17 March and to attach a copy of it. The letter said:

> *You have asked the minister to use his discretion to grant you added years of reckonable service up to 31 May 2022 which would allow your pension benefits to benefit from the three year pay deal.*
>
> *Rule 2.24 which you refer to gives the minister discretion to grant a scheme member added years of reckonable service. However, it does not treat the member as if they had remained in service for that additional period of time. So, if the Minister were to grant you the additional period of reckonable service you have asked for it would increase your reckonable service by this amount,* ***but the pensionable earnings used to calculate your pension would still be based on your earnings up until your last day of service – ie they would not be based on what you would have earned if you had remained in service until 31 May 2022.***

{the letter ought to have said 31 May 2023 as that would be the last pay date of the three year pay deal}

> *Added years granted under rule 2.24 are paid for by the member's employer. As such, the employer needs to submit a business case to the Minister asking him to grant added years in a particular case. If the Minister agrees to this, the scheme actuary (The Government Actuary's Department) calculates the cost of those added years and they are only granted to the member in question once the employer pays that amount over to the scheme.*

40. The letter advises the claimant to take the matter up with his employer and reminds him that added years are only granted in exceptional circumstances. The claimant replied challenging the guidance given saying he couldn't see that the exercise of the ministerial discretion was conditional on the employer making payment, that the test was special circumstances not "exceptional circumstances", that the minister could add 2.3 years to his service, and that pensionable earnings

are not limited to actual earnings but could be "assumed earnings" under provisions at A2 (4) to (6) of the Scheme Rules, that is the amount of earnings he would have received had he remained in employment until he reached 40 years of service.

41. On 28 July 2021 Mr Mesquita at The Cabinet Office pensions team wrote to the claimant. He agreed the test for the CO was "special circumstances" and said that "assumed earnings" in the Rules did not fit the claimant's circumstances. The claimant had also challenged the basis on which Mr Mesquita was acting for the Minister. Mr Mesquita stated that actions of civil servants are deemed to be the actions of the relevant government minister. There was further correspondence between the claimant and HMRC in which the claimant pursued his points on 30 July 2021 and 2 September 2021. The claimant made freedom of information requests.

42. On 10 September 2021 the claimant had a telephone consultation with his GP. He reported a deterioration in his health over the last twelve months and said he never had a day when he felt well. He reported physical and psychological symptoms. He told his GP about his brother having died the year before and how the claimant had been sorting out his affairs. He had felt suicidal. He reported debilitating fatigue. He told the GP that he had retired from work and had financial issues which meant that his lump sum and pension were markedly reduced.

43. Mr Mesquita replied on 13 September 2021 saying that matters were now before the employment tribunal and correcting the claimant who had suggested on 30 July 2021 that Mr Mesquita had accepted that there were errors in the 17 March 2021 letter; Mr Mesquita had not accepted that, he said there were no errors, the letter was correct in directing the claimant to HMRC.

44. In October 2021 the claimant reported severe, debilitating fatigue and malaise to his GP and had more blood tests done. On 5 October 2021 he attend a case management hearing in this complaint before Employment Judge Frazer and represented himself.

45. On 12 October 2021 the claimant wrote to Ms Wallington, at HRMC, asking that HMRC provide a business case and confirmation of funding to the Cabinet Office so that it can consider his request. In this letter, for the first time, the claimant says his ME was a factor in his retirement.

> *I was forced to retire on 30 April 2021, partly due to a life- shortening disability (type 1 diabetes) but also because shortly before I retired I was diagnosed as having ME, which had made it impossible for me to work more than a couple of hours each day.*

46. Carole Martin at HMRC acted on the letter to Ms Wallington and conducted a review of the case. Ms Martin's review included consultation with the claimant's Deputy Director, in the absence of the line manager at the time, Mike Beard, who had retired, and with pensions colleagues. She prepared a written report on 31 May 2022 which concluded that HMRC did not support the awarding of added years to the claimant. The factors that led her to that conclusion were set out in her report. Notably, she took into account the following factors: The claimant worked full time and had adjustments in place for management of diabetes. His sickness absence record did not raise any concerns. He was an active, engaged and effective member of the team. He had informed HRMC on 12 October 2021

that he had been diagnosed with ME. His assessment of his life expectancy at 69 was based on a historic study and had been undertaken before he had himself attained age 60. Other data was available to show better life expectancy for type 1 diabetics born later in the 20th century. He made a personal decision to retire at the minimum age of 60. On the point about his ill health ME/CFS meaning that he could not work beyond 30 April 2021 she took into account that there was no OH referral or report. There was no application for early ill health retirement. At the time of retirement he was working full time delivering effective service. He gave notice of retirement on 23 November 2020. He did not say his health prevented him working beyond his retirement date before retiring. He was working from home and had no significant absence record. He had full attendance. The three year Collective Agreement pay settlement required that the colleague must be employed on each of the pay settlement dates, 1 June 2020, 2021 and 2022. He retired in full knowledge that negotiations were for a multi year pay settlement that would take effect for three years from June 2021.

47. On 31 May 2022 solicitors acting for the respondents submitted an ET3 Response Form to his claim. In November 2022 the claimant represented himself at the public preliminary hearing to identify the correct respondent in this case. On 5 December 2022 the claimant attended a second preliminary hearing for case management in this case and represented himself.

The agreed dates of the acts of discrimination

48. At case management hearing Employment Judge Hodgson identified that the period from 1 March 2021 (when the claimant requested the added years) to 31 May 2022 (when he saw Ms Martin's report refusing to support a business case to Cabinet Office to grant the years) as the potentially relevant period for acts of discrimination.

49. At final hearing the claimant and Ms Ling confirmed that the alleged acts of discrimination were as follows:

The CO refusal to exercise the discretion by the Minister and its decision to tell the claimant that he must revert to his employer and get their support by way of a business case and funding before it would consider exercise of its discretion in 2.24. That was decided by 17 March 2021 but not communicated to the claimant until 21 July 2021.

HMRC's refusal (based on Ms Martin's assessment that there were no exceptional circumstances in his case) to support the claimant in his application to the CO for the exercise of the discretion (in special circumstances) under 2.24 with a business case and funding commitment which was made in December 2021 and not communicated to him until Ms Martin's report on 31 May 2022.

Relevant Law

<u>Section 6 Disability</u>

50. This states:

> **(1) A person (P) has a disability if—**
>
> **(a) P has a physical or mental impairment, and**

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—
(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

51. Section 212(1) defines "substantial" as more than minor or trivial. Schedule 1 of the Act provides supplementary provisions, including at paragraph 2(1)

The effect of an impairment is long term if-
(a) It has lasted for 12 months
(b) It is likely to last for at least 12 months, or
(c) It is likely to last for the rest of the life of the person affected.

And at 2(2)
If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is treated as continuing to have that effect if that effect is likely to recur.

Paragraph 5(1) of Schedule 1 states that an impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:

(a) Measures are being taken to treat it or correct it; and
(b) but for the measures, the impairment would be likely to have that effect.

52. Further, Schedule 1 provides the power for guidance to be issued and that a Tribunal must take account of such guidance as it thinks relevant. The guidance which has been issued is the *Guidance on Matters to be taken into account in determining questions relating to the Definition of Disability (2011)* (*'The Guidance').* The Tribunal also had regard to the *EHRC Code of Practice on Employment (2011) ('the Code') Appendix 1* in so far as it relates to the matters which we must decide.

53. The activities affected must be "normal". The EQA 2010 Guidance states at paragraph D3 that in general, day-to-day activities are things people do on a regular or daily basis.

54. In considering whether the substantial adverse effect is likely to last 12 months, this should be determined at the time of the alleged discriminatory act. In considering whether it is 'likely' the Guidance states that this should be interpreted as 'could well happen'.

55. The Tribunal also had regard to the decision of the EAT in Goodwin v Patent Office 1999 ICR 302 in which guidance was given as to the proper approach to adopt when applying the provisions relating to disability. Although this case related to the Disability Discrimination Act 1995, the approach is one which can be adopted

in determining section 6 of the EQA2010. The four questions which a Tribunal must address sequentially are:

(1) Did the claimant have a mental and/or physical impairment?
(2) Did the impairment affect the claimant's ability to carry out normal day to day activities?
(3) Was the adverse condition substantial?
(4) Was the adverse condition long term?

Section 123 Time Limits

56. This section states:

> **(1) [Subject to [[section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—**
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **(2) Proceedings may not be brought in reliance on section 121(1) after the end of—**
> **(a) the period of 6 months starting with the date of the act to which the proceedings relate, or**
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **(3) For the purposes of this section—**
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
> **(a) when P does an act inconsistent with doing it, or**
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

57. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

58. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

> "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."

Section 15: discrimination arising from disability

59. This section states:

> **(1) A person (A) discriminates against a disabled person (B) if—**
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

60. A Section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

61. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

> *"The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:*
>
> > *31. ……the proper approach to determining section 15 claims …. can be summarised as follows:*
> >
> > *(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
> >
> > *(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
> >
> > *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is*

simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose one."

62. The Court of Appeal in Robinson v Department for Work and Pensions [2020] EWCA Civ 859 considered causation in a section 15 complaint. Bean LJ at paragraphs 55 and 56 of the judgment rejected a "but for" test in establishing whether the treatment (unfavourable treatment for a section 15 complaint and less favourable treatment for a section 13 complaint) was *because of* the claimant's disability or something arising in consequence of it. Bean LJ affirmed Underhill LJ in Dunn v Secretary of State for Justice [2018] EWCA Civ 1998 who stated that a prima facie case under section 15 is not established solely by the claimant showing that she would not be in the situation…if she were not disabled. The Tribunal must look at the thought processes of the decision maker concerned to ascertain "the reason why they treated the claimant as they did. Was it wholly partly because of something that arose in consequence of the claimant's disability?"

Section 19 Indirect discrimination

63. Section 19 provides that:

(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 shows 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.**

64. Four conditions in section 19(2) must be met. The first condition is that there must be a PCP which the employer applies to employees who do not share the protected characteristic of the claimant. The second condition is that the PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic. Thirdly the claimant must experience that particular disadvantage herself and the fourth condition, the defence of objective justification, is that the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

65. Mr Justice Langstaff when President of the Employment Appeal Tribunal in Dziedziak v Future Electronics Limited EAT 0271/11, established that the burden of proof lies with the claimant to establish the first, second and third conditions within section 19(2). Only when the claimant has established those does the burden shift to the respondent to establish its objective justification. This approach was affirmed by the Supreme Court in Essop and others v Home Office (UK Border Agency) 2017 ICR 640 SC.

66. The Equality and Human Rights Commission (EHRC) Code confirms that a PCP can arise from a one off or discretionary decision. In Ishola v Transport for London [2020] EWCA Civ 112 the Court of Appeal confirmed that an act that has occurred or is likely to occur more than once will usually be regarded as a PCP.

67. Section 19(2) Equality Act 2010 requires that the employer applies *or would apply* the PCP equally to people who do not share the protected characteristic of the claimant. The Equality Act allows for a hypothetical comparator group British Airways plc v Starmer 2005 IRLR 862 and for adverse disparate impact to be measured by reference to that group.

68. Essop clarified previously conflicting Court of Appeal authorities by confirming that it is not necessary for the claimant to show *why* the PCP puts people sharing a protected characteristic at a disadvantage. Baroness Hale said:

> ***"Sometimes, perhaps usually, the reason why the PCP results in the disadvantage will be obvious: women are shorter than men so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: ….Indirect discrimination assumes equality of treatment -that the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a protected characteristic not subjected to requirements which many of them cannot meet which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification it is dealing with barriers which are not easy to anticipate or to spot."***

69. The purpose of indirect discrimination legislation is to challenge practices

which appear neutral, in that they apply to everyone, but have a disadvantageous effect on the protected group when compared to other people who do not share the protected characteristic.

70. In D v E 2023 EAT 66 the Employment Appeal Tribunal stressed the importance of correctly defining the provision, criterion or practice. The claimant had formulated his PCP to say that if an allegation of rape is made it is investigated by a line manager. Clearly, rape allegations related only to men. The claimant's case was that he was disadvantaged as a man because only men can be accused of rape. The difficulty for him in this formulation of his PCP was that it would not apply to women and was not of neutral application. The Tribunal reformulated the PCP to relate to allegations of serious sexual offence so that it could then be neutrally applied to men and women. There was a further difficulty in that the PCP related to the *member of staff being suspended on full pay pending the outcome of police investigation after which consideration is given to whether further action by the respondent is necessary.* The EAT found that the Tribunal had wrongly struck out the complaint as being without merit because it had wrongly concluded that dismissal could not be a potential consequence of the PCP. Dismissal was the particular disadvantage the claimant complained of. The PCP must be neutral in application and give rise to the particular disadvantage.

71. Section 19(2) requires a comparative exercise to be undertaken. The EHRC Employment Code endorses the method of constructing a pool for comparison as one way of undertaking the comparative exercise.

72. The first step in constructing the pool for comparison is to identify those affected by the PCP including those who are disadvantaged by it and those who are advantaged by it. Constructing the pool is "a matter neither of discretion nor fact-finding but of logic. Logic may on occasion be capable of producing more than one outcome" according to Lord Justice Sedley in Allonby v Accrington and Rossendale College and others 2001 ICR 1189 CA. Lord Justice Sedley in Grundy v British Airways plc 2008 IRLR 74 observed:

> ***"The correct principle in my judgment is that the pool must be one which suitably tests the particular discrimination complained of: but this is not the same thing as the proposition that there is a single suitable pool in every case."***

73. Where there is more than one potential pool it is a matter for the Employment Tribunal to decide which of the pools to consider.

74. In Ministry of Defence v DeBique 2010 IRLR 471 the EAT stated that the tribunal should have regard to the circumstances of the case and the underlying purpose of the legislation when constructing the pool, or choosing which of a range of possible pools to consider. It should choose the pool which it considers will realistically and effectively test the particular allegation before it.

75. Section 23(1) Equality Act 2010 provides that for the purposes of Section 19 there must be no material difference in circumstances. In Spicer v Government of Spain 2005 ICR 213 CA the Court of Appeal found that as a matter of logic once the tribunal had established that in order to receive a higher pay package the

individual had to be a Spanish civil servant recruited in post from Spain, the only possible pool for comparison in order to assess disparate impact consisted of all teachers in the school. Any other pool, either all Spanish teachers or all British teachers would be illogical and could not give effect to the purposes of the legislation as on that basis a claim of indirect discrimination would never succeed.

76. A PCP applied to all employees across an existing workforce can also give rise to difficulty in constructing the pool. In such cases the pool should be drawn from all persons employed who are affected or potentially affected by the PCP in question. When the pool is drawn the Tribunal must then undertake the comparative exercise.

77. In disability cases, the PCP must put those who have the same disability as the claimant (section 6(3)(b) Equality Act 2010) at a particular disadvantage when compared with those who do not.

78. The concept of disadvantage is similar to that of detriment in other sections of the Equality Act 2010. The EHRC Code defines disadvantage as something that a reasonable person would complain about. It does not have to be a financial loss and does not have to be quantifiable. The Code derives from the House of Lords decision in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337 HL when it says that an "unjustified sense of grievance" does not qualify as a disadvantage. In Shamoon the disadvantage was that a Chief Inspector's standing amongst her colleagues would be diminished once they knew that her responsibility for conducting appraisals had been taken away from her. In Williams v Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65 the Supreme Court accepted that there was no need for a fine distinction between the concept of unfavourable treatment and the concept of detriment.

79. A claimant must show group disadvantage and a disadvantage to the claimant. There are different methods of establishing disparate impact. It can be done by adopting a statistical approach. The EHRC Code (at paragraph 4.21 - 4.22) states that tribunal may compare the proportion of workers with and without the protected characteristic who are disadvantaged in order to ascertain whether the group with the protected characteristic experiences a particular disadvantage in comparison with others. What has to be considered is the total number of people from each group present in the pool so that the number of those affected by the PCP can be expressed as a proportion or percentage of the total. Two percentages may help to demonstrate disadvantage. The first is the number of women adversely affected by the PCP, as a proportion of the total number of women in the pool. Second is the number of men adversely affected by the PCP, as a proportion of the total number of men in the pool. The difference in the two proportions may be small, but may nonetheless demonstrate a particular disadvantage if they represent large differences in the actual numbers of men and women adversely affected by the PCP.

80. In Royal Parks Limited v Boohene and others EAT 2023, a case about contractual terms offered to agency and non agency workers, the EAT found that the Employment Tribunal had erred in law in the definition of the PCP which led it to adopt an indefensible pool for comparison in an indirect race discrimination

case. Applying Essop and Naeem v Secretary of State for Justice SC the EAT found that the pool should consist of the entire group the PCP affects or would affect whether positively or negatively while excluding those who are not affected by it. The flawed approach to the composition of the pool arose from a change of position in the definition of the PCP from the claimant's pleaded case.

81. If a claimant has met its burden of proof in establishing the first three parts of section 19 then the burden will shift to the respondent to establish its objective justification defence.

82. There is no statutory definition of a legitimate aim but the EHRC Code provides that must be legal and not discriminatory. It should represent a real objective consideration.

83. ECJ authorities established that the PCP must correspond to a real need on the part of the respondent, be appropriate with a view to achieving the objective in question and be necessary to that end. A balance must be struck when considering proportionality between the discriminatory effect of the PCP and the reasonable needs of the party who applies it. Section 19(2)(d) requires the tribunal to carry out an objective balancing exercise between effect of and reasons for the PCP taking into account all relevant facts (EHRC Code para 4.30).

84. Costs can be a factor. In Heskett v Secretary of State for Justice [2020] EWCA Civ 1487 Underhill LJ reviewed the authorities on legitimate aim where that aim is to save costs:

> **"83. It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate."**

85. The EHRC code at paragraph 4.30 provides an employment tribunal may wish to conduct "a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts".

86. Lord Justice Sedley in Allonby v Accrington and Rossendale College and ors explained: '**In this situation it is not enough that the tribunal should have posed, as they did, the statutory question "whether the decision taken by the [employer] was justifiable irrespective of the sex of the person or persons to whom it applied"… [T]here has to be some evidence that the tribunal understood the process by which a now formidable body of authority requires the task of answering the question to be carried out, and some evidence that it has in fact carried it out. Once a finding of a [PCP] having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the [employer]'s reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the PCP on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.'**

Section 20 Duty to make adjustments

87. Section 20 states:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

Section 21 Failure to comply with duty

88. Section 21 provides:

> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.**

89. The words "provision criterion or practice are not defined in The Equality Act 2010. The Commission Code of Practice paragraph 6.10 says the phrase "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

90. The importance of a Tribunal going through each of the constituent parts of the provisions relating to the duty to make reasonable adjustments was emphasised by the EAT in Environment Agency –v- Rowan [2008] ICR 218 and reinforced in The Royal Bank of Scotland –v- Ashton [2011] ICR 632.

91. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in 2018 in Sheikholeslami v The University of Edinburgh UK EATS 2018 Mrs Justice Simler considered the comparison exercise. At paragraph 48:

> "*It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question…There is no requirement to identify a comparator or comparator group whose*

circumstances are the same or nearly the same as the disabled person's circumstances."

"The PCP may bite harder on the disabled group than it does on those without a disability. Whether there is a substantial disadvantage is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

92. The Code provides that a PCP is a PCP that is applied by or on behalf of the respondent. In Ishola v Transport for London [2020] EWCA Civ 112 Lady Justice Simler considered what might amount to a PCP at para 35:

"The words "provision, criterion or practice" are not terms of art, but are ordinary English words…they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application."

93. And at paragraph 37:

"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treated employee by an act or decision and neither direct discrimination nor disability -related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."

94. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

Burden of proof: Section 136

95. Section 136 states:

(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.

96. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

97. In Igen v. Wong [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding the Equality Act 2010. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination.
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic

> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

98. The initial burden of proof is on the claimant: Ayodele v. Citylink Ltd [2017] EWCA 1913. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in Igen v. Wong, but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage.

99. Lord Hope of Craighead in the Supreme Court in Hewage v. Grampian Health Board [2012] UKSC 37 reminded tribunals not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

100. In the Employment Appeal Tribunal in Mrs A Field v Steve Pye and Co (KL) Limited and others [2022] EAT 68 HHJ Tayler cited Lord Hope and went on to say:

> **41. It is important that employment tribunals do not only focus on the proposition that the burden of proof provisions have nothing to offer if the employment tribunal is in a position to make positive Judgment approved by the court for handing down findings on the evidence one way or the other. If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment. To do so ignores the prior sentence in Hewage that the burden of proof requires careful consideration if there is room for doubt.**
>
> **42. Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an Igen analysis. Where there is evidence that suggests there could have been discrimination, should an employment tribunal move straight to the reason why question it could only do so on the basis that it assumed that the claimant had passed the stage one Igen threshold so that in answering the reason why question the respondent would have to prove that the treatment was in no sense whatsoever discriminatory, which would generally require cogent evidence. In such a case the employment tribunal would, in effect, be moving directly to paragraphs 10-13 of the Igen guidelines.**

101. It is for the claimant to prove, on the balance of probabilities, the facts that might lead to an inference of discrimination. If the claimant succeeds in shifting the burden of proof, it then falls to the respondent to prove, again on the balance of probabilities, that its treatment of the claimant involved no discrimination whatsoever. The guidance goes on to state that 'the tribunal would normally expect cogent evidence from the respondent to discharge that burden'.

Closing Submissions

The respondent's submissions

102. The respondent provided a bundle of authorities and submitted in relation to the section 15 complaint against CO and HMRC the claimant has not

established unfavourable treatment. The claimant has not shown that his ME/CFS was a disability and if he has then in the alternative neither respondent had any knowledge of it before October 2021. It submitted his complaints must fail.

103. The respondent submitted that Tameside Hospital NHS Foundation Trust v Mylott UK EAT/0399/10 says a disabled claimant cannot retire on more favourable terms than a non disabled person due to disability. The respondent submitted that O Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283 and Mylott say the legislation on failure to reasonably adjust is to support disabled people to work. There are other provisions to cater for needs of disabled employees such as ill health retirement, death in service and in retirement benefits. Clause 2.24 gave discretion and is used in relation to recruitment and retention. The claimant's circumstances did not meet the criteria, they were neither special (the CO test for exercise of discretion) nor exceptional (the HMRC test for supporting an application to CO with a business case and funding). The respondent submitted that exercise of HMRC discretion to support the claimant and CO discretion in the claimant's favour to grant added years would create a precedent and apply to everyone who says they can no longer work and would even apply to those already beyond normal retirement age.

104. The respondent submitted that Trustees of Swansea University Pension Scheme v Williams EAT [2015] establishes that for a section 15 complaint it must be the unfavourable treatment that causes the disadvantage to the claimant. The claimant's case is that the rules of the scheme or the application of those rules disadvantage him. The respondent says it is not unfavourable treatment to apply rules of scheme so as to deny betterment to him or others. The claimant fails to establish a connection between the alleged unfavourable treatment and his disability.

The claimant's closing submissions

105. The claimant's overarching submission was that he had to retire early because he had a short life expectancy due to his diabetes and because he had ME/CFS and *could not* work on through the last two of the three years of the pay deal. He took a pension that was less than that which he would have had if there had been no pay progression freeze or if the pay deal that was put in place to remedy the lack of progression had been awarded in full during his employment. He submitted that he had no choice but to retire at 60 because of his reduced life expectancy and because of his inability to carry on working at all due to ME/CFS.

106. In his second Skeleton Argument document, prepared before closing submissions and share the claimant again stated his pleaded case without refinement to his drafting that had been discussed during the hearing. He was clear that he wanted his case to be decided the way he had pleaded it.

107. The claimant cited Heskett as authority for the proposition that cost should not defeat his claim. He said that the respondent ought to have factored into its decision making the fact that there would be a saving to the respondent in his having retired because that would mean it would not have to pay death in service benefit.

Applying the Law to the Facts

Disabled status and ME/CFS relevant to CO and HMRC

Did the Claimant have a physical or mental impairment?

108. The claimant had symptoms of fatigue, post exercise malaise, nausea and headaches and dizziness from May 2020 and they continued beyond retirement date of 30 April 2021.

Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

109. The relevant period is the time of the acts of discrimination complained of. Those acts began in response to his letter of 1 March 2021 and ended with the decision of HMRC not to support the claimant in his request on 31 May 2022. The Tribunal assumed for the purposes of the definition of the disability that those acts all were continuing acts throughout that period. The Tribunal found it helpful to look at the claimant's evidence from 2020 and to the evolving situation in relation to his health prior to 1 March 2021.

April to June 2020

110. The Tribunal finds that the claimant suffered an adverse effect on his ability to carry out his normal day to day activities for short periods in April, May and June 2020 when he was not well enough to work. He was absent from work from 6 – 9 April 2020, from 11 May 2020 to 3 June 2020. The reasons for his absence were respiratory and digestive.

111. Was that substantial? The effect was more than minor or trivial for short periods of the dates of absence in April, May and June 2020. The claimant was experiencing symptoms and could not work. However, the effect had not lasted and was not likely, at that point, to last for 12 months. It was not, at that point, long term within definition in Section 6.

June to December 2020

112. The claimant recovered and returned to work on a phased return in early June 2020. He was continuing to experience fatigue but this was not sufficient to prevent him from being able to work. He had not requested occupational health referral and had not asked for any adjustments. The effect of his condition on his ability to carry out normal day to day activities following his return to work from 3 June 2020 was not substantial.

113. Work is part of normal day to day activities as are other matters such as getting washed and dressed, domestic duties, engaging with family members and playing a musical instrument. The claimant was able to do all of those things during summer 2020. He was tired and needing to rest after exercise. The GP asked that he check his blood sugar levels after exercise in case the fatigue was diabetes related.

114. The claimant failed to adduce evidence of his not being able to carry out normal day to day activities as a result of ME during summer 2020. He had prepared a Disability Impact Statement which did not address ME. He was asked questions about it in cross-examination and by the panel. The Tribunal finds that the symptomatology that the claimant was experiencing from June 2020 to December 2020 was not substantial.

115. The Tribunal rejects the claimant's assertion made in cross-examination and in support of the Rest Record document created for this litigation that he was so ill throughout the period from May 2020 to his retirement in April 2021 that he was regularly resting for several hours during normal working time each day. The claimant went to his GP in December 2020 and told the GP he felt he had turned a corner.

116. The Tribunal finds that the claimant did not send details of his long rest periods to his line manager at that time. The Tribunal rejects his evidence that he sent his rest periods and wanted them to be counted as sickness absence and that he had expected his manager to record them as such and cannot explain why the manager did not other than that the manager knew him well and did not push things. The Tribunal finds that the claimant, if he had had sickness absence to the extent listed on his Rest Record and it had not been recorded, would have contacted his line manager to formally correct the position and would have challenged the absence recording that was on his record. If his line manager had had that information then it would be reasonable to assume that some sickness absence management would have occurred including a referral to occupational health. The absence of those interventions corroborates the Tribunal's finding that the claimant had not communicated his rest periods to his line manager and that the rest as listed in the recently produced Rest Record, overstates the reality of the impact of his condition on his ability to work during May to December 2020.

117. The claimant was not disabled by reason of ME/CFS in 2020.

December 2020, through his retirement date in April 2021, to June 2021

118. The claimant was still experiencing fatigue in January 2021 through to his retirement. He was recording his rest periods. He was working as normal and talking to his wife about his retirement and the financial implications of the pay deal on his pension in the two months prior to retirement. He was able to work as normal and carry on his home life. The respondent's records continued to show him to be a good performer with no attendance issues. He was not absent and was performing well to the date of his retirement.

119. The diagnosis letter from his telephone clinic appointment in early April 2021 reported ME/CFS the claimant was reporting that his symptoms were having a significant effect on his work and home life. The Tribunal sees this report in the context of the claimant continuing to work, to not be off sick, to perform well, to be able to put together letters including a letter to the Minister about his pension and to be discussing the detail of his retirement intensively with his wife at that time. The Tribunal again notes the absence of evidence from the claimant in a disability impact statement (which referred only to his diabetes) or his witness statement or in oral evidence as to the effect of this condition on his day to day life at the time.

120. The Tribunal rejects the claimant's assertion in his Skeleton Argument and closing submission that he told his line manager on or around 27 April 2021 before he retired that he had ME. The claimant had not raised this anywhere else. It was not in his letter writing at the time. His letter of 30 April 2021 refers only to his diabetes and reduced life expectancy as reasons for retirement. If the claimant had been so unwell that his Me/CFS symptoms were having a substantial adverse effect on his day to day activities then he could not have continued to work effectively, which he did.

121. The effects of his ME/CFS on his ability to carry out his normal day to day activities from December 2020 to his retirement on 30 April 2021 were not substantial.

122. In May 2021 the claimant contacted ACAS. In his Claim Form dated 13 June 2021 in case number 2407553-21 he makes no mention of ME/CFS. The Tribunal finds its effects on him were still not yet substantial. The claimant was not disabled by reason of ME/CFS in June 2021.

September 2021

123. By September 2021 things had changed. The claimant was now very unwell on a daily basis. His oral evidence was that he was extremely fatigued, suffering nausea, headache and malaise that lasted up to two days after any exertion. In September 2021 he had a telephone consultation with his GP and reported debilitating fatigue. The Tribunal finds that by September 2021 the symptoms of his ME/CFS were having a substantial adverse effect on his ability to carry out his normal day to day activities. He was having to rest most of the time so that he could not do ordinary, everyday things with his family. The condition had then lasted, on the claimant's report, from May 2020 and had worsened over time. His symptomatology was substantial by then and was likely to last at least a year from then. The Tribunal finds that the claimant was disabled by reason of ME/CFS from September 2021.

<u>Did the Respondent have knowledge of or could reasonably be expected to have knowledge of the Claimant's ME/ CFS?</u>

HMRC's knowledge

124. HMRC had no knowledge of ME/CFS until 12 October 2021 when the claimant wrote to Mrs Wallington.

125. The claimant had not raised his ME/CFS ill health as an issue at work during 2020 nor at all prior to his retirement on 30 April 2021. He had not requested occupational health referral and had not asked for any adjustments. He had been to the GP in December 2020 and told the GP he felt he had turned a corner. The Tribunal rejects his assertion that he told his line manager Mike Beard, shortly before his retirement that he had ME/CFS. The contemporaneous documentation; the claimant's letter to Boris Johnson and letter to Michael Gove make no reference to ME. The respondent's records show no significant sickness absence. The claimant was performing well.

126. Applying the guidance in the Code, there was nothing to suggest that HMRC ought reasonably to have known that he was disabled by reason of ME/CFS until his letter of 12 October 2021. The attendance and performance were good, there was no OH request, there was no communication of symptoms beyond those of diabetes to alert the respondent.

CO's knowledge

127. The Tribunal finds as a fact that CO did not know that the claimant had ME/CFS when it made its decision on 17 March 2021, which was not communicated to the claimant until 21 July 2021, not to exercise the discretion by

the Minister at that time but to refer the claimant back in accordance with the guidance seek a business case and funding support from HMRC.

128. The CO made no further determination though its decision communicated on 21 July 2021 was a continuing act in the sense that the claimant, if he had achieved support from HMRC would and could have reverted to it for exercise of the discretion. It's determination that the claimant had to get support endured throughout the period until 31 May 2022 when Ms Martin told the claimant that HMRC would not support him. CO became aware of the claimant's ME/CFS at some point when Ms Martin shared her decision with Mr Hennem and Mr Spain at CO probably, though the Tribunal had no specific evidence on this point, in around December 2021 when the decision was made. The Tribunal finds that CO became aware of the claimant's ME/CFS in December 2021. It made no further decisions, no further acts of discrimination were alleged against CO.

Is the issue of knowledge separable between the two Respondents

129. CO and HMRC are not the same organisation or legal entity. HMRC knew of the claimant's ME/CFS on 12 October 2021. CO knew of the ME/CFS in December 2021.

130. The Tribunal accepts the respondent submission that knowledge of HMRC is not to be imputed to CO and finds that even if it had been it would have made no difference (during the short period in which the Tribunal has found the claimant was disabled and HMRC knew that he was from October 2021 to the date when the CO knew that HMRC would not support the claimant December 2021) as the CO made no further determination during that period. The ball was in HMRC's court at that time to decide whether or not to support the claimant.

131. If the Tribunal is wrong about the imputed knowledge point, then knowledge is not determinative because each of the discrimination complaints against CO fails below for other reasons.

PART ONE the case against The Cabinet Office CO

Section 21 Failure to reasonably adjust

Did CO ("CO") apply the following provision criterion or practice ("PCP")?

The refusal to apply "rule 2.24" other than by way of request made by an employer coupled with confirmation of financial support

132. CO applied a PCP which was to require those seeking exercise of the discretion under rule 2.24 of the Principal Civil Service Pension Scheme Rules (which gives the Minister the discretion to grant added years of reckonable service to a civil servant in special circumstances) to approach their employer and require the employer to make the request by way of submission of a business case with confirmation of financial support.

133. The Guidance provided that in the exceptional circumstances in which an employer, in this case HMRC, wishes to buy added years of reckonable service for a member then HMRC will need to make a business case to the Scheme Manager. If the Scheme Manager agrees the proposal they will also decide the cost of the

added years.

134. The CO applied the PCP when it refused to apply the discretion itself without the business case and funding from HMRC. The Tribunal finds that his was a criterion applied in all cases and to the claimant. The Tribunal accepts the oral evidence of Mr Hennem that this criterion would have been applied to anyone disabled or non disabled asking for the exercise of that discretion.

Did such PCP put C at a substantial disadvantage in relation to a relevant matter *in comparison with persons who are not disabled (Tribunal's wording in italics)*

C contends that the substantial disadvantage was that his disability/disabilities prevented him from remaining in employment through to 31 May 2023

135. There was a problem with the claimant's drafting of his PCP; the substantial disadvantage did not flow from the operation of the PCP. This was put to the claimant at the outset of the hearing when the List of Issues was being discussed. The Tribunal said that the substantial disadvantage was problematic in the following way: the claimant was saying that because the CO made him go back to HMRC and get a business case and funding before the CO would consider exercising its discretion, he couldn't stay in work to May 2023 to get the full pay deal. The Tribunal said that that did not reflect what it understood his case to be. The Tribunal understood his case to be *that he wanted the Minister to exercise the discretion and not "bat him back" to HMRC for support and that because he had been "batted back" and HMRC had not supported him he could not get the discretion exercised by the Minister/CO and so had retired without added years which he wanted to compensate him for the pay deal not counting in his pension.* This note was read back to the claimant and agreed. The claimant, confusingly, confirmed both that that was his case and that he was happy with the way he had drafted his claim.

136. The respondent objected to the Judge assisting the claimant to define his "substantial disadvantage" in a way that addressed the discrimination he alleged. The respondent said that the claimant was an experienced litigant, that he had had opportunity when drafting his claim form and again later at preliminary hearing for case management to reframe his PCP and substantial disadvantage and had chosen not to do so.

137. The Tribunal had regard to the Claim Forms and Response, to the Equal Treatment Bench Book and the obiter of Ms Justice Simler in Sheikholeslami regarding the "mischief" that a reasonable adjustment claim is intended to address and decided to support the claimant to precisely define his complaint so that his substantial disadvantage was having to go to HMRC for a business case and funding and then not getting their support so he did not get the added years. It was clear that the respondent had understood this to be his case and was not in any way disadvantaged by the support afforded to an albeit experienced litigant in person.

138. The Tribunal finds that the PCP (the decision of CO to "bat him back" to HRMC) did not put him at either his original drafted substantial disadvantage of not being able to work to 31 May 2023 nor the reframed disadvantage of his having to go to HMRC and not being awarded the added years and the consequent impact of that on his pension compared to non disabled people.

139. Simler J in Sheikholeslami set out that the focus of the Tribunal must be on

whether what causes the disadvantage is the PCP. This part of the claimant's case in section 20/21 was not made out. He did not say why he thought it was a disadvantage to him to be "batted back" compared to non disabled people who he accepted would also be "batted back". The Tribunal finds that the CO decision to refer him to HMRC was based on the Guidance that says added years decisions under rule 2.24 are Reserved to the Scheme Manager and need support of the employer /HMRC in this case. The Tribunal accepted the evidence of Mr Hennem that the CO would apply the Guidance in any case. A non disabled person retiring in April 2021 and seeking added years would also have been batted back to HMRC and may also have been declined support and thereby denied the grant of added years.

140. The PCP did not cause any disadvantage to the claimant compared to a non disabled person and therefore no substantial disadvantage. The claimant failed to meet the first stage test on burden of proof in Section 136 Equality Act. The complaint must fail at this point.

Did CO know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

141. Even if disadvantage had been made out and it was not, the CO could not reasonably have been expected to know that complying with the Guidance to direct all applicants back to their employer for support and funding would be likely to disadvantage disabled persons generally or the claimant.

What steps could have been taken to avoid the disadvantage? C contends that the reasonable adjustment would have been the application of "rule 2.24"

142. If the claimant had established disadvantage and knowledge of disadvantage his complaint would have failed on the reasonableness of the adjustment. Here again the claimant was assisted as a litigant in person to specify what the reasonable steps were beyond his stated "application of 2.24".

143. The Tribunal assisted the claimant to clarify that the reasonable step would have been for (i) the Minister /CO to exercise the discretion itself in his favour without recourse to HMRC and (ii) to award the claimant what he would have had if he had been able to remain employed to 31 May 2023 but for it to be paid to him at the date by which he retired on 30 April 2021 (explained in evidence set out below by Mr Hennem in terms of pensionable salary and reckonable service).

Was it reasonable for CO to have taken those steps?

144. His reasonable step (i) asks the CO to not follow the Guidance, that is to say not to require him, as any other applicant, to revert to the employer and have the employer submit a business case and funding. The claimant seeks something extraordinary and outwith the Scheme Rules and Guidance. The Tribunal finds that would not have been a reasonable step. It accepts Mr Hennem's evidence that the CO must apply a transparent set of rules in the exercise of decision making for providing benefits under the scheme, that those rules must have clear criteria for eligibility and that the CO does not and should not have a general discretion to make payments in individual circumstances. That would not have been a reasonable step.

145. In relation to reasonable step (ii) the award of the added years, the claimant submitted that he was a long serving civil servant, that he had Type 1 diabetes and

had served through years of pay freeze. The Tribunal considered the response that Ms Cureton for the CO sent to his request letter on 21 July 2021 which set out that it could not grant what he was seeking. This was further explained by Mr Hennem and accepted by the Tribunal in oral evidence as follows. The grant of added years by an employer under rule 2.24 is discretionary. The amount that can be purchased is limited to whatever added years would bring reckonable service up to 40 years by pension age. The calculation is 1 /80th x pensionable earnings x reckonable service. When added years are granted the reckonable service increases but not the pensionable earnings. If for example someone had 38 years of reckonable service at £ 50 000 final salary then an employer may apply to purchase an added 2 years for him so that his pension would be 1/80th x £ 50 000 x 40 - £ 25 000 instead of 1/80th x £ 50 000 x 38 = £ 23 750.

146. The claimant wanted what he said was the amount that he would have had if he had worked on until 31 May 2023 to achieve the full pay deal, or an amount to compensate for that as he could not work to 31 May 2023. He wanted, in effect, a sum to be done to reflect the salary he would have had at 31 May 2023 x 1/80 x 40 (or 43, he was not consistent on this point). He wanted that amount as at his retirement date of 31 April 2021. He wanted enhancement to *both* his reckonable service and pensionable earnings, *or* added years of reckonable service to put him in the position he would have been in for pension if he had had his 31 May 2023 salary at 30 April 2020. This was firstly not something the Scheme allowed and secondly Mr Hennem said would have given the claimant something that a non disabled person retiring on that date would not have been entitled to.

147. Ms Cureton's letter had explained that added years would not increase the pensionable earnings but the claimant persisted in seeking the amount of earnings he would have had if he had remained in service to 31 May 2023. His thinking was that the pay deal, being paid out over three years from 1 June 2020, was to compensate him for the pay freeze period, so that it was money that morally he felt he had earned. In this regard, the members wished this judgment to record that they can understand why he held this view and had been aggrieved about the pay freeze but they wished to record that the claimant could have remained employed to 31 May 2023. He had not informed his employer of his ME/CFS, had made no request for a referral to OH nor any reasonable adjustment to enable him to remain in work to 31 May 2023. The Tribunal found that it was his decision to retire when he did that denied him the pay award and not any failure to reasonably adjust by the employer.

148. The Tribunal accepts the respondent's submission that a reasonable adjustment is one that supports a disabled person to remain in work. What the claimant was seeking was to retire on enhanced terms.

149. Addressing the respondent's submissions; Tameside v Mylott referred to by the respondent was a case that relied on London Borough of Lewisham v Malcolm [2008] IRLR 700 and was decided under the provisions of the Disability Discrimination Act 1995. The O Hanlon case referred to by the respondent was a failure to reasonably adjust case that went to the Court of Appeal on the point as to whether or not it was discriminatory to fail to adjust the rules of the sick pay scheme to allow the claimant more sick pay than she would otherwise have been entitled to under the scheme and more than a non-disabled person would have been entitled to. The Court of Appeal found that it would be invidious for an employer to have to determine whether to increase sick payments ….*by assessing the financial hardship suffered by the employee or the stress as a result of the lack*

of money which could equally be felt by a non disabled person absent for a similar period.

150. The Tribunal finds that the request for (i) direct decision by the Minister and (ii), the added years to put the claimant in the position in relation to pensionable earnings he would have been in as at 31 May 2023 on 30 April 2021 would not, if he had succeeded in establishing disadvantage, have been a reasonable step because he was not continuing in work and because it would have put him in a position of betterment over other people with a disability other than his retiring at that time.

151. The claimant's complaint of failure to reasonably adjust against CO fails.

Discrimination arising out of Disability (section 15 Equality Act 2010)

Did CO treat C unfavourably by requiring him to remain in employment through to 31 May 2023 in order to benefit in terms of his pension entitlement from the pay increase made in 2021?

152. The CO knew at the time it made its decision that the claimant was a Type 1 diabetic and ought reasonably to have known this made him a disabled person. Was there unfavourable treatment ? What caused it ? Did it arise in consequence of disability ?

No unfavourable treatment

153. The Tribunal finds that the CO did not require the claimant to remain in employment through to May 2023 to get the pay deal. There was no unfavourable treatment within section 15 on the claimant's case as pleaded by him. The pay deal was agreed between the employer HRMC and the unions. The claimant was offered an opportunity at the outset of the case to redefine his unfavourable treatment and was adamant that he did not want to do so. The claimant failed to meet the first stage burden of proof test. There was no evidence that could realistically suggest that there was discrimination in the section 15 complaint by CO. His complaint must fail at this point.

154. Even if the claimant had established unfavourable treatment, for example if his complaint had been drafted so that the Minister's refusal to exercise the discretion himself and the "batting back" were the unfavourable treatment (the same things complained of in the failure to reasonably adjust complaint) the Section 15 complaint would have failed on this point as the Tribunal would have found that the claimant had an unjustified sense of grievance, applying Shamoon, in complaining about treatment that was in effect the proper operation of the Scheme Rules and Guidance. Even in this scenario the claimant would not have discharged his burden of proof. There was no evidence to show a link between the unfavourable treatment, "the batting back" and disability.

155. Even if the claimant had succeeded in establishing unfavourable treatment, on his case as drafted or as reframed for him, his complaint would have failed on causation. Applying Pnaiser,

> *The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is*

likely to be required, just as it is in a direct discrimination case

156. The Tribunal finds that what caused the Minister to refuse to exercise the discretion at that point and the CO to refer the claimant back to HMRC for support was its application of the Guidance to the Scheme. The Tribunal accepts the evidence of Mr Hennem and Ms Martin that this was the route, rarely used, only three cases since 2000, but this was the route for an application for the Minister / CO to exercise its discretion. The conscious thought process was to apply the Rules and Guidance. This applied more broadly even than for HMRC employees, it applied to anyone in the Civil Service Pension Scheme wanting exercise of the discretion in the Scheme Rules. Each of them had to get the support and funding from their own department. It had nothing at all to do with any characteristics of the claimant.

157. The claimant said that the something arising out of his disability was

his disability/disabilities prevented him from remaining in employment through to 31 May 2023

The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. The respondent did not, on the claimant's stated case, require him to work to May 2023 (at all) nor on the case as reenvisaged for him by the Tribunal in this judgment bat him back to HMRC because he could not remain in employment to 31 May 2023. It batted him back because it complied with the Rules and Guidance. The compliance with the Rules and Guidance did not arise in consequence of the claimant's disability. The Tribunal acknowledges *that for the "in consequence test" to be satisfied, the connection can be a relatively loose one."* The connection here is not made out at all.

158. Even if the CO had either required him to work on or batted him back because he could not remain in employment (none of which is accepted) the Tribunal rejects his assertion that he could not work on to 2023 by reason of his diabetes. His diabetes did not prevent him working on. His reduced life expectancy did not prevent him working on. The date of his decision to retire and therefore the impact of the pay award on his pension did not arise in consequence of his disability.

159. The claimant's case, to address his thinking rather than the application of the law above, is that *his decision to retire* arose in consequence of his not being able to work on because of his ill health / diabetes. The Tribunal rejects that the claimant was too unwell to work because of his ME symptomatology at the point of his retirement in April 2021. He was not disabled by reason of ME/CFS at the date of the decision in July 2021 to bat him back. He was not too unwell because of diabetes to work at April 2021. He had had good attendance and performance that year and no significant absence the year before.

160. The Tribunal finds that the claimant's decision to retire was, for him, a financial one which arose in turn out of his beliefs about his life expectancy. Those beliefs about life expectancy do not in consequence of his disability. The expert in 2012 to whom he sent his life expectancy report said it is not possible to reach a conclusion about life expectancy in an individual case of Type 1 diabetes. The data the claimant relied on was old. He had not revised his view since 2012. He

had not factored in his own good health, good blood management and recent research. He had not factored in that he was age 60 and that life expectancy may differ having already reached 60.

161. There may be other Type 1 diabetics who did not share his beliefs on life expectancy and did not decide to retire because either they did not share his beliefs on life expectancy or, sharing them decided instead to work to maximise income during lifetime and to remain eligible for death in service benefit for his family. Others may have chosen to take ill-health retirement. The claimant told the Tribunal he had done those sums, he had considered early ill health retirement and had considered working on part time during the payment period of the pay deal but neither of those options which he had costed was sufficiently beneficial to dissuade him from his decision to retire. He might well have made the same decision after almost 38 years service to retire on his sixtieth birthday even if he had not been disabled by reason of Type 1 diabetes. None of the factors in this paragraph, what he or others might have done, would defeat his section 15 complaint if a connection had been made out but what his evidence on having done the sums, and having spent the best part of two months prior to April 2021 discussing options with his wife, showed the Tribunal was that it was not his health that prevented him working on.

162. The complaint having failed it has not been necessary to consider whether or not any treatment complained of was a proportionate means of achieving a legitimate aim. There was little focus on this part of the case in cross examination or in submission. If it had been necessary to decide this point then the Tribunal would have found that each of the respondent's stated aims were legitimate and that it would not be proportionate to grant what amounted to betterment to a scheme member with diabetes who had chosen to retire at age 60. To do so would favour disabled scheme members retiring during the payment period of the pay deal over non disabled who might equally have worked during the pay freeze period, and to favour those with diabetes over non diabetics, or even those who believe themselves to have a reduced life expectancy, whether related to disability or not, over those who do not have that belief about their life expectancy. The Tribunal members felt that the claimant was seeking recompense for pay he felt he had earned during the pay freeze and was aggrieved that he could not have that benefit he felt he had earned AND retire at the date he had always planned to retire. To award him that would be disproportionate to the respondent's legitimate aims at (2) (3) (4) and (5). The section 15 complaint against CO, if it had not failed above would have been objectively justified.

Time points against the CO

Are there any alleged breaches of duty occurring on and/or prior to 28 February 2021 and, if so, are they prima facie out of time?

163. The complaints against the CO all relate to the decision made on or around 17 March 2021 but not communicated to the claimant on 21 July 2021. The claimant went to ACAS on 28 May 2021 and achieved his Certificate on 7 June 2021 and commenced proceedings on 13 June 2021. His complaint against the CO is in time.

Time points against HMRC

164. The List of issues did not raise any time points in the complaints against HMRC. The decision not to support the claimant was made in December 2021 but not communicated to him in writing until 31 May 202. The claimant had been to ACAS and brought his complaint on 22 February 2022.

PART TWO the case against HMRC

Failure to Make Reasonable Adjustments (Sections 20 and 21 Equality Act 2010 ("EqA")

Did the Second Respondent ("HMRC") apply the following PCP?

the application of "rule 3.4" with specific reference to the interpretation of "exceptional circumstances"

165. The claimant refers to Section 3.4 of the Guidance not any “rule” 3.4. This was the Scheme Flexibilities guidance that provided that in exceptional circumstances in which HMRC wants to buy added years of reckonable service for a member they do that by providing a business case and funding commitment to the Scheme Manager, for onward approval by CO.

166. The claimant’s complaint was that the respondent should have adjusted what it considered to be “exceptional circumstances” to fit his case.

167. Ms Martin conducted the review and considered whether or not exceptional circumstances existed in the claimant’s case. HMRC, through Ms Martin, applied the exceptional circumstances criterion to the claimant.

Did such PCP put C at a substantial disadvantage in relation to a relevant matter compared to *persons who are not disabled*

168. The claimant said that the substantial disadvantage was

that his disability/disabilities prevented him from remaining in employment through to 31 May 2023

169. As in his complaint against CO set out above the claimant had difficulty in the way he had defined his substantial disadvantage. The Tribunal explained that on his own case the substantial disadvantage of not remaining in employment to 31 May 2023 does not flow from the operation of the PCP without the addition of some extra words to the effect *and thereby stopped him getting the benefit of the pay deal in his pension.*

170. The Tribunal supported him to reframe his substantial disadvantage so that it was being denied the business case and funding support and therefore the award of added years by the CO. Again, in this way the substantial disadvantage addressed the “mischief” if any of the PCP. The respondent made no objection.

Did the PCP put the claimant at a substantial disadvantage compared to a non disabled person ?

171. Ms Martin made the decision on “exceptional circumstances”. She set out her reasoning in her May 2022 letter. The Tribunal heard and accepted the following oral evidence from her. She explained that she had taken into account

the following factors; the claimant was long serving, he had retired at a date that meant he was not in service during the second and third years of pay deal. She did some research, consulting with colleagues including Mr Spain, Head of Pensions Policy and Technical Team at the CO who was the Scheme Adminstrator and found that clause allowing for the purchase of added years by the employer had rarely been used. Where it had been used, in three cases since 2002, it related to recruitment. Ms Martin was able to tell the Tribunal of the three specific cases (and contemporaneous documentation relating to those cases was presented in the bundle) so that she was credible on the point of both her research and the use of the "exceptional circumstance" provision. Ms Martin took into account that if HMRC supported the claimant it would put the claimant in a better position than others, disabled and not disabled whether with diabetes or otherwise who retired during the first year of the three year pay deal. She considered it would have broad implications for anyone retiring during the pay deal. She accepted that the claimant was disabled by reason of his diabetes and that he had ME/CFS. She took those conditions into account. She considered that the existence of disability / medical condition of itself did not amount to an exceptional circumstances. She considered that his decision to retire ten months into a three year payment period of a pay deal did not amount to an exceptional circumstance. She considered that around 13 per cent of HMRC's workforce were disabled in March 2021. She thought about whether or not the claimant had made applications for voluntary early retirement on health grounds and found he had not. Ms Martin then obtained information about the claimant's pension. He had 37 years and 210 days as at his retirement date. His pensionable earnings were £ 64516 when he had retired so that his pension, after lump sum, was £ 28,801.

172. Ms Martin calculated what his pension would have been if he had used the pay rate for 1 June 2022 for 2023, that is the final year of the pay deal. His pension would have been £ 31 988. She called this Option 1. Option 2 was extending reckonable service to 31 May 2023 and using his May 2023 salary too. This would have been a pension of £ 33 847. In both options there were increases to his lump sum too. In this way, although the claimant had not specified these figures, Ms Martin was aware of the substantial disadvantage to the claimant. It was the difference between his £ 28,801 pension and £ 33,847 (having made adjustments to reflect the enhanced lump sum the claimant took)

173. Mr Spain then calculated the estimated cost for HMRC to fund those options. For option 1 it was £ 75,914 and for Option 2 £ 120,196. Mr Spain provided links to the Guidance and to the Pension Manual. Ms Martin took into account the only medical report provided by the claimant which was dated 7 April 2024 and confirmed the ME/CFS diagnosis. She spoke to the claimant's Deputy Director Matt Blake who confirmed that the claimant worked full time and he had reasonable adjustments in place for diabetes including breaks and disability leave. She knew that the claimant had not taken any disability leave. She took into account the claimant's evidence on life expectancy. She did not accept that he had been forced by his health to retire when he did.

174. Ms Martin wrote a Case Review document which outlined her reasons for not supporting the claimant's request. She did not consider that his circumstances met the special circumstances test the CO would need to apply because there had only been three cases since 2000 and they had all been recruitment related. She took into account in her determination that he could need meet the CO special circumstances test that he would not be continuing in work, he had already retired. It was her view that reasonable adjustments are to support people to remain in

work who otherwise could not do so. She also considered that he could have worked on to 31 May 2023 or bought the added years himself. Those were options open to him.

175. Ms Martin was concerned not to set a precedent. Supporting the claimant would mean that he would retire with a financial advantage over non-disabled members. She was concerned supporting him could have implications not just for HMRC but for other public sector employers whose staff retired during the pay period of an agreed pay deal. Ms Martin had regard to Managing Public Money a guidance document which said that Treasury consent should be obtained before entering transactions which set precedents, she thought this was such a transaction. She noted guidance that said the purchase would need to be in the public interest, made objectively and without favouritism. She considered that supporting the claimant would favour him over other disabled and non disabled people retiring during the payment period. She did not feel she could argue it was in the public interest to support the claimant. She could not conclude that the claimant's case met the exceptional circumstances test.

176. Her decision not to support the claimant was detrimental to him. There was disadvantage in the ordinary sense of the word. For him to succeed in his failure to reasonably adjust complaint though he must show that her decision put him at a substantial disadvantage compared to people who are not disabled.

177. The Tribunal finds that the operation of the PCP did not put the claimant at the substantial disadvantage either as originally pleaded or as reframed when compared with non disabled people. The Tribunal found anyone who was not supported with a business case and funding whether disabled or not would suffer the same disadvantage of not getting the added years.

<u>The burden of proof does not lie with C but he contends that the reasonable adjustment would have been submitting a "business case" and/or providing appropriate financial support in support of his application under "rule 2.24"</u>

178. The Tribunal finds it would not be a reasonable step to expect HMRC to support a case that it did not consider exceptional or adjust what it considered exceptional to be to meet the circumstances of the claimant.

179. Whilst cost was taken into account the Tribunal finds that the cost was not Ms Martin's reason for failing to support the claimant. She was concerned not to create a precedent within HMRC that exceptional circumstances included a decision to retire and concerned not to expose not just HMRC but potentially the CSP Scheme to a precedent being set which would apply to scheme members.

180. In the section 20/21 complaint against HMRC the first stage burden of proof was met. The claimant established facts, that the discretion was not exercised in his favour, that could realistically have amounted to discrimination if his disability had been part of that decision making. It was necessary for the Tribunal to move to the second stage and consider the respondent's reason for failing to exercise its discretion in his favour. The burden of proof was reversed and HMRC was able to show as set out above a non discriminatory reason for its failure to exercise the discretion in his favour.

Discrimination arising out of Disability (section 15 Equality Act 2010)

Did HMRC treat C unfavourably by failing to submit a "business case" and/or provide appropriate financial support in support of his application under "rule 2.24"?

181. HMRC knew at the time it made its decision that the claimant was a Type 1 diabetic and ought reasonably to have known this made him a disabled person. HMRC knew from 12 October 2021 that the claimant had ME/CFS and ought reasonably to have known that this made him a disabled person.

182. Was there unfavourable treatment ? What caused it ? Did it arise in consequence of disability ?

Unfavourable treatment

183. The decision not to support the claimant amounts to unfavourable treatment. It was generally to his detriment as he was denied the chance of the exercise of the discretion to award him added years by the CO. The first stage burden of proof test was met and the burden shifted to the respondent.

If so, was this because of something arising in consequence of any disability? **-**

C contends that his disability/disabilities prevented him from remaining in employment through to 31 May 2023

184. Again, as with the complaint against CO the drafting of the “something” was problematic. The HMRC decision not to support the claimant was not because of something arising in consequence of his disability. The paramount factor for Ms Martin was that she did not see retirement as an exceptional circumstance.

185. The something that the claimant pleaded, not being able to work through to 31 May 2023, did not arise in consequence of his disability. The reasoning in relation to the Section 15 complaint against CO on the “something” point applies equally here.

186. The claimant has not established in relation to either diabetes or ME/CFS that he could not have worked on to 31 May 2023. He had good attendance and performance, he had not told HMRC about his ME/CFS until after his retirement. He had not asked for OH referral or any reasonable adjustments to accommodate any emerging symptoms of ME/CFS in April 2021. He told the Tribunal that he had done the sums and worked out what his financial position would be if he applied for early ill health retirement and if he worked on to 31 May 2023 on a part time basis. That showed that he was not credible in saying that his ME/CFS prevented him from working beyond the retirement date he had planned. He had thought about, and costed, doing just that. His decision making was financial and did not arise out of an inability to work for either or both diabetes or ME/CFS reasons. He was undoubtedly unwell and had his diagnosis of ME/CFS on 1 April 2021 by telephone consultation but the claimant worked in April and did not, the Tribunal found, tell his managers that he was too unwell to work. He took no sick leave and there were no performance issues.

187. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

Neither his ill health nor alleged inability to work on to the end of the payment period on 31 May 2023 caused Ms Martin not to support him, not to consider his case an exceptional circumstance.

188. The complaint having failed it has not been necessary to consider whether or not denying support was a proportionate means of achieving a legitimate aim. There was little focus on this part of the case in cross examination or in submission. If it had been necessary to decide this point then the Tribunal would have found that aim (2) and (3), (4) and (5) were legitimate aims. Aim (1) in so far as it related to not putting forward a business case that did not amount to "special circumstances" for the purposes of the Scheme Rules and Guidance was not a legitimate aim of HMRC. The Tribunal would have found that it was legitimate for HMRC to have an aim of applying the "exceptional circumstances" test itself in deciding whether or not to support an applicant for added years but it was not legitimate for HMRC to apply the test that was a matter for the exercise of the discretion by the CO delegated from the Minister. The "special circumstances" test could be something that HMRC had regard to as a relevant factor in whether or not to consider the claimant an exceptional circumstance, it might consider its view of his prospects of achieving the added years from CO, but it was not a legitimate aim for HMRC to apply the CO test itself and not support those who it thought would not meet the CO test. In fact, Ms Martin did not do that but the aim itself would not have been legitimate if this point had had to be decided.

189. In relation to legitimate aims (2), (3),(4) and (5) denying support for the claimant as an exceptional circumstance case, and failing to commit to funding would have been a proportionate means of achieving those aims. The section 15 complaint against HMRC, if it had not failed above would have been objectively justified in relation to those aims.

Indirect Discrimination

Did HMRC apply the following PCP?

the application of "rule 3.4" with specific reference to the interpretation of "exceptional circumstances"

190. The respondent applied the guidance in Section 3.4 of the Scheme Flexibilities document which required that an applicant have the support of the employer in an application for added years. The test for HMRC to decide whether or not to offer that support was "exceptional circumstances"

191. Was it a provision, criterion or practice ? The Tribunal concludes in this case, based on the evidence of Ms Martin, that it was both a criterion, that the claimant must have the support of the second respondent by way of a business case and commitment to funding before the Minister would consider exercise of the discretion, and a practice, to require those seeking the exercise of the discretion by the Minister, to follow that route. It was also both a criterion and a practice (though there had only been 3 cases since 2000 but it was likely that it would be applied again in the same way in future) to interpret "exceptional circumstances".

192. HMRC applied the PCP to persons with whom the claimant did not share the characteristic, it applied to those with and without Type 1 diabetes ME/CFS.

Anyone seeking added years under 2.24 needed HRMC support and funding which was only granted in exceptional circumstances. Ms Martin applied the PCP to the claimant and to others.

Did or would the application of such PCP put (disabled people) *persons with whom B shares the characteristic ie Type 1 Diabetes* at a particular disadvantage when compared with people (who are not disabled) *persons with whom he does not share it.*

193. The List of issues wrongly stated the language of the statute. The comparator group is not "disabled people". Section 6(3)(b) Equality Act 2010 says that a reference to persons who share a protected characteristic is a reference to persons who have the same disability. The law is applied to ask did the PCP put people *with Type 1 Diabetes ME/CFS* at a particular disadvantage when compared with people *who do not have Type 1 Diabetes ME/CFS.* Further, Section 23 Equality Act 2010 requires that for the purposes of Section 19 there must be no material difference in circumstances. The parties accepted that this was the Tribunal's understanding of the correct application of the law at the outset of the hearing.

194. The next step is to address section 19 (2)(b) which tests whether the PCP put or would put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom he does not share it. A comparator group or pool can be formulated. In applying sections 19, 6(3)(b) and 23 the Tribunal formulated the following comparator group of those who do not share the claimant's disability:

> Pool A
>
> HMRC employees who have a disability other than Type 1 diabetes and ME/CFS and who are retiring between 1 June 2020 and 31 May 2023 together with those non-disabled HMRC employee who are retiring between 1 June 2020 and 31 May 2023.

195. The formulation of the comparator group is a matter of logic, and it may be possible to have more than one logical group. The group at Pool A as formulated by the Tribunal is not so broad as to encompass all employees, only those who would retire during the payment period, but it does embrace the test in section 19 as it includes those with whom the claimant does not share the characteristic. In this way, applying MOD v DeBique it can realistically and effectively test the allegation that the PCP indirectly discriminates against the claimant. It focuses on those who will be retiring during the pay period, therefore those who may need support as an exceptional circumstance to get added years. Applying the recent EAT decision in Royal Parks v Boohene (in which the EAT applied Essop and Naeem) the pool consists of the entire group the PCP affects or would affect (who might qualify as an exceptional circumstance for support in an application for added years on retirement when retiring during a payment period for a three year pay deal or not) whilst excluding those who are not affected by it.

196. Each of those comparators in Pool A, depending upon the date of their retirement, would experience a different amount of financial impact than each other (the claimant retired 10 months into the pay deal payment period) there may be comparators who retired on a different date than the claimant and different dates from each other but the common factor is that they all would have achieved less in

pension than they would have had if they had retired on 1 June 2023 at the completion of the payment period). There is no material difference between the others and the claimant other than his Type 1 diabetes and ME/CFS.

197. This is a case where the Scheme Rules, the exceptional circumstances test, applied to everyone and applying Spicer v Govt Spain the Tribunal had regard to the need to formulate the pool in a way that focused on those who are affected or potentially affected by the PCP, again a focus on those retiring during the payment period was adopted. To have formulated the pool to include all employees or anyone leaving the employ of the respondent or even anyone who was a member for CSP Scheme who had worked at all during the pay freeze could have been logically arguable but would have lost focus on the operation of the PCP and the determination on "exceptional circumstances". To have narrow the pool (as in Pool A) to those applying for added years on retirement during the payment period could arguably have narrowed the group excessively and potentially over represented the disabled in that group.

198. The pool could be constituted a different way taking into account that it can include all of those affected by the PCP *whether negatively or positively* Royal Parks*.* The Tribunal heard evidence from Ms Martin that there had only been three cases since 2000 in which a member had got added years under the "special circumstances" CO discretion presumably with support as an "exceptional circumstance". Those cases were broader than just HMRC and related solely to recruitment scenarios. It is arguable then that the pool above is drawn too narrowly. The pool could be redrawn to include recruitment cases:

> Pool B
>
> HMRC employees *or potential employees seeking to join HMRC* who have a disability other than Type 1 diabetes and ME/CFS and who are retiring or joining between 1 June 2020 and 31 May 2023 together with those non-disabled HMRC employees or potential employees who are retiring or joining between 1 June 2020 and 31 May 2023.

199. Each of the comparators in Pool B, joining HMRC, would achieve a different advantage to each other if added years were awarded on appointment depending on their individual circumstances. For example, someone recruited who was leaving another department to join HMRC and losing the benefit of a pay deal in that other department may have years added as an exceptional circumstance, which may be a different number of years added to another new joiner moving from a second different department with a different pay deal.

Did the application of such PCP put C at that disadvantage in relation to a relevant matter in comparison with (persons who are not disabled*?) persons with whom he does not share his disability*

200. The PCP the claimant relies on was the decision of HMRC not to treat him as an exceptional circumstance, not to support him in his application to the CO with a business case and funding to get the added years.

201. The claimant (those with the claimant's disability) could not now go to CO and seek exercise of the Ministerial discretion in clause 2.24. That was not the particular disadvantage he pleaded. He said it was

that his disability/disabilities prevented him from remaining in employment

through to 31 May 2023

On that formulation his complaint must fail as the operation of the PCP does not put the claimant (those with his disability) at that disadvantage. On his complaint as formulated by the Tribunal for him, so that the disadvantage is not getting the support, his complaint also fails because he is not disadvantaged in comparison with people with whom he does not share that characteristic.

202. The comparison exercise itself was not something that the claimant addressed in his evidence. The claimant said

> *I doubt that there are any other people in my position retiring just at this time as a result of life shortening disabilities. There is clearly no danger, therefore, that exercising your discretion in this way would set a dangerous precedent.*

No statistics were provided on the composition of any comparator groups by either side save that Ms Martin gave evidence that she believed the respondent to have a workforce in which around 13% were disabled in April 2021.

203. The Tribunal accepts the evidence of Ms Martin that she would not have supported as an exceptional circumstance an application for added years whether an applicant had Type 1 diabetes and ME/CFS or not where it related to a decision to retire during the payment period of a pay deal, seeking betterment than others retiring on that date (whether disabled by reason of Type 1 diabetes or ME/CFS or not) and where to do so would set a precedent of allowing anyone leaving service during a payment period of a pay deal to potentially claim added years to put them in the position they would have been in if they had worked through the payment period. The Tribunal was satisfied on her oral evidence that a non-disabled or otherwise disabled than with Type1 diabetes/ CFS would have experienced exactly the same application of the exceptional circumstances test and decision making outcome as the claimant / a person with the claimant's disability.

204. The claimant did not adduce any statistical evidence of different treatment between himself and those without Type 1 diabetes ME/CFS either on retirement or recruitment based applications for added years.

205. The Tribunal finds there is no particular disadvantage to the claimant/ those with Type 1 diabetes ME/CFS compared to those who do not have Type 1 diabetes ME/CFS in the exercise of Ms Martin's discretion on exceptional circumstances.

206. It has not been necessary to consider if HMRC would have succeeded in establishing that the operation of the PCP was a proportion means of achieving a legitimate aim. However, the Tribunal comments that if it had had to conduct that analysis it was likely, by way of provisional view only, to find that the third aim: *"To avoid setting a precedent that could possibly endorse and incentivise disabled members of the PCSPS to leave at or before their scheme retirement age and that would also have significant financial implications for HMRC and also for other government departments* was both legitimate and proportionately applied.

207. In Pool B, if the claimant had succeeded in establishing particular disadvantage, which he did not (the claimant adduced no evidence of differential treatment between Type 1 diabetic /ME/CFS applicants either on recruitment or retirement and non Type1 diabetic/ ME/ CFS applicants) the Tribunal would have been likely, by way of a provisional view to have found that the first and second

aim pleaded by HMRC

> To comply with the rules of the PCSPS and relevant guidance and not to put forward a business case that did not amount to "special circumstances" for the purposes of those rules and guidance

and

> To maintain compliance with the spirit and letter of the pension scheme rules so as not to encourage pension scheme administrators to overstep the reach of their authority

were legitimate aims and that the decision not to support the claimant in his application to CO for added years was a proportionate means of achieving those aims because the Pension Scheme Rules set out the categories of application for added years and there was a category for recruitment and retention. It would also have been proportionate because the applicant for added years would be continuing to work for the respondent.

Conclusion

The claimant's complaints against both CO and HMRC fail.

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Employment Judge Aspinall

Date 23 August 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date 12 September 2023

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FOR EMPLOYMENT TRIBUNALS