Neutral Citation Number: [2023] EAT 135

Case No: EA-2022-000021-OO
EA-2022-000123-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 October 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT)

- -

Between :

CHIEF CONSTABLE OF DERBYSHIRE CONSTABULARY
CHIEF CONSTABLE OF WEST MIDLANDS CONSTABULARY
SECRETARY OF STATE FOR HOME DEPARTMENT

Appellants/Respondents to Cross-Appeal

- and –

MS N CLARK
MRS M BELL

Respondents/Appellants in Cross-Appeal

- -
- -

Peter Lockley (instructed by East Midlands Police Legal Services and Joint Legal Services for Staffordshire Police and West Midlands Police) for the **Chief Constable Appellants/Respondents to the Cross-Appeal**
Elizabeth Hodgetts (instructed by Government Legal Services) for the **Secretary of State Appellant/Respondent to the Cross-Appeal**
Jack Feeny (instructed by Penningtons Manches Cooper LLP) for the **Respondents/Cross-Appellants**

Hearing date: 25 July 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 23.10.2023

SUMMARY

Disability discrimination – jurisdictional points – whether Employment Tribunal has jurisdiction to hear a claim of unlawful discrimination arising out of the operation of regulation 12 of the ***Police Injury Benefit Regulations 2006*** *– sections 61 and 108* ***Equality Act 2010***

The claimants were former police officers who had suffered work-related injuries, which had subsequently led to total and permanent disablement. Because their respective total and permanent disablements had occurred more than 12 months after they had suffered their injuries, the claimants were not entitled to a disablement gratuity under regulation 12 of the **Police Injury Benefit Regulations 2006** ("PIBR 2006"). By separate claims, the claimants each sought to bring claims of disability discrimination before the Employment Tribunal ("ET") in respect of the 12 month rule for entitlement under regulation 12 **PIBR 2006**. Their claims were pursued under section 108, alternatively section 61 of the **Equality Act 2010** ("EqA"); Ms Clark's claim also placed reliance on principles of European Union ("EU") law.

The ET held that the claims could not be pursued under section 108 but did fall within its jurisdiction by means of section 61 **EqA**, because the regulation 12 **PIBR 2006** benefit fell within the definition of an occupational pension scheme for the purposes of section 1 **Pension Schemes Act 1993** ("PSA"). The respondents appealed against the conclusion in relation to section 61 **EqA**; the claimants cross-appealed in respect of section 108.

Held: allowing the appeal and dismissing the cross-appeal

The ET had erred in its construction of section 1 **PSA**, which required (relevantly) that the benefit in issue should be provided *on* retirement or termination of service. While the disablement gratuity provided by regulation 12 **PIBR 2006** required that the police officer's service had ceased, that was insufficient to establish entitlement: the benefit was only payable after the cessation of service at the point when the officer was deemed to be totally and permanently disabled by reason of a relevant injury. The grammatical construction of regulation 12 **PIBR 2006** was further supported by the

historical and legislative context.

Moreover, the claimants could not establish a directly effective right under EU law. The benefit in issue was not paid "*in consideration for work*" (see article 157 of the **Treaty on the Functioning of the EU**) and was not directly related to the claimants' periods of service (see the decisions of the Court of Justice of the European Union in **Bestuur Van Het Algemeen Burkerlijk Pensioenfonds v Beune** [1995] 2 CMLR 30, **Griesmar v Ministre de L'Economie** [2003] 3 CMLR 5, and **Maruko v Versorgungsanstalt der Deutschen Bühnen** [2008] 2 CMLR 32). As such, it could not be said to be "*pay*" for the purposes of the **EU Directive 2000/78** ("the Framework Directive"); as the domestic legislative and historical context suggested, it instead fell to be considered as an injury benefit granted under "*state schemes or similar, including state social security or social protection schemes*" and thus coming within the exception at article 3(3) **Framework Directive**.

By their cross-appeal the claimants did not seek to argue that the ET had erred in its conclusion under section 108 **EqA** but said that supported their case under EU law and/or as to the construction of section 61 **EqA**; for the reasons provided in rejecting those earlier submissions, the cross-appeal was refused.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. In this appeal and cross-appeal the Employment Appeal Tribunal is asked to determine whether an Employment Tribunal ("ET") has jurisdiction under the **Equality Act 2010** ("EqA") to hear a claim of unlawful discrimination arising out of the operation of regulation 12 of the **Police Injury Benefit Regulations 2006** ("PIBR 2006"). By the reserved judgment of the Midlands (East) ET (Employment Judge Blackwell sitting alone on 8-10 November 2021), promulgated on 3 December 2021, it was held that, although there was no jurisdiction to hear claims of disability discrimination pursuant to sections 39 or 108 of the **EqA**, the ET had jurisdiction to hear such claims pursuant to section 61 **EqA**.

2. The claims before the ET were brought by Ms Clark and Mrs Bell; referred to in this judgment as "*the claimants*" or by name, where necessary to distinguish between them. The respondents were (1) the Chief Constable of Derbyshire (Ms Clark's claim) and the Chief Constable of West Midlands Constabulary (Mrs Bell's claim) ("*the Chief Constables*"), and (2) the Secretary of State for Home Department ("*SSHD*"); referred to in this judgment as "*the respondents*" or by title, as necessary. Representation has remained the same throughout.

3. The appeal is brought by the respondents, who contend that the ET erred in law in finding that regulation 12 **PIBR 2006** is, or forms part of, an "*occupational pension scheme*", and thus falls within the ambit of section 61 **EqA**. The claimants resist the appeal and cross-appeal against the ET's decision in respect of section 108 **EqA**.

The relevant factual background

The legislative history (summary)

4. As Ritchie J observed in **R (White) v Police Medical Board** [2022] EWHC 385 (Admin):

> "39 It has long been the case that Parliament has provided injury benefits to

> police officers injured at work. So as noted by Lord Reed in *Lothian and Borders Police Board v MacDonald* 2004 SLT 1295, para 27:
>
> > "the Metropolitan Police Act 1829, which established the Metropolitan Police Force, made provision by section 12 for the payment of sums to constables 'as a compensation for wounds or severe injuries received in the performance of their duty, or as an allowance to such of them as shall be disabled by bodily injury received, or shall be worn out by length of service'.""

5. Although initial provision was discretionary (as section 23 **Metropolitan Police Act 1839** made clear: *"... nothing herein contained shall be construed to entitle any constable absolutely to any superannuation allowance, or to prevent him from being dismissed without superannuation allowance*"), provision for police pensions and other gratuities as of right was made under the **Police Pensions Act 1921**. Thereafter, developed through further legislative iterations, the provisions and systems for police pensions (including ill-health retirement) and for police injury awards and benefits continued to be contained within a single legislative instrument until 1987, albeit full separation did not take place until 2006.

6. Under the **Police Pensions Act 1948** (and subsequent Acts), regulations were introduced to provide for an "*ill-health award*" where a person:

> "(1) … retires or has retired … on the ground that he is or was permanently disabled" (see regulation 20 **Police Pensions Regulations 1971**);

and for a "*supplemental pension*" in respect of an individual:

> "(1) … who ceases or has ceased to be a member of the police force …, and is permanently disabled as a result of injury received without his own default in the execution of his duty" (see regulation 22 **Police Pensions Regulations 1971**).

7. For the respondents, it is observed that a distinction was thus made between awards which required there to be a causative connection between the disablement and termination ("*on the ground that ...";* regulation 20) and those that did not (regulation 22). This distinction continued (and continues) to be drawn, thus (relevantly) entitlement to an ill-health pension was subsequently provided by regulation 29 **Police Pensions Regulations 2006** (applying to "*a regular police officer*

who retires or has retired under regulation 21 (compulsory retirement on the ground of disablement)", emphasis added), and regulation 22 of the **Police Regulations 1971** was replicated by regulation 11 **PIBR 2006**, providing that an "*injury award*" would be payable to:

> "(1) … a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty (in Schedule 3 referred to as the "relevant injury")."

8. The particular award to which these proceedings relate was first introduced under regulation 4 of Part II of the **Police Injury Benefit Regulations 1987**, which provided for a disablement gratuity in terms now replicated by regulation 12 **PIBR 2006**, as follows:

> "12.- Disablement gratuity
> (1) This regulation applies to a person who – (a) receives or received an injury without his own default in the execution of his duty, (b) ceases or has ceased to be a member of a police force, and (c) within 12 months of so receiving the injury, becomes or became totally and permanently disabled as a result of that injury. …"

9. For the respondents, it is again observed that this provision includes no requirement for a causative connection between disablement and termination.

10. In 2006, it was determined to separate out the schemes providing for police pensions on the one hand, and injury awards on the other; this was achieved by amending the then **Police Pensions Regulations 1987** and the schemes continued to be the subject of separate provision in the **Police Pensions Regulations 2006** and the **PIBR 2006** (and, subsequently, the **Police Pensions Regulations 2015** and the **Police Injury Benefits Regulations 2015**). The legislative division was the result of a conscious decision to remove injury awards from the scope of the police pension scheme. Eligibility for injury awards did not require that an officer be a member of the police pension scheme, and tax changes made by the **Finance Act 2004**, with effect from April 2006, necessitated the removal of benefits that were not tax-approved (which included injury awards) so as to ensure that the police pension scheme would retain the favourable tax status of a tax-approved pension scheme. As the ET recorded:

> "16. The disablement gratuity which is the subject of this litigation was first provided for by Regulation 4 of the Police Injury Benefit Regulations 1987. Eligibility did not depend upon membership of a police pension scheme and that remains the case.
> 17. In 2001 to 2005, there was a review of the financing of police pensions, which included the staff side of the Police Negotiation Board (which includes the Police Federation). It seems to have been common ground that injury awards were not part of pension benefits. At broadly the same time, there was a wide-ranging review of the tax regime in respect of registered pension schemes and the Finance Act 2004 became law. As a consequence, the PIBR 2006 was also enacted. … [T]he explanatory memorandum to the PIBR 2006 [provides, at] … paragraph 4.3:
>
> > "4.3 This situation changes when the new tax regime for registered pension schemes – introduced by the Finance Act 2004 – comes into effect on 6 April this year. Any unauthorised payment will incur a tax charge. In order not to let the Police Pension Scheme incur such charges it is necessary to separate the injury benefits from the pension scheme regulations."
>
> 18. At paragraph 7 headed "Policy background":
>
> > "7.1 Police injury awards do not depend on membership of the Police Pension Scheme, but are in effect compensation for work-related injuries. Benefits comprise pensions and gratuities for former officers who are permanently disabled as a result of an injury received without their default in the execution of duty, and survivors' pensions and gratuities for spouses, civil partners, children and adult dependent relatives where the officer dies as a result of such an injury.
> > 7.2 For the reasons set out in paragraph 4, this instrument brings together the current regulations relating to injury benefits into a separate document from the SI for the Police Pension Scheme. The instrument is not a formal consolidation since the opportunity is taken to update references to widows (now called adult survivors) and, in line with the new HMRC requirements, to apply an age limit of 23 years to child benefits where the child is not permanently disabled. …""

11. The claimants point out that, on introducing the new arrangements in Parliament on 29 November 2005, the then Minister for Policy, Security and Community Safety explained that the new arrangements "*will not affect officers*". The respondents accept this, but counter that the legislative de-coupling of injury awards merely reflected the distinction between these awards and pension benefits (meeting the definition within section 1 **Pension Schemes Act 1993**): it was, therefore, correct to say that the position for officers would not be affected. As the **Home Office Guidance on the Police Pension Scheme 2006** made clear, however, the definition of "*retirement*" for the purposes of the pension scheme was different to that previously used; making clear (by regulation 17) that

"*retirement*" was restricted to:

> "an event which gives immediate entitlement to [pension benefits] and which is therefore a 'benefit crystallisation event' in the terminology of HMRC and the Finance Act 2004".

12. The respondents further observe that subsequent government reviews of police injury benefits, in 2008 and 2018/9, have underlined that the system of injury benefits are not pension scheme benefits but a separate element of the broader package of benefits in place for police officers (see as outlined in the witness statement of the Home Office witness, Peter Spreadbury, at paragraphs 28-29).

*The **PIBR 2006***

13. The **PIBR 2006** create a system of awards for police officers injured in the execution of their duty. Part 2, which comprises regulations 11-23 **PIBR 2006**, is headed "*Awards on Injury and Death*" and sets out the awards created by the **PIBR**.

14. Regulation 11 **PIBR 2006** (replicating the earlier provision at regulation 22 **Police Pensions Regulations 1971**) provides for entitlement to an "*injury award*" in the terms set out at paragraph 7 above. It further makes clear that entitlement might arise some time *after* cessation of service (for whatever reason), stating:

> "(2) A person to whom this regulation applies shall be entitled to a gratuity and, in addition, to an injury pension, in both cases calculated in accordance with Schedule 3; but payment of an injury pension shall be subject to the provisions of paragraph 5 of that Schedule and, where the person concerned ceased to serve before becoming disabled, no payment shall be made on account of the pension in respect of any period before he became disabled."

15. Regulation 12 **PIBR 2006** is also contained within Part 2 and provides for a (more valuable) disablement gratuity in (more serious) cases of total and permanent disablement. As regulation 12(1) makes clear (see paragraph 8 above), this is a lump sum gratuity paid to those officers who (a) are injured in the execution of their duty, through no fault of their own, (b) cease (or have ceased) to be members of a police force, and (c) become (or became) totally and permanently disabled as a result

of that injury. Regulation 12(2) confers the gratuity on a person to whom the regulation applies, and defines the amount to be paid, as follows:

> "(2) … an amount equal to whichever is the lesser of the following amounts, namely-
> (a) five times the annual value of his pensionable pay on his last day of service as a member of a police force;
> (b) the sum of four times his total remuneration during the 12 months ending with his last day of service as a member of a police force and the amount of his aggregate pension contributions in respect of the relevant period of service."

Further provision about the calculation of the amount of the gratuity for the purposes of regulation 12(2)(b) is then made by regulation 12(3)-(4).

16. Regulation 7 **PIBR 2006** specifies the time at which the relevant conditions for entitlement are deemed to be satisfied, as follows:

> "(1) … a reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time likely to be permanent.
> …"

17. As for the regulation 12 requirement that the officer be "*totally"* disabled, that is defined at regulation 7(6), as follows:

> "(6) … "totally disabled" means incapable by reason of the disablement in question of earning any money in any employment …"

18. Regulations 13-21, also within Part 2 **PIBR 2006**, define various other benefits, which are all payable on the death of an officer. By regulation 21, entitlement to a "*Death gratuity*" is (relevantly) provided in the following terms:

> "(1) Subject to paragraph (2), this regulation applies to a member of a police force who receives or received an injury without his own default in the execution of his duty and within 12 months of receiving that injury dies or has died as a result of it.
> (2) In the case of a person who had ceased to serve as a member of a police force before his death, this regulation shall apply to him only if his death also occurred before any decision by a medical authority under Part 4 of these Regulations that he was totally and permanently disabled as a result of that injury; and where this regulation so applies it shall apply to the exclusion of

> regulation 12."

It is thus envisaged that a police officer's service may terminate first, before any decision on total and permanent disablement is made. If, however, that decision is made prior to the officer's subsequent death (caused by an injury suffered in the execution of duty), regulation 12 will apply, whereas if no such decision has been made regulation 21 applies to the exclusion of regulation 12.

19. Regulations 22 and 23 **PIBR 2006** then set out detailed rules on the "*abatement of certain gratuities*", in essence to avoid double recovery.

20. Part 4 **PIBR 2006** is headed "*Appeals and Medical Questions*" and provides (by regulation 30) for a selected medical practitioner ("SMP") to determine medical questions relevant to entitlement, subject to a right of appeal to a board of medical referees (regulation 31) and ultimately (for a member of a home police force) to a right of appeal to the Crown Court (regulation 34).

21. Under Part 6 **PIBR 2006**, it is explained that:

> "42. Funds out of which and into which payments are to be made
> (1) All payments for the purposes of these Regulations made by or to a police pension authority shall be paid out of or into the police fund …"

As the respondents observe, it is thus made clear that benefits under **PIBR 2006** are not funded by the police pension scheme.

The facts relating to the claimants

22. Both Ms Clark and Mrs Bell had been serving police officers: Ms Clark as part of the Derbyshire constabulary; Mrs Bell working within the West Midlands police force. Before the ET, there was no dispute as to the relevant factual history in their respective cases.

23. Ms Clark had sustained a head injury following an incident on duty in September 2001. She developed seizures, which initially lasted until about 2007 but then began to recur in 2017. In October 2018 it was determined that Ms Clark was disabled from the core duties of a police officer due to epilepsy and she retired on the grounds of permanent disablement on 15 February 2019. On 20 March

2019, Ms Clark applied for an award under **PIBR 2006** and, on 14 May 2020, was assessed to be entitled to an injury award under regulation 11 **PIBR 2006** at Band 4 (the highest band), but not to be entitled to a regulation 12 gratuity because more than 12 months had elapsed between her injury and her total and permanent disablement.

24. For her part, Mrs Bell had been signed off work with anxiety and panic attacks arising from events in the workplace in 2015. In December 2018 she was assessed to be totally and permanently disabled and she retired on the grounds of permanent disablement on 9 December 2018. On 24 June 2019, she was awarded a Band 4 injury award under regulation 11 **PIBR 2006**, but was refused a regulation 12 gratuity because more than 12 months had elapsed between her injury and her disablement.

The legal bases for the claims before the ET and the ET's decision and reasoning

Introductory overview

25. Both claimants brought claims before the ET (Ms Clark presented her claim on 4 November 2020; Mrs Bell's was lodged on 21 January 2021), in which they complained that the refusal of a disablement gratuity pursuant to regulation 12 of the **PIBR 2006** – in particular, the application of the 12 month rule - amounted to disability discrimination, under sections 15 and 19 **EqA**.

26. An ET can only hear claims for which jurisdiction has been conferred on it by statute. In relation to **EqA** claims, section 120(1) **EqA** within Part 9 ("Enforcement") confers jurisdiction on the ET to hear complaints relating to a contravention of (a) Part 5 (work) or of (b) sections 108, 111 or 112 that relate to Part 5; in the present proceedings, the relevant provision in this regard is section 108 **EqA**.

27. The paradigm case would be that of an employee, against whom it is unlawful to discriminate by virtue of section 39 **EqA**; police officers are treated as employed by their Chief Constables by virtue of section 42(1). By section 108 **EqA**, however, protection is extended to "*Relationships that*

have ended", which extends the prohibition on discrimination beyond the currency of the employment relationship, provided that two conditions are fulfilled:

> "(1) A person (A) must not discriminate against another (B) if— (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.
> […]
> (6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended."

28. Additionally, an ET has jurisdiction to determine a complaint of discrimination in relation to occupational pension schemes. Chapter 2 of Part 5 **EqA** is titled "*Occupational pension schemes*", within which section 61 **EqA** creates and defines the "*non-discrimination rule*" to which any occupational pension scheme is subject:

> "Non-discrimination rule
> (1) An occupational pension scheme must be taken to include a non-discrimination rule.
> (2) A non-discrimination rule is a provision by virtue of which a responsible person (A)— (a) must not discriminate against another person (B) in carrying out any of A's functions in relation to the scheme;
> …
> (3) The provisions of an occupational pension scheme have effect subject to the non-discrimination rule."

29. Section 61(4)(b) **EqA** stipulates that a responsible person includes "*an employer whose employees are, or may be, members of the scheme*". Section 61(7) confirms that a breach of the non-discrimination rule is a breach of Part 5 for the purposes of Part 9. As a result, if regulation 12 of the **PIBR** is, or forms part of, an "*occupational pension scheme*", then the ET would have jurisdiction to entertain a claim that the non-discrimination rule has been breached in relation to it.

30. The claimants did not seek to pursue claims through the gateway of section 39 **EqA**: the retirement of each of the claimants brought about the end of their respective employments before either of them lodged claims with the ET; as they were not employees at the time of bringing their respective claims, they accepted that they could not rely on section 39 **EqA**. The cases before the ET

were instead put on the basis of section 108, alternatively section 61 **EqA**.

31. Additionally, in Ms Clark's case, it was stated that, in putting her complaints of discrimination under the **EqA**, she further relied on (1) the fundamental principle of non-discrimination under European ("EU") law, by which the UK courts were bound to disregard or disapply provisions of national law which conflict with that principle in the context of EU law, asserting that occupational pension benefits "*such as those conferred by PPR [the Police Pension Regulations] and the Injury Benefit Regulations*" fell within "*that context*"; and (2) the right conferred by EU law to an effective remedy, enshrined in Article 147 of the **EU Charter of Fundamental Rights**. No such reliance on EU legal principles was pleaded by Mrs Bell and it is unclear to what extent any argument under EU law was pursued below. In any event, the ET made no reference to any arguments founded upon EU law in its reasoning.

The section 108 case

32. Section 108(1)(a) **EqA** echoes the language of section 16A(3) of the former **Disability Discrimination Act 1995** ("DDA"), which was enacted to give effect to the decisions of the House of Lords in **Rhys-Harper v Relaxion Group plc** [2003] ICR 867. In **Rhys-Harper**, the House of Lords read the provisions of the **DDA** purposively, to extend protection to "*incidents of the employment relationship*" which persisted after the termination of the contractual relationship (in that case, the operation of procedures to appeal against dismissal). At paragraph 45 **Rhys-Harper**, Lord Nicholls defined an "*incident of the employment relationship*" as follows:

> "45. To be an 'incident' of the employment relationship for this purpose the benefit in question must arise between employer or former employer as such and employee or former employee as such. A reference is a prime example."

33. In **Ford Motor Company Ltd v Elliott & others** [2016] ICR 711 EAT, it was observed that:

> "26. … the question to be considered under section 108(1)(a) is not … whether there was a close connection between the Claimants' relationship with the Respondent as former employees and that as current pensioners in which capacity they bring their claims. The question is whether the discrimination alleged, in this case the difference between the lump sum payments made to

> active employee members of the FPSSS [Ford Pension Scheme for Senior Staff], and the additional pension increase made in 2011 to pensioner members, arose out of and was closely connected to the employment relationship which used to exist between them and the Respondent. … "

34. As for section 108(1)(b), the EAT in **Elliott** held that the ET had erred:

> "29. …… in failing to consider and decide whether the allegations in the ET1s, if established, would show that the circumstances in which the payments to the Claimants and to their comparators were not materially different so as to found a claim of discrimination contrary to the EqA. Such a decision is necessary to determining whether the claims fall within section 108(1)(b). …"

35. Considering whether the claimants in the present proceedings might rely on section 108 **EqA**, the ET had regard to the guidance in **Elliott**, noting that this provision had been introduced to codify the decision in **Rhys-Harper**. Adopting the reasoning provided in an earlier ET decision, in **Curry v Chief Constable of Northumbria Police** Case No. 2500281/2017, the ET accepted that:

> "47. … the conduct of the respondent which is impugned by this claim could not have occurred during the employment relationship because the allegations arise out of the scheme into which the claimant was admitted only after the relationship ended and as a consequence of it ending."

It concluded that the refusal to pay gratuities under regulation 12 **PIBR** arose out of the relationship between the Chief Constables exercising their duties under the **PIBR**, and the claimants seeking benefit thereunder, not the employment relationship; as such section 108 **EqA** did not apply.

The section 61 case

36. Section 61 **EqA** applies to an "*occupational pension scheme*", which is defined (by section 212(1)) by reference to the definition in section 1 of the **Pension Schemes Act 1993** ("PSA 1993"). As was common ground below (and on appeal), the question for the ET was whether **PIBR 2006** fell within the definition of section 1 **PSA 1993**.

37. As originally enacted, section 1 **PSA 1993** defined "*occupational pension scheme*" as meaning:

> "… any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners with qualifying service in an employment of any such description or category;"

38. In **Westminster City Council v Haywood** [1997] Pens LR 39, CA, Millet LJ (as he then was) observed that this provided a "*very wide*" definition. That observation was cited by Chadwick LJ (with whom Thorpe LJ agreed) in **Parlett v Guppys (Bridpot) Ltd (No 2**) [2000] Pens LR 195, CA at paragraph 31, as encouragement for the view:

> "… that 'occupational pension scheme' should be construed liberally and not restrictively".

In **Parlett**, Chadwick LJ identified that the definition of occupational pension scheme contained four elements that had to be satisfied. On the facts of that case, the third element, whether the scheme provided benefits "*payable on determination of service or on death or retirement*", was "*plainly satisfied*" and, as such, did not fall for decision (see paragraph 27).

39. The definition of occupational pension scheme was also the subject of consideration in **City and County of Swansea v Johnson** [1999] Pens LR 187 HC (ChD). In that case, the court (Hart J) had to determine whether the Pensions Ombudsman had had jurisdiction to entertain a complaint relating to the scheme for industrial injury allowances set out in Part L of the **Local Government Superannuation Regulations 1986**, which depended on whether such a scheme was an "*occupational pension scheme*" for the purposes of the **PSA 1993**. Part L applied where a person in relevant employment:

> "L2 … (a) sustains an injury, or (b) contracts a disease as a result of anything he was required to do in carrying out his work."

40. The particular issue in **Johnson** concerned regulation L3, which provided:

> "(1) If as a result of an incapacity which is likely to be permanent caused by the injury or disease of a person … ceases to be employed in a relevant employment … he shall be entitled to an annual allowance."

41. Observing that his "*intuitive predisposition*" would have been to find otherwise, Hart J

concluded that:

> "14. … It is … difficult to say that such a scheme does not provide 'benefits, in the form of pensions or otherwise, payable on termination of service'."

Noting:

> "Those words are, as Millett LJ (as he then was) pointed out in *Westminster City Council v Haywood* … of wide ambit. Other examples may be given of schemes or arrangements, which are potentially within those words: a provision, for example, in an employment contract for agreed damages in the event of dismissal before the expiry of the contractual employment term, or for compensation for termination of the employment contract on grounds of redundancy."

42. Hart J acknowledged that:

> "15. … the scheme (or sub-scheme) of which regulation L3 forms part does include provisions for benefits payable otherwise than on termination of service (see regulation L4) and, in that respect at least, does not fulfil the definition of an 'occupational pension scheme' in section 1 of the 1993 Act."

but did not consider that impacted upon his decision:

> "I am not, however, persuaded that the inclusion of such an extraneous benefit necessarily takes the scheme outside the definition if it otherwise qualifies. The appellant did not seek so to argue."

43. The wording of section 1 of the **PSA 1993** was amended with effect from 1 July 2005 (pursuant to the **Pensions Act 2004** ("PA 2004")), to read:

> "1. Categories of pension schemes.
> (1) In this Act, unless the context otherwise requires—
> "*occupational pension scheme*" means a pension scheme– (a) that– (i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or (ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people, is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, …
> …
> or a pension scheme that is prescribed or is of a prescribed description;
> …
> (2) This subsection applies– (a) where people in employments of the description concerned are employed by someone, to a person who employs such people, (b) to a person in an employment of that description, and (c) to a person representing interests of a description framed so as to include– (i) interests of persons who employ people in employments of the description

> mentioned in paragraph (a), or (ii) interests of people in employments of that description.
> …
> (5) In subsection (1) "pension scheme" (except in the phrases "occupational pension scheme", "personal pension scheme" and "public service pension scheme") means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people– (a) on retirement, (b) on having reached a particular age, or (c) on termination of service in an employment."

44. The amended definition no longer includes schemes or arrangements that provide benefits payable "*on death*". More than that, however, the definition under the **PSA 1993** can be seen to be narrower than that provided by the **Finance Act 2004**, which, by section 150 (which came into force from 6 April 2006), defines a "*pension scheme*" as follows:

> "Meaning of "pension scheme"
> (1) In this Part "pension scheme" means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons— (a) on retirement, (b) on death, (c) on having reached a particular age, (d) on the onset of serious ill-health or incapacity, or (e) in similar circumstances.
> …
> (5) In this Part "occupational pension scheme" means a pension scheme established by an employer or employers and having or capable of having effect so as to provide benefits to or in respect of any or all of the employees of— (a) that employer or those employers, or (b) any other employer, (whether or not it also has or is capable of having effect so as to provide benefits to or in respect of other persons)."

45. Before the ET, the respondents argued that the broad approach adopted in the cases of **Hayward**, **Johnson**, and **Parlett** related to an earlier, and different, definition of occupational pension scheme, and it was relevant that Parliament (even when amending the **DDA** in October 2004) had chosen not to adopt the wider definition provided under the **Finance Act 2004**. The relevant benefits were deliberately taken out of the **Police Pension Regulations** as a consequence of the tax changes introduced by the **Finance Act 2004**, and that reflected the distinction between the ill health awards in question – which were more akin to a scheme of social security – and occupational pension benefits, which were a form of pay (and see the observations of Henderson LJ (with whom the other members of the court agreed) at paragraphs 2-3 in **Evans and anor v Chief Constable of the South**

Wales Police [2018] EWCA Civ 2107).

46. The ET did not accept those submissions. Although the judicial decisions in **Hayward**, **Johnson**, and **Parlett** related to an earlier definition under the **PSA 1993**, the ET considered that the courts in those cases were carrying out an analogous task, namely considering whether the Pensions Ombudsman had jurisdiction. More specifically, the ET found the **Johnson** case to be of "*direct application*": it concerned an entitlement to an injury allowance which arose after early retirement and it had been argued that the Pensions Ombudsman did not have jurisdiction as "*the scheme of allowance as contained in Part L of the 1986 Regulations did not amount to an occupational pension scheme within the meaning of section 1 of the Pension Schemes Act 1993*."

47. Referring back to the earlier decision in **Curry** (where the ET had allowed the claimant's application to amend his claim to rely on section 61 **EqA**, rejecting the respondent's submission that that provision could have no application to benefits under **PIBR 2006**, which could not be described as a pension), the ET again adopted the reasoning in that case, as follows:

> "40. …
> Thus benefits under the Scheme only arise if an officer has ceased to be a member of a police force. But if an officer has so ceased then he has retired from the police force albeit because of that disability. The word "retirement" must cover a situation different to retirement on reaching a particular age for that is specifically provided for. Furthermore the benefits to the claimant clearly arise on the termination of his employment as Regulation 11 only applies when membership of the police force has ceased and thus employment ended. …"

48. Acknowledging that the **PIBR** had been de-coupled from the police pension scheme, the ET considered that was "*purely as a consequence of avoiding a tax disadvantage and/or on administrative grounds*" and not to be afforded "*any great weight*". Returning to the question whether the **PIBR 2006** fell within the definition under the **PSA 1993** – that is, whether it constituted a scheme or other arrangements that provided, or was capable of providing, benefits "*on retirement"* or *"on termination of service in an employment*" (section 1(5)(a) and (c)) - the ET concluded that it did.

The ET's subsequent decision in Mrs Bell's case

49. At a subsequent preliminary hearing on 13-14 February 2023, the ET ruled that Mrs Bell's claim had been brought out of time, dismissing her case for want of jurisdiction for reasons set out in a judgment sent to the parties on 16 May 2023. A second appeal has been lodged against that decision.

The appeal and the respondents' submissions in support

50. The respondents appeal against the ET's decision in relation to section 61 **EqA** on the following principal grounds: (1) the ET thereby erred in its construction of the natural meaning of section 1 **PSA 1993**, in particular of the word "*on" ("on retirement"; "on termination*"); (2) the ET further erred in failing to distinguish between an ill-health retirement award (which is payable on termination) and the regulation 12 **PIBR** disablement gratuity (which is not); (3) the ET was wrong to see the decision in **City and County of Swansea v Johnson** [1999] Pens LR 187 HC as of direct application – that case related to an ill-health retirement award and was thus not relevant to the construction of regulation 12 **PIBR 2006** and/or should be distinguished; (4) the ET erred by failing to give proper weight to the fact that Parliament had deliberately chosen a definition of "*occupational pension scheme*" that was narrower than an alternative available under section 150(1) **Finance Act 2004**, which would have encompassed regulation 12; (5) the ET further erred by giving no, or no proper weight to the legislative history of the **PIBR 2006**, which demonstrated a deliberate de-coupling of injury benefits from the police pension scheme.

51. In addressing the first ground of appeal, and the question of statutory construction raised in relation to section 1(5) **PSA 1993**, the respondents submit that "*on retirement"* and *"on termination*" must mean "*on the occurrence of*" retirement or termination of employment. That was the grammatically correct construction and must be presumed to be the meaning intended by the legislature: section 11.4 *Bennion on Statutory Interpretation 8th edn* (and see the approach taken to the requirement that a claim arise or be outstanding "*on termination*" of employment under the **ETs**

(Extension of Jurisdiction) (England and Wales) Order 1994: **Miller Bros & FP Butler Ltd** [2002] ICR 744 EAT, at paragraphs 13-14, 20 and 25). Support for the grammatical construction was also provided by the historical and legislative context. The original definition of "*occupational pension scheme*" under section 1 **PSA 1993** re-enacted section 66 of the **Social Security Pensions Act 1975**, which – read with the principal Act, the **Social Security Act 1975 -** treated benefits for industrial injuries, including disablement gratuity, differently from pensions on retirement.

52. A similar distinction was also reflected in the history of police pensions and injury awards, where separate provision had been made for an ill-health award on retirement ("*retires or has retired … on the ground that he is or was permanently disabled*", emphasis added), on the one hand, and a supplemental pension, which required no causative link ("*where there is or has been termination, and there is permanent disablement …*", emphasis added), on the other (ground 2). This was a distinction between **PIBR 2006** and the benefit in issue in **Johnson**, which was payable *on* cessation of employment (albeit that cessation had to have specifically arisen as a result of an incapacity meeting the requirements of L3) (ground 3). There was a distinction between benefits payable on termination of service for a specified reason (which would still be a benefit payable "*on termination*") and those provided under **PIBR 2006**, which did not require the same causative connection. Indeed, it was clear that regulation 11 **PIBR 2006** could apply where termination of employment had preceded the onset of disability (see regulation 11(2)). As for regulation 12, there was no requirement that the cessation of service (condition (b)) must have any causal connection with conditions (a) (injury) or (c) (permanent disablement), although (as in the present cases) it might do: termination of service was a necessary but not sufficient, or crystallising, condition, such that it could not be said that the benefit under regulation 12 arose "*on retirement*" or "*on termination*".

53. The respondents further point out (ground 4) that Parliament had deliberately chosen to distinguish between benefits payable "*on retirement*" or "*on termination*" (falling within the section 1 **PSA 1993** definition) and those payable "*on death*" or "*on the onset of serious ill-health or*

incapacity" (*per* the extended definition of "*occupational pension scheme*" at section 150 **Finance Act 2004** but outside that under the **PSA 1993**). Although substantial amendments were made to the **DDA** in 2004, no change was made to section 68, which incorporated the definition of "*occupational pension scheme*" under section 1 **PSA 1993** for the purpose of claims brought under section 4G of the **DDA** (precursor to section 61 **EqA**). Parliament might also have chosen to use language denoting that termination need not be a trigger event but merely a preliminary condition (see the formulation "*… in connection with, the termination* …" at section 37(2) **Finance Act 1960**, section 148(2) **Income and Corporation Taxes Act 1988**, and section 401(1) **Income Tax (Earnings and Pensions) Act 2003**), but did not. Equally, Parliament did not deploy the wording available at section **8 Pensions (Increase) Act 1971** (still in force when the **PSA 1993** was enacted). This was notwithstanding the fact that when the **PSA 1993** was amended, by section 239 **PA 2004**, section 68 **DDA** already adopted the definition of "*occupational pension scheme*" provided under that Act for the purpose of defining the limits of the ET's jurisdiction to determine disability discrimination claims. The respondents further submitted that section 225 **PA 2004** (in the same Part as section 239) posits a clear distinction at section 255(5) between benefits paid by reference to reaching retirement, and benefits in the form of payments on death, disability or termination; which requires the formulation "on" to be given particular effect.

54. Moreover (ground 5), the schemes for police pensions and for gratuities payable on injury or death had always been treated differently and the deliberate de-coupling of the **PIBR** from the police pension scheme (i) reflected this; and (ii) made clear that benefits under the **PIBR** were not part of a wider scheme making provision for police occupational pensions, thus ensuring that police pensions retained the favourable tax status of a tax-approved pension scheme having regard to the changes introduced by the **Finance Act 2004** (in particular, sections 160, 164, 166, 168, 206 and 208). The respondents also submitted that the consistent legislative intention to treat injury benefits schemes as a distinct category, was reflected in the **Public Service Pensions Act 2013**, which at section 37

defines injury benefits as "*compensation for incapacity or death as a result of injury or illness*", and provides that a pension scheme (for these purposes) is an injury or compensation scheme if it provides only for injury or compensation benefits (or both); and further provides at section 19 and Schedule 6 that such schemes include the police injury benefits scheme. Yet further, in oral submissions, the respondents submitted that their construction was further supported by the wording of section 393B **Income Tax (Earnings and Pensions) Act 2003** (in force from 6 April 2006; which replicated section 612 **Income and Corporation Taxes Act 1988**): (i) this made a clear distinction between benefits payable "*on retirement*", "*in anticipation of retirement*", and "*after retirement*", such that the formulation "*on*" had to be given particular effect; (ii) if the claimants' construction were preferred, such benefits would constitute a payment "*on retirement*" for these purposes and therefore taxable, which was clearly not what Parliament intended.

The claimants' submissions on the appeal

55. For the claimants, it is urged that the section 1 **PSA 1993** definition of "*occupational pension scheme*" imported no condition of exclusivity: a scheme could include further criteria before eligibility crystallised; had Parliament intended the subsection 1(5)(a)-(c) conditions to be a necessary trigger event the words "*only*" and "*immediately*" would have been used, such that "*pension scheme*" would have been defined as *"... a scheme or other arrangements ... having or capable of having effect [only] so as to provide benefits to or in respect of people [immediately]- (a) on retirement, (b) on having reached a particular age, or (c) on termination of service in an employment*". The respondents' approach would mean that a pension scheme that delayed receipt of benefits, or added further criteria to eligibility (no matter how trivial), would be outside the definition; the section 1(5) conditions of eligibility were necessary for entitlement to be triggered but did not need to be sufficient for that entitlement, there was no abuse of language in including pension schemes for which additional criteria of eligibility exist.

56. The dominant purpose of the **PIBR 2006** was to provide benefits to police officers who had to leave service because of an injury received in the course of the execution of duty (and which had the necessary disabling effects). As for the legislative history, the ET permissibly (and correctly) concluded that the de-coupling of the **PIBR** from the police pension scheme for tax reasons was not "*of any great weight*" (ET paragraph 41). To the extent that any assistance could be gained from interpretations of the effect of the changes at the time, it was significant that the Minister of Policing confirmed to Parliament that the changes "*will not affect officers as members of those schemes*" (Hansard, 29 November 2005); if the changes had the effect of removing the injury pension from the scope of anti-discrimination legislation, it would be extraordinary that no express statement to that effect was made (the **DDA** applied to police officers from 1 October 2004, so it would have been a material consideration at the time).

57. The claimants further submit that little assistance can be gained from a comparison between the **Finance Act 2004** and the **PSA 1993** definitions of "*occupational pension scheme*". The decision to use the **PSA 1993** definition for the purposes of discrimination legislation pre-dated the enactment of the **Finance Act 2004** by some years (see section 68 **DDA**). At most it could be said that the draftsmen of the **EqA** decided against a change of definition. To the extent that a comparison was of assistance, however, the most significant distinguishing feature was that section 150(1)(d) **Finance Act 2004** permitted a person to be in receipt of an ill health pension whilst still employed; the use of the **PSA 1993** definition in discrimination legislation thus provided a much clearer distinction between those still employed (who would potentially have claims available to them under section 39-40 **EqA**) and pensioners (whose recourse would be to section 61-62 **EqA**). Importantly, both regulations 11 and 12 **PIBR 2006** were clear that the benefits were only payable if service had ceased: there was no scope for a police officer to receive the gratuity (or pension) if she was still a serving police officer. By stating that a pension scheme need only be "*capable of having effect*" so as to provide the relevant benefits, section 1(5) **PSA 1993** would extend to such cases where there would

be entitlement if other conditions were yet to be met.

58. The ET also correctly regarded the decision in **Johnson** as of "*direct application*": the question in that case was whether an injury allowance, due under separate regulations from the local government pension scheme, was caught by the **PSA 1993** definition; the court was persuaded that additional requirements to trigger entitlement did not take it outside that definition. The case was directly analogous and the ET bound by it. **Johnson** was also authority for the proposition that it was permissible to carve out aspects of a scheme that did not meet the **PSA 1993** definition.

59. By way of their respondents' answer before the EAT, the claimants further stated that the ET's decision should be upheld on the basis that:

> "d. The benefits payable to the [claimants] through the PIBR amount to "pay" within the meaning of domestic and EU law."

No details were, however, provided as to how the claimants sought to place reliance on this assertion.

60. Within the claimants' skeleton argument for this hearing, the point was developed as follows:

> "17. … [the respondents' construction] would also render the PSA definition inconsistent with EU law obligations, at least in respect of the PIBR … To that end, if necessary, it is submitted that the words "or after" could be inserted after "on" in s.1(5) PSA, applying the **Marleasing** principle …
> …
> 51. … with … the application of principles of anti-discrimination derived from EU law, the Tribunal was without doubt correct to find that the PIBR met the PSA definition.
> 52. … since the Judgment in this case was promulgated, the Court of Appeal has in **Eckland v Chief Constable of the Avon and Somerset Constabulary** [2022] ICR 606, CA, paras 32-40, reinforced the proposition that the equivalence principle means that the Tribunal should (where possible) accept jurisdiction to determine discrimination claims, notwithstanding that the ex-officer may also have alternative recourse to the County Court or (in the case of the PIBR) the Crown Court.
> 53. This is further support for the conclusion that the Claimants' construction of s. 1 PSA should be preferred and that the Tribunal has jurisdiction to consider the complaint pursuant to s. 61 EqA."

61. Absent objection from the respondents, these arguments were articulated more fully at the hearing. The claimants contend that the principles of equivalence and effectiveness under EU law require a remedy to be provided in the ET; alternative rights of action (such as the right of appeal to

the Crown Court under regulation 34 **PIBR 2006** or judicial review) were of little weight: the ET was the specialist forum for the resolution of complaints of discrimination arising out of an employment relationship (see the observations to this effect in **Eckland**, applying **P v Commissioner of Police of the Metropolis** [2018] ICR 560). Moreover, the benefits payable to the claimants through the **PIBR 2006** amounted to "*pay*" within the meaning of that term under both domestic and EU law (under domestic law: see **Parry v Cleaver** [1970] AC 1, and **Smoker v London Fire and Civil Defence Authority** [1991] AC 52; under EU law: see **Defrenne v Belgium** Case 80/70 [1974] CMLR 494) and thus an effective remedy must be provided pursuant to the **EU Directive 2000/78** ("the Framework Directive"). The benefit in issue arose out of the employment relationship and was part of a scheme which had been subject to consultation, such that it did not fall to be seen as a social security scheme or benefit (see **Defrenne** at paragraphs 7-12).

62. If the claimants' primary submissions on construction were not accepted, the EAT should thus apply **Marleasing** principles to reconcile any deficit between the rights conferred by national legislation and those under the **Framework Directive** (**Marleasing SA v La Comercial Internacionial de Alimentación SA** C-106/89 [1990] ECR I-4135).

The respondents' submissions in reply

63. The respondents note that in **Eckland** the Court of Appeal (applying **P v Commissioner of Police of the Metropolis** [2017] UKSC 65) held that the principle of equivalence and effectiveness required that it must be possible to pursue allegations of discriminatory dismissal of police officers in the ET because: (i) such allegations relating to employees more generally are heard in the ET, and (ii) the **Framework Directive** applies to dismissals; by contrast, in the present case, the claimants were unable to point to the ET having jurisdiction to scrutinise the operation of another injury benefit in any other sphere of employment. This reflected the fact that injury benefits did not constitute "*pay*" and so did not come within the scope of the **Framework Directive**.

64. Although payments under a pension scheme were deferred pay under domestic law (**Parry**), the injury benefit in issue was not "*pay*" for the purposes of EU law: it amounted to compensation for injury, not consideration for employment, and thus fell outwith article 157 **Treaty on the Functioning of the EU** ("TFEU") and within the exception at article 3(3) **Framework Directive** ("*payments of any kind made by state schemes or similar, including state social security or social protection schemes*"). Where, as here, the scheme in issue was contained wholly within legislation the benefits paid would amount to "*pay*" where (i) they only concern a particular category of workers, (ii) they are directly related to the period of service completed, and (iii) the amount is calculated by reference to past salary (**Bestuur Van Het Algemeen Burkerlijk Pensioenfonds v Beune** [1995] 2 CMLR 30, at paragraph 45; **Griesmar v Ministre de L'Economie** [2003] 3 CMLR 5 at paragraph 30; **Maruko v Versorgungsanstalt der Deutschen Bühnen** [2008] 2 CMLR 32 at paragraph 48). The benefit in issue in this case did not meet condition (ii).

65. More specifically, although Ms Clark's claim had been presented before 31 December 2020 (the implementation period ("IP") completion day for the purposes of the **EU (Withdrawal) Act 2018**) and had stated that she relied on the fundamental principle of non-discrimination under EU law and the right conferred by EU law to an effective remedy, absent a claim that fell within the **Framework Directive**, she could not demonstrate any basis for the purposive reading for which she contended. As for Mrs Bell, her claim (which had not referenced EU law) had been presented after IP completion day and must therefore fail (see **Secretary of State for Work and Pensions v Beattie and ors** [2023] Pens LR 3, at paragraph 140).

The cross-appeal and the claimants' submissions in support

66. By way of cross-appeal, the claimants take issue with the ET's rejection of their claims under section 108 **EqA**. Put as an appeal contingent on the respondents' succeeding on their challenge to the ruling on the section 61 claims, the claimants provided no further grounds in support of their

cross-appeal, explaining their position in their skeleton argument, as follows:

> "54. The cross appeal is brought solely to protect the Claimants' position in the event that the EAT is satisfied that the claim cannot be advanced under s. 61 EqA. On that basis, applying **Eckland**, it is submitted that the Tribunal's jurisdiction must be granted under s. 108 EqA instead. It would not be consistent with the principle of equivalence for the Tribunal to have no jurisdiction at all to determine these claims.
> 55. The Claimants, however, recognise the difficulties in framing this type of discrimination as falling within s. 108 EqA and for that reason make no positive submissions in support of such a contention. Indeed, it is the Claimants' position that the difficulties in applying s. 108 EqA on the facts of these claims make it all the more likely that the correct jurisdictional gateway is s. 61 EqA. Accordingly, this is a further reason why any doubts over interpretation should be resolved in the Claimant's favour."

The respondents' submissions on the cross-appeal

67. The respondents contend that the ET's decision under section 108 **EqA** was plainly correct given that neither of the conditions under section 108 (a) and (b) were satisfied. As for the suggestion that this must bolster the claimants' case under section 61 **EqA**, if the EAT concluded that domestic law failed to provide a remedy otherwise required by EU law it would need to adjust the construction of section 61 accordingly; section 108 provided no assistance in this regard.

Analysis and Conclusions

*The appeal: the claims under section 61 **EqA***

68. It is common ground before me that the issue of the ET's jurisdiction to hear the claims via the gateway of section 61 **EqA** turns on whether regulation 12 **PIBR 2006** is, or forms part of, an "*occupational pension scheme*" as defined by section 1 **PSA 1993**, and, therefore, is a "*pension scheme*" as defined by sub-section 1(5). That, in turn, raises the question whether regulation 12 provides benefits on the occurrence of any of the three events listed in section 1(5)(a) to (c) **PSA 1993**; if it does, then it is agreed that all other elements of the definition are met. It is further accepted that, of the three events listed in section 1(5)(a) to (c), (b) is not relevant; the question for me thus becomes whether regulation 12 **PIBR 2006** has effect, or is capable of having effect, so as to provide

benefits "*on retirement*" or "*on termination of service in an employment*".

69. It is the respondents' case that the natural meaning of the language used at section 1 **PSA 1993** requires that retirement, or termination, must be the trigger event: that is, the event that necessarily gives rise to immediate entitlement to the benefit; in HMRC parlance, the "*benefit crystallisation event*", see paragraph 2.73 **Home Office Guidance on the Police Pension Scheme 2006** (paragraph 11 *supra*). The respondents' submission is that, as a matter of ordinary English, where A is said to arise "*on*" B (that is, *on the occurrence of* B), then B must be an event that completes the fulfilment of conditions necessary for A to arise.

70. As for regulation 12 **PIBR 2006**, three conditions have to be fulfilled for the benefit to be payable. The officer must (a) have received an injury in the execution of duty (not of their own fault), *and* (b) ceased to be a member of a police force, *and* (c) within 12 months of receiving the injury, have become totally and permanently disabled. Logically, condition (a) (injury in the execution of duty) has to precede conditions (b) (cessation of service) and (c) (total and permanent disablement as a result of the injury). There is, however, no requirement that the cessation of service (condition (b)) must have any causal connection with conditions (a) or (c), although, as in the present cases, that may well be so. Indeed, recognising (as regulation 12 plainly does) that total and permanent disablement might not arise for some time after the injury, entitlement to a disablement gratuity allows for the possibility that the cessation of the officer's service might be entirely unrelated to the injury they previously received in the execution of their duty. Unlike entitlement to ill-health pension (which, by regulation 29 **Police Pensions Regulations**, arises upon an officer's "*compulsory retirement on the ground of disablement*", see paragraph 7 *supra*), entitlement to a disablement gratuity under regulation 12 **PIBR 2006** requires no causal link between the cessation of the officer's service and the injury, and subsequent disablement, they suffered.

71. Another way of making the point is to note that ceasing to be a member of a police force is only one of the three conditions that must be satisfied for the entitlement to arise. Given that an

officer's service could cease *before* they became totally and permanently disabled - a question to be determined by the selected medical practitioner, pursuant to regulation 30 **PIBR 2006** - (a possibility further underlined by the provision for a death gratuity under regulation 21, see paragraph 18 *supra*), it cannot be said that the entitlement arises *on* cessation: cessation of service is a necessary but not sufficient condition, such that it could not be said that entitlement to the benefit under regulation 12 arises "*on retirement*" or "*on termination of service*".

72. On a straightforward reading of regulation 12 **PIBR 2006**, therefore, I agree with the respondents: it does not provide for a benefit that would fall within the definition of an "*occupational pension scheme*" for the purposes of section 1 **PSA 1993**.

73. For the claimants it is said that the words "*capable of having effect*" within section 1(5) **PSA 1993** would cover both regulations 11 and 12 **PIBR 2006**, as this would extend the definition to schemes or arrangements where there *could be* entitlement if other conditions were met (the scheme or arrangement would thus be *capable* of having that effect). I am not, however, persuaded that that can be correct. In my judgement, the phrase "*capable of having effect*" clarifies that a scheme or other arrangement will be a pension scheme in relation to a member without that member having yet drawn any benefits from it. It is a necessary part of the definition as, absent such clarification, the literal reading of the sub-section would seem to exclude that possibility; it thus provides the answer to the claimants' objection that the respondents' construction would exclude pension schemes where an entitlement arises on retirement or termination but the actual payment of the benefit is delayed in certain circumstances: the scheme would still be *capable* of providing benefits *on* retirement or termination. I cannot, however, see that it would make sense to read this reference as meaning that a scheme or arrangement is a pension scheme for these purposes provided that in one possible permutation of circumstances it could be capable of satisfying the conditions for being such a scheme.

74. In taking this view, I acknowledge that it has been observed in the authorities that section 1 **PSA 1993** provides a "*very wide*" definition (**Westminster City Council v Haywood** [1997] Pens

LR 39), and that this should lead to a liberal (not a restrictive) approach to determining what is an "*occupational pension scheme*" (**Parlett v Guppys (Bridpot) Ltd (No. 2)** [2000] Pens LR 195 CA) – see the discussion at paragraph 38 *supra*. While I do not consider it to be material that the authorities in question were concerned with the earlier, pre-1 July 2005, definition under the **PSA 1993**, I note that the courts in those cases were not required to determine what might be meant by "*on retirement*" or "*on termination*". Moreover, giving meaning to the use of the word "*on*" does not detract from the otherwise very wide definition under section 1: as Hart J noted, in **City and County of Swansea v Johnson** [1999] Pens LR 187 HC (ChD), it will still cover benefits that might normally not be seen as pension payments, such as an award agreed to be paid on the termination of employment before the expiry of the contractual term, or a payment made on termination on grounds of redundancy (see the passage set out at paragraph 41 *supra*). To see the present case as on all fours with **Johnson** would, however, fail to give meaning to the requirement that the benefits in issue be provided "*on*" retirement or termination. In **Johnson**, entitlement to the benefit in issue – arising under regulation L3 of the **Local Government Superannuation Regulations 1986** – plainly crystallised *on* the cessation of employment, albeit that had to be "*as a result of an incapacity*" (a causal connection absent from regulation 12 **PIBR 2006**).

75. In **Johnson**, adopting a broad approach to section 1 **PSA 1993**, the court did not consider it fatal that the scheme of which regulation L3 formed part also included provision for benefits that were payable "*otherwise than on termination of service*", and thus fell outside the definition of an occupational pension scheme. Allowing that a scheme or arrangement might be an occupational pension scheme for the purposes of section 1 **PSA 1993** notwithstanding that it includes some provisions that would fall outside that definition, I have sought to stand back to consider the **PIBR 2006** more generally, to see whether – other than the difficulties I have identified in relation to regulation 12 - it might otherwise be said to fall within the definition under section 1 **PSA 1993**. That, however, is plainly not the case. The injury award provided by regulation 11 expressly

envisages that entitlement might arise some time *after* (not "*on*") cessation of service (see regulation 11(2), paragraph 14 *supra*). Otherwise, the benefits provided under the **PIBR 2006** are payable on the death of the officer – a crystallising eventuality previously included within the definition under section 1 **PSA 1993** ("*on termination of service, or on death or retirement*"), but removed with effect from 1 July 2005. Thus seen in the broader context of the **PIBR 2006**, regulation 12 does not sit within a scheme that would otherwise meet the definition of an occupational pension scheme for the purposes of section 1 **PSA 1993**.

76. I arrive at the same conclusion when considering the broader legislative context and the history of the **PIBR 2006**. First, I note the historic distinction between ill-health benefits that crystallise on retirement or termination of service (the ill-health award made under section 20 **Police Pensions Regulations 1971**) and the supplemental award made to those permanently disabled as a result of an injury sustained in the execution of duty who have since left the police force (section 22 **Police Pensions Regulations 1971**). The different focus of the provisions in issue was reflected in the requirements of entitlement: the former requiring that the officer retire (or had retired) on the ground of permanent disablement, the latter making provision for those who suffered permanent disablement as a result of an injury sustained in the execution of duty, who were – for whatever reason – no longer in service.

77. Secondly, I do not consider it irrelevant that this distinction was recognised in the statutory de-coupling that took place in 2006. Although the tax changes introduced by the **Finance Act 2004** might have been the immediate catalyst for that division, it reflected a distinction that already existed - between those benefits for which eligibility depended upon membership of a police pension scheme and those which effectively provided a form of compensation for work-related injuries (see paragraph 7 of the explanatory memorandum to the **PIBR 2006**, cited by the ET at paragraph 18; paragraph 10 *supra*) – and which, at least in the review that took place between 2001 and 2005, was understood to exist by both management and staff side; see the ET's finding at paragraph 17 (paragraph 10 *supra*).

78. For the claimants it is said that, had it been intended that section 1 **PSA 1993** required entitlement to the relevant benefit to crystallise *only* upon *immediate* retirement or termination, that would have been expressly stated. I cannot, however, see that it would be necessary to add the words "*only*" and/or "*immediately*" to the statutory language when the meaning is made plain by the use of the word "*on*". That, it seems to me, similarly reflects the distinction that had long been made (and understood) in the different conditions for entitlement to police pension benefits (payable on retirement, whether that was due to age or ill-health or some other specified reason) on the one hand, and to supplemental awards to compensate former officers who had been injured in the line of duty on the other.

79. The claimants argue that the dominant purpose of regulation 12 of the **PIBR 2006** is to provide benefits to police officers who had to leave service because of an injury received in the execution of duty (which had the necessary disabling effects), but that is not what the language of the regulation implies. The focus of regulation 12 (and regulation 11) **PIBR 2006** is not on compensating for loss of office (as the claimants' construction would suggest) but, rather, to compensate officers, who are (for whatever reason) no longer employed in the service, for total and permanent disablement resulting from an injury sustained in the execution of duty.

80. Moreover, seen in the context of the **EqA**, I do not infer that this was an accidental distinction between different types of benefits arising from the adoption of the section 1 **PSA 1993** definition, initially under section 68 **DDA**, but then affirmed by section 212(1) **EqA**. Had Parliament wished to adopt a definition of occupational pension scheme that included benefits payable "*on the onset of serious ill-health or incapacity*", it would have been open to it to refer instead to the definition under section 150 of the **Finance Act 2004**. Indeed, although section 150 did not come into force until 6 April 2006, other provisions of that Act were in force as at 1 October 2004, when substantial amendments were made to the **DDA**, including to expand its scope to police officers, and when the **PA 2004** was passed (on 18 November 2004) introducing (by section 239) the amendments to the

definition of occupational pension scheme under section 1(5) **PSA 1993** that came into force on 1 July 2005. The inference I draw is that Parliament thus made a deliberate choice as to the definition of "*occupational pension scheme*" relevant for section 61 **EqA** purposes, not that it simply overlooked the provisions of the **Finance Act 2004**.

81. The claimants submit that, to the extent that Parliament should be taken to have made a considered choice between the definitions under section 1 **PSA 1993** and section 150 **Finance Act 2004**, that could be seen as drawing a distinction between those who were still employed (who would potentially have recourse to the ET pursuant to section 39 **EqA** (formerly section 4 **DDA**)) and pensioners (who would need to use the gateways provided by sections 61-62 **EqA** (previously sections 4G-4H **DDA**)). I do not, however, see that as a distinction with force in this context. Sections 61-62 extend the protections against discrimination under the **EqA** to occupational pension schemes, and it was plainly open to Parliament to widen the potential scope of protection in this context to a scheme that would provide benefits "*on the onset of serious ill-health or incapacity*" just as it had chosen to include schemes providing benefits "*on having reached a particular age*" (section 1(5)(b) **PSA 1993**). Alternatively, when determining how section 1 **PSA 1993** was to be amended pursuant to the **PA 2004**, Parliament might simply have chosen to amend section 1 **PSA 1993** to use the formulation "*in connection with …*", used in other legislative contexts, rather than "*on*" (see the discussion at paragraph 53 *supra*). The legislative history in this context, and the inference which that suggests should be drawn as to the relevant Parliamentary intent, thus strengthens the conclusion I have reached as to how section 1 **PSA 2003** is to be construed.

The appeal: the claimants' arguments pursuant to EU law

82. To the extent that I am persuaded that the respondents' construction of section 1 **PSA 1993** is correct, the claimants contend that, in the context of regulation 12 **PIBR 2006**, this would render the definition of "*occupational pension scheme*" inconsistent with the United Kingdom's EU law

obligations under the **Framework Directive**. It is the claimants' case that, in accordance with the EU law principles of equivalence and effectiveness, section 1 **PSA 1993** should be read in such a way as would provide a right of claim in these circumstances before the ET, applying **Marleasing** principles (**Marleasing SA v La Comercial Internacionial de Alimentación SA** C-106/89 [1990] ECR I-4135).

83. In approaching this question, I accept that the ET has a particular expertise in determining discrimination disputes in the field of employment (see the clear observations to this effect by Lord Reed JSC in **P v Commissioner of Police of the Metropolis** [2018] ICR 560 SC at paragraph 29, and by Underhill LJ in **Eckland v Chief Constable of the Avon and Somerset Constabulary** [2022] ICR 606, CA, at paras 35-40). For the reasons I have already explained, however, I am unable to see that domestic law evinces a Parliamentary intention that a benefit such as that provided under regulation 12 **PIBR 2006** should fall within the jurisdiction of the ET under section 61 **EqA**. For the claimants, however, it is contended that this is not fatal to their claims, as it would be necessary, in order to give effect to their rights under the **Framework Directive**, to interpret section 1 **PSA 1993** in such a way as would provide the ET with the necessary jurisdiction.

84. This is an argument that was not fully developed prior to the oral hearing of the appeal. Considering, however, how the claimants' case is put in this regard, it is helpful to start by setting out the provisions of the **Framework Directive** and the **Treaty on the Functioning of the EU** ("TFEU") relied on by the parties, before turning to the case-law and my analysis of, and conclusions upon, the competing submissions on this point.

85. First, under the recitals to the **Framework Directive**, it is provided (relevantly):

> "(2) The principle of equal treatment between women and men is well established by an important body of Community law, in particular in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
> …

> (12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. …
> (13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment."

86. Article 157 **TFEU** now replicates article 141 of the **EC Treaty** (referenced at recital (13) of the **Framework Directive**), providing:

> "1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
> 2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
> ..."

87. By article 3 of the **Framework Directive**, it is then provided:

> "Scope
> 1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
> …
> (c) employment and working conditions, including dismissals and pay;
> …
> 3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
> …"

88. It is the claimants' case that, pursuant to article 3 of the **Framework Directive**, they enjoy a directly effective right to be treated in accordance with the principle of equal treatment (including the right not to suffer disability discrimination) in relation to "*pay*". The issue between the parties is whether the disability gratuity provided by regulation 12 **PIBR** can be said to constitute "*pay*" for these purposes.

89. It is common ground that payments under a pension scheme have been found to amount to deferred pay under domestic law; see **Parry v Cleaver** [1970] AC 1 HL (which concerned the ill-health award payable under the **Police Pension Regulations** to a police officer who retired from

service on the ground that they were permanently disabled). The respondents submit, however, that that says nothing about the treatment of benefits falling outside an occupational pension scheme, such as the essentially compensatory benefit provided under regulation 12 **PIBR 2006**; more particularly, they contend that such benefits do not amount to "*pay*" for the purposes of the **Framework Directive** but instead must be treated as payments made "*by state schemes or similar, including state social security or social protection schemes*", which fall outside the scope of the Directive.

90. Accepting the approach to pension benefits as deferred pay that has been adopted under domestic law, I do not consider I can treat this as providing a way of interpreting "*pay*" for the purposes of EU law. The domestic authorities relied on by the claimants (**Parry**; **Smoker v London Fire Authority** [1991] ICR 449 HL) were concerned with the question whether pension benefits were to be treated as deductible from personal injury awards; those cases were plainly not determined with the concept of "*pay*" under the **Framework Directive** (or earlier EU legislation) in mind. I therefore turn to the case-law of the Court of Justice of the EU.

91. In the case of **Defrenne v Belgium** Case 80/70 [1974] CMLR 494, the CJEU held that a retirement pension granted under a social security scheme financed by workers' and employers' contributions, as well as state grants, did not amount to "*pay*", explaining (by reference to article 119 **EEC Treaty**, an earlier precursor to article 157 **TFEU**):

> "[6] Article 119 (2) extends the concept of 'pay' to all the emoluments, in cash or in kind, paid or payable, on condition that they are paid, even indirectly, by the employer to the worker as a result of the latter's employment.
> [7] Although payments in the nature of social security benefits are consequently not excluded in principle from the concept of pay, it is not possible to include in this concept, as defined in Article 119, social security schemes and benefits, especially retirement pensions, which are directly settled by law without any reference to any element of consultation within the undertaking or the industry concerned, and which cover without exception all workers in general.
> [8] These schemes provide workers with the advantages of a statutory system, to the financing of which workers, employers and, in some cases, the authorities contribute in a manner which is determined less by relationships between employers and workers than by considerations of social policy.
> [9] Consequently, the contribution falling on employers in the financing of such systems is not a direct or indirect payment to the worker.

> [10] Furthermore, the latter is normally entitled to the benefits provided by law, not because of the employer's contribution but solely because of the fact that he complies with the statutory conditions required to qualify for the benefit.
> [11] These characteristics are shared by special schemes, which, within the framework of the statutory and general scheme of social security, cover in particular some groups of workers.
> [12] It is therefore necessary to note that any discrimination that might result from the application of such a system falls outside the requirements of Article 119 of the Treaty."

92. The Court returned to this question in a number of subsequent cases, including **Bestuur Van Het Algemeen Burkerlijk Pensioenfonds v Beune** [1995] 2 CMLR 30 (see, in particular, paragraphs 43-45), **Griesmar v Ministre de L'Economie** [2003] 3 CMLR 5 (in particular, paragraphs 27 and 30), and **Maruko v Versorgungsanstalt der Deutschen Bühnen** [2008] 2 CMLR 32 (in particular, paragraphs 46-48). The approach thus laid down in the EU jurisprudence can be discerned from the judgment of the Court in **Maruko**:

> "40. It is clear from Art.3(1)(c) and (3) of Directive 2000/78 that the Directive applies to all persons, as regards both the public and private sectors, including public bodies, inter alia, in relation to conditions of pay and that it does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
> 41. The scope of Directive 2000/78 must be understood—in the light of those provisions read in conjunction with Recital 13 of the preamble to the Directive—as excluding social security or social protection schemes, the benefits of which are not equivalent to "pay", within the meaning given to that term for the application of Art.141 EC, or to payments of any kind made by the state with the aim of providing access to employment or maintaining employment.
> …
> 46. Moreover, for the purposes of assessing whether a retirement pension … falls within the scope of Art.141 EC, the court has stated that, of the criteria for identifying a pension scheme which it has adopted on the basis of the situations brought before it, the one criterion which may prove decisive is whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment, based on the wording of that article …
> 47. Admittedly, that criterion cannot be regarded as exclusive, inasmuch as pensions paid under statutory social security schemes may reflect, wholly or in part, pay in respect of work …
> 48. However, considerations of social policy, of state organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail if the

> pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the last salary …"

93. It is not in dispute that, although the benefit in issue in the present case was established by the national legislature, it is paid by reason of a form of employment relationship and clearly concerns a particular category of workers. It is also apparent that, at least so far as the benefit provided by regulation 12 **PIBR 2006** is concerned, payments are to be "*calculated by reference to the last salary*" (albeit, by regulation 12(2)(b), account might also be taken of the amount of aggregate pension contributions in certain circumstances). It is, however, also common ground before me that regulation 12 benefits cannot be said to be "*directly related to the period of service completed*".

94. The claimants submit that the fact that regulation 12 **PIBR 2006** does not meet one of the tests thus laid down by the Court should not be fatal, especially as the benefit provided by regulation 11 *does* relate to the officer's period of service (see paragraph 3, schedule 3 **PIBR 2006**), and they observe that the regulation 12 benefit is in the form of a one-off payment and would thus be less likely to be fixed to periods of service. More generally, it is apparent that the criterion of employment was plainly met in relation to regulation 12, and to the benefits under the **PIBR 2006** more generally; this strongly pointed to the benefits in issue being "*pay*". The respondents counter, however, that the benefit payable under regulation 12 is an injury benefit; it is not pay "*in consideration for work*" for the purposes of article 157 **TFEU**, but an award in compensation for injury. Workers do not accrue rights to such benefits in proportion to the work performed; the benefits in question are not an aspect of the wage-work bargain. Accordingly, a disablement gratuity under regulation 12 **PIBR 2006** is not "*pay*", but falls within the exception under article 3(3) of the **Framework Directive**, as a payment "*made by state schemes or similar*".

95. For my part, while sympathetic to the claimants' desire to find a route by which the ET might be said to have jurisdiction to determine their claims, I do not consider it to be clear that the benefit in issue does amount to "*pay*" for the purpose of article 3 of the **Framework Directive**. As an award

of compensation for work-related injury (and subsequent disablement), the benefit is not obviously "*in consideration for work*" (*per* article 157 **TFEU**) and the lack of any direct relationship with the recipient's period of service could be taken to point towards this being an aspect of the scheme of benefits under the **PIBR 2006** that is more concerned with considerations of social policy than the relationship of employment. In former times, this might have been a case where consideration would be given to whether to make a preliminary reference to the CJEU, but that is no longer an option that is available. On balance, on the basis of the guidance that is available to me – in the form of the CJEU case law I have cited – I do not find that the benefit provided under regulation 12 **PIBR 2006** can be said to amount to "*pay*" so as to give rise to any directly enforceable right under the **Framework Directive**.

96. In reaching this conclusion, I am fortified by the fact that the benefit in issue is not funded by the police pension scheme and does not depend upon membership of that scheme. It is, moreover, part of a scheme established by national legislation, which does not (as I have found) fall within the relevant domestic definition of an "*occupational pension scheme*", and, although only payable after the cessation of employment, that cessation does not have to be because of the relevant injury and/or disablement: the employment may have ceased some time earlier and for an entirely unrelated reason. The history of the benefit provided by regulation 12 **PIBR 2006** further suggests that it was previously seen by all sides as disablement gratuity, more akin to a form of social security compensation, and not part of a police officer's pension benefits (see the ET's finding at paragraph 17; paragraph 10 *supra*). Certainly there is a clear distinction drawn in the relevant legislation (echoing that made in the context of the **Social Security Act 1975**; see the discussion at paragraph 51 *supra*), between an award under regulation 12 **PIBR 2006**, focused on providing compensation for work-related injury and disablement, and other payments, that would be made *on* retirement or *on* termination of service, where the focus would be on the loss of office as the trigger for entitlement. Thus seen in context, I consider the absence of a link to the recipient's period of service, is a relevant indicator that this is a

benefit that is not to be treated as "*pay*" for the purposes of the **Framework Directive**, but as falling within the article 3(3) exception.

97. Having reached that conclusion, it is unnecessary for me to address the further difficulty for Mrs Bell (who, in any event, did not plead any reliance on EU law when making her claim) arising from the fact that proceedings in her case only commenced after IP completion day for the purposes of the **EU (Withdrawal Act) 2018** (see **Secretary of State for Work and Pensions v Beattie and ors** [2023] Pens LR 3).

My conclusion on the appeal

98. For the reasons I have provided, I consider the ET erred in its approach to the construction of section 1 **PSA 1993**. A disablement gratuity under regulation 12 **PIBR** is not part of an occupational pension scheme for the purposes of section 61 **EqA** and the ET was thus wrong to hold that it had jurisdiction to determine the claimants' claims under that provision. I duly allow the respondents' appeal.

*The cross-appeal: the claims under section 108 **EqA***

99. I can address the cross-appeal more shortly. Although the claimants have formally cross-appealed against the ET's judgment on the claims brought under section 108 **EqA**, in reality their case in this regard is made as a submission in support of their arguments under section 61. Asserting a directly effective right under the **Framework Directive**, the claimants contend that (per **Eckland**) if the ET does not have jurisdiction to hear their claims of disability discrimination under section 61 **EqA**, it must be found to be able to do so under section 108 instead. Alternatively, acknowledging that the ET made no error of law in concluding that refusal to pay gratuities under regulation 12 **PIBR 2006** did not arise out of the employment relationship, the claimants say that this must give additional force to their arguments as to the correct construction of section 1(5) **PSA 1993**.

100. Given my conclusions (i) as to the proper construction of section 1(5) **PSA** 1993 and (ii) on the claimants' arguments under EU law, and for the reasons I have already provided, I do not accept these submissions. As the claimants accept, the ET made no error of law in its reasoning in respect of the claims made under section 108 **EqA**; I therefore dismiss the cross-appeal.