Case Nos: 2601673/2021
& 2601668/2021

EMPLOYMENT TRIBUNALS

Claimant: (1) Dr RM Green
(2) Ms A Palmer

Respondent: Loughborough Schools Foundation

Heard at: **Leicester** **On:** **12 (reading day), 13, 14, 15, 16, 19, 20, 21 June 2023, and (in Chambers) 9 August 2023**

Before: **Employment Judge Varnam**
Dr G Looker **Mrs K Srivastava**

Representation
First Claimant: Ms A Cheung, counsel
Second Claimant: Mr R O'Dair, counsel
Respondent: Mr R Hignett, counsel

RESERVED JUDGMENT

The unanimous decision of the tribunal is that: -

1. The First Claimant's claim of unfair dismissal **succeeds**.

2. The Second Claimant's claim of unfair dismissal **succeeds**.

3. The First Claimant's claim of indirect age discrimination **fails and is dismissed**.

4. The Second Claimant's claim of indirect age discrimination **succeeds**.

5. The Second Claimant's claim of indirect sex discrimination **fails and is dismissed**.

6. Remedy will be determined at a remedy hearing if not agreed.

REASONS

Introduction and Procedural History

1. This is our judgment in respect of claims of unfair dismissal and indirect age discrimination brought by both Claimants, and also in respect of an indirect sex discrimination claim brought by the Second Claimant.

2. As is set out in more detail below, these claims all arise from the decision of the Respondent, in February 2021, to withdraw from the Teachers' Pension Scheme ('TPS'). The Claimants were among a number of teachers employed by the Respondent who refused to sign variations of their employment contracts which would have replaced their right to a TPS pension with a right to what they both viewed as a less favourable pension provided by the Aviva Pension Trust for Independent Schools ('APTIS'). In consequence, both Claimants, along with a number of their colleagues, were dismissed, and offered re-engagement on terms that included provision for an APTIS pension. The Claimants were among three teachers who did not accept re-engagement, and in consequence the employment of each of them ended by reason of dismissal on 31 August 2021.

3. Supported by their trade union, NASUWT, the Claimants each commenced ACAS early conciliation and subsequently issued their claims to the Tribunal on 3 August 2021. The Respondent entered timeous responses to both claims.

4. The claims have subsequently been through an extensive case management history, which does not need to be set out here, save to note that on 5 November 2021 Employment Judge Adkinson directed that the Claimants' claims be heard together, and that on 30 August 2022 Employment Judge Ahmed struck out an equal pay claim brought by the Second Claimant, and directed that the remaining claims be heard at an eight-day final hearing.

5. Regrettably, matters have not proceeded entirely smoothly even in the immediate run-up to and during the hearing. We particularly note the following:

   (1) On 24 May 2023, less than three weeks prior to the start of the hearing, NASUWT, which acts for both Claimants, wrote to the Tribunal indicating a concern that the matter would not be ready for final hearing, because further information from the TPS itself was required. This necessitated a last-minute order from the Tribunal that such information be provided, and it was in due course forthcoming. Given that the material disclosed was, as our Reasons below make clear, plainly relevant, it is not clear

why this matter was not formally raised with the Tribunal until the last few weeks before the hearing, given that the claims had been issued some 22 months before the hearing, and that there had been several case management hearings.

(2) The first day of the hearing, 12 June 2023, was a reading day for the Tribunal. On 13 June 2023 we were due to begin hearing the evidence, but Mr O'Dair, counsel for the First Claimant, had not attended. We were informed by Ms Cheung, counsel for the Second Claimant, that the wrong dates for the hearing had been entered in Mr O'Dair's professional diary, and that in consequence he had believed that the hearing was due to begin in the week commencing 19 June 2023. While we accepted this explanation, we noted that Mr O'Dair had been present at the hearing on 9 November 2022 when Employment Judge Ahmed had listed the matter, and that the correct dates of the hearing were clear from, among other things, the written case management order made by Judge Ahmed. As Mr O'Dair was appearing in the Court of Appeal on 13 June 2023, and in consequence could not attend the Tribunal that day, we considered that we had little choice but to adjourn the start of the hearing to 14 June. A day of hearing time was thereby lost. An application was subsequently made by the Respondent in respect of this issue, but happily that was resolved between the parties.

(3) Even when the hearing began, there were a number of case management issues that fell to be resolved before the hearing of evidence could commence. In particular:

(i) At around 4pm on 12 June 2023 the Claimants' solicitors (acting, in particular, on behalf of the Second Claimant) had filed a witness statement from Steve Lloyd, an official in NASUWT who had acted for both Claimants in their appeals against their dismissals. This statement was filed some time after exchange of witness statements, and, indeed, after we had conducted most of our preparatory reading. We did not permit this evidence to be adduced, in view of its lateness, and in view of the agreement of Mr Hignett, on behalf of the Respondent, that the chronology before the Tribunal could be amended to record all the dates of industrial action carried out by staff at Loughborough Grammar School (see below), which, Mr O'Dair told us, was the primary factual point which he sought to establish from Mr Lloyd's statement.

(ii) Also late in the day on 12 June, the Claimants' solicitors served a supplementary bundle of documents. While some of these documents had only come to the parties late in the day (for example, the information sought from the TPS, and referred to above, had only been provided on either 9 or 12 June), it was unclear why much of the information had not been included in the core bundle. As it was, Mr Hignett, having had time to consider

the documents, pragmatically and sensibly did not object to them being considered as part of the evidence.

(iii) During the morning of 13 June, Ms Cheung in particular raised queries about various documents that appeared not to be in either the core or the supplemental bundles. After Mr Hignett had taken instructions, the Respondent subsequently disclosed three further documents, consisting of the document referred to below as the 'options brief', as well as copies of presentations made by the employee representatives during consultation meetings on 24 November and 7 December 2020. These were clearly disclosable, so it is unclear why the Respondent had not disclosed these previously. Equally, it is unclear why the questions that led to their disclosure had not previously been raised by the Claimants' solicitors.

(iv) Mr O'Dair's skeleton argument, served on the other parties on the morning of 12 June 2023, contained various calculations designed to show the approximate financial loss that the Second Claimant would have incurred as a result of the move from a TPS to an APTIS pension. This was, Mr O'Dair confirmed, produced to support the Second Claimant's case on individual disadvantage in respect of her indirect discrimination claims, and to rebut the Respondent's case on justification (proportionate means of achieving a legitimate aim) in respect of those claims. On the morning of 14 June, Mr Hignett objected to the provision of Mr O'Dair's calculation, contending that it provided insufficient information to enable him to understand and respond to it. The Tribunal had some sympathy with this view, and directed that Mr O'Dair provide an expanded version of the calculation by the morning of 16 June. Mr O'Dair did this, and the Tribunal has considered Mr O'Dair's calculations in the course of its deliberations, although Mr Hignett maintained an objection to us doing so, as he had not, in his view, had sufficient time to consider them. We took the view that by the stage of final submissions, Mr Hignett had had sufficient time to consider the final draft calculations provided five days earlier. In the event, for reasons set out below, we did not consider that these particular calculations assisted us greatly in resolving the issues in the case.

(4) Regrettably, resolving these case management issues and consequential matters consumed the entire morning of 14 June, with the result that we did not start hearing the evidence until after lunch. Given the delays that we had already experienced, this was unsatisfactory. These case management issues should all have been resolved some time (and, in respect of all matters other than that set out at subparagraph 5(2)(iv) above, some weeks if not some months) before the final hearing.

6. When we did come to hear evidence, we began by hearing the Respondent's witnesses. It had been the original view of the Tribunal that the Claimants should give evidence first. During discussions between the Tribunal, Ms Cheung, and Mr Hignett on 13 June, Mr Hignett had suggested that, given the limited availability of some of the Respondent's witnesses (James Doherty in particular was only available on 14 and 15 June), we should hear the Respondent's evidence first. The Tribunal expressed the view that this might well be the approach that was adopted, but did not at that stage reach a final view on the matter. However, when we reconvened on 14 June, neither Claimant had attended, and hearing the Respondent's evidence first thus became something of an inevitability. It is likely that we would have decided to hear the Respondent's evidence first, but it was unfortunate that the Claimants presented the Tribunal with a *fait accompli* in this respect.

7. Once begun, the Tribunal hearing evidence from the following witnesses on behalf of the Respondent:

   (1) Mr James Doherty, the Respondent's former Chief Operating Officer (who was in post between August 2012 and January 2023, and thus at all material times).
   (2) Mr Roger Harrison, a governor of the Respondent at the time of the events giving rise to the claims, and currently the Chair of Governors.
   (3) Dr Fiona Miles, headmistress of Loughborough High School.
   (4) Mr Tony Jones, the Respondent's Vice-Chair of Governors at the time of the events giving rise to the claims.

8. We subsequently also heard evidence from both Claimants. As noted above, we declined to admit Mr Steve Lloyd's evidence on behalf of the Claimants.

9. Counsel delivered their closing submissions on 21 June, the last scheduled day of the hearing. While the case management order of Employment Judge Ahmed provided that each counsel should have 30 minutes to deliver closing submissions, the issues in the case plainly merited considerably more time than that, and ultimately submissions consumed the entirety of 21 June.

10. We did not, during the course of the hearing in June 2023, hear evidence or submissions concerning remedy, should the claims succeed. This included questions in respect of a possible *Polkey* reduction (*Polkey v AE Dayton Services Ltd* [1988] 1 AC 344), should the unfair dismissal claims succeed. While, at the outset of closing submissions, the employment judge raised with the parties the question of whether, were it to be found that the dismissals were unfair on procedural or partlyprocedural grounds, the Tribunal would need to consider whether one or both Claimants might nonetheless have been fairly dismissed had there been no procedural flaws, counsel had not anticipated that this point would be raised, and it was agreed that such questions would, if they arose, be addressed at a subsequent remedy hearing.

11. The Tribunal panel met in Chambers on 9 August 2023 to consider our decision, and on that day we reached the conclusions set out below.

12. This judgment and reasons has taken a very considerable time to promulgate since the Tribunal panel met on 9 August 2023. The delay rests with the employment judge, who hereby apologises to the parties for the length of the wait that they have had. There is a regrettable irony in the fact that this judgment, having noted a number of procedural delays and mishaps on the part of the parties, is now itself subject to excessive delay on the part of its author.

Findings of Fact

13. The Respondent is a company limited by guarantee and a registered charity. It operates four fee-paying independent schools in Loughborough, namely:

(1) Loughborough Grammar School ('LGS'), a school for boys aged 10 to 18.
(2) Loughborough High School ('LHS'), a school for girls aged 11 to 18.
(3) Loughborough Amherst School ('LAS'), a mixed school for children aged 4 to 18.
(4) Fairfield Prep School ('FPS'), a preparatory school for boys and girls aged 3 to 11.

The issues in this case were primarily concerned with LGS and LHS.

14. We heard some evidence about the Respondent's management structure. Ultimate responsibility for the management of the Respondent rests with the governors of the Respondent (i.e. the governors of the Foundation itself). There are 22 governors, who are also charity trustees. They are no staff governors. Each of the four schools within the Respondent Foundation has its own cadre of governors, who report to the Respondent's governors.[1]

15. Among the Respondent's employees, it appeared that there were five senior members of staff, being the heads of the four schools, and Mr Doherty, who was chief operating officer of the Foundation as a whole, and was responsible for the Respondent's central services function, which included the large bulk of the non-academic business of the Foundation (for example, business development, finance, marketing,

[1] In the remainder of this judgment, references to governors should be read as referring to the Respondent's governors – i.e. the governors of the Foundation, rather than of the individual schools. Similarly, where reference is made to 'the Board', these should be read as referring to the Board of Governors/Trustees of the Foundation.

admissions, HR, operations, estates, compliance, and information and network services). Mr Doherty also supported the Respondent's governors, as company and charity secretary of the Respondent, and as strategic planning lead.

16. Each of the heads was in turn supported by a variety of other academic staff within the schools, including assistant and deputy heads. Mr Doherty had his own senior leadership team consisting of directors and managers of the individual divisions within shared services (for example, the directors of HR and finance were among those who reported to Mr Doherty).

17. The First Claimant was born on 4 April 1962. At the time of his dismissal on 31 August 2021 he was 59 years old. He was a late entrant to the teaching profession, and became employed by the Respondent as a physics teacher at LGS in September 2003; this was his first teaching job.

At the time of his dismissal he was second in charge of LGS's physics department.

18. The Second Claimant was born on 19 September 1984. At the time of her dismissal on 31 August 2021 she was 36 years old. She began her teaching career in 2008, and became employed by the Respondent as an English teacher at LHS in September 2014.

19. The Second Claimant is the mother of a son, born in 2018. Between 2018 and 2019 she took nine months' maternity leave following the birth of her son. We did not hear evidence that she had taken any other career breaks.

20. Until 2021, the Respondent provided its teaching staff with a pension under the TPS. This was a career average defined benefits pension scheme, which, we find, was generally and accurately viewed as a highly beneficial scheme for teaching staff. We accept the evidence of both Claimants that the benefits of the TPS were seen by each of them as a valuable part of the total compensation that they received as teachers employed by the Respondent.

21. The TPS is an unfunded pension scheme. That means that rather than there being an established pot of money from which the pensions of retired scheme members are paid, the scheme's costs are met from contributions made by current scheme members. In other words, the pensions of current pensioners are paid from contributions paid on an ongoing basis by current teacher members and schools that provide TPS pensions.

22. This means that if the liabilities of the TPS to its existing pensioners increase, it is likely that the TPS will in turn increase the rate of contributions charged to current teachers and schools.

23. The level of employee's and employer's contributions to the TPS are reviewed every four years.

24. Between 2007 and 2015, TPS employer contribution rates were 14.1%. In 2015 they were increased to 16.5%. In October 2018, the results of the next quadrennial review were announced, and the Respondent became aware that employer's contributions to the TPS would increase from 16.5% to 23.6%. In his witness statement, Mr Doherty explained that that represented not only a 43% rise in the employer's contribution rate, but also a 7% increase in the Respondent's teaching costs, and, consequently, a 3.5% rise in the Respondent's overall cost base.

25. It is appropriate at this point to touch on certain matters that were relied upon by the Respondent in respect of the Respondent's financial position. These matters were set out in some detail by Mr Doherty in his witness statement, and he was also cross-examined on them. From the evidence that we heard, we understood the key points to be as follows:

    (1) As a charity, the Respondent does not, for example, seek to generate a profit for shareholders. However, it does seek to operate on an annual cash surplus of 10% of turnover. As Mr Doherty explained in his evidence, the 10% surplus was needed to meet ongoing capital expenditure, including not only large projects such as new buildings, but smaller ongoing maintenance and infrastructure costs. The Respondent's turnover was around £30million, indicating that it was aiming for a £3m surplus each year.

    (2) The Respondent's income derives almost entirely from school fees paid by pupils' parents. However, the Respondent has suffered a decline in total pupil numbers. We were shown a chart showing that the total number of pupils had declined from 2,579 in the 2004/5 school year to 2,195 in the 2019/20 school year [180].

    (3) The Respondent was not necessarily well-able to respond to increased costs by materially increasing school fees. The Respondent's parent body is, it appears, on average less wealthy than that at many independent schools, and many parents struggled to meet the fees at their existing level.

26. As early as February 2018, Mr Doherty had made a presentation at a governors' away day, in which he expressed the view that the Respondent was only financially viable in a best-case scenario [699-729]. Against this background, the increase to the Respondent's TPS contributions was naturally concerning to Mr Doherty.

27. The question of the impact of the increase in contributions was referred by Mr Doherty to the Board, and the Board subsequently considered the matter at an away day on 26 February 2019 [minutes at 730-738].

28. In advance of the 26 February 2019 away day, a report was prepared for the Board by Richard Soldan, a partner at Lane Clark & Peacock LLP ('LCP'), a well-known firm of actuaries with expertise in pensions [S/64S/102]. This document was explored in some detail during the evidence, and it is appropriate to spend some time explaining the conclusions that we drew from it.

29. As is set out at the beginning of the presentation, it was designed '*to illustrate the pension benefits that might be earned by sample teachers in the [TPS] and an alternative defined contribution (DC) pension scheme'* [S/65]. It proceeds to model a series of scenarios in order to show how the pension provision of three example teachers would be affected by a move from the TPS to a defined contribution scheme.

30. The specific example teachers were [S/67]:

    (1) A: a 22-year-old newly-qualified teacher, on an annual salary of £24,500, and a normal retirement age of 68.
    (2) B: a 40-year-old teacher, with 18 years' service, an annual salary of £41,500, and a normal retirement age of 68.
    (3) C: a 58-year-old teacher, with 35 years' service, an annual salary of £46,000, and a normal retirement age of 60.

    Example B correlates quite closely to the circumstances of the Second Claimant. B is slightly older than the Second Claimant was at the time of her dismissal (40 as opposed to 36), and has somewhat more service (18 years as opposed to 13), but we considered that these were relatively minor differences. B's salary is also similar to that earned by the Second Claimant. While B is not an exact representation of the Second Claimant's position, we consider that this example is close enough to the Second Claimant to provide a reasonably reliable indicator of the impact upon her of a move away from the TPS. Example C correlates quite closely to the First Claimant in terms of age, salary, and normal retirement age, albeit that the First Claimant had considerably less service.

31. The document proceeds to model the impact of a move from the TPS to a defined contributions scheme for the example teachers, showing in particular the income that each teacher could expect under each scheme at the ages of 68 and 88. It does so on the basis of certain assumptions. These include an assumption that the total contributions to the defined contributions scheme will be 28%, although one scenario features higher contributions of 30% [S/67]. The document records that '*the DC illustrations are not dependent on the DC provider that [the Respondent] selects*'. The models generally assume that the fund in which the

pension contributions are invested will achieve an average 5% annual return, although some scenarios assume a poorer annual return of 2.5%.

32. The scenario analyses broadly show that the hypothetical teachers would be worse off under a defined contributions scheme than under the TPS. While this does vary according to the particular scenario selected, Mr O'Dair on behalf of the Second Claimant drew our attention in particular to a scenario in respect of example B, headed 'what if security is important?' [S/76]. This was designed to show how B's pension would be affected by a move to a defined contribution scheme, in circumstances in which B, upon retirement, used the defined contribution fund to buy an annuity and thereby generate a fixed annual income for life (which is also what the

TPS provides). It shows that B's annual pension would be around £31,000 if B remained in the TPS, but only around £22,000 if B left the TPS and joined a defined contributions scheme.

33. When the same 'what if security is important' scenario is applied to example A, the model shows that A's annual pension income would be likely to be approximately £24,000 if A stayed in the TPS, but would fall to around £14,000 if A moved to a defined contribution scheme [S/71]. The difference would be far smaller for example C, owing to C's far longer existing service with a TPS pension, albeit that even for this hypothetical teacher there would still be some loss of pension income as a result of the move from the TPS to a defined contribution scheme [S/82]. It is material to note that what the models show is that withdrawal from TPS would leave examples A and B materially worse off in retirement than example

C. This is because of the much longer existing period of membership of the TPS that C had accrued.

34. The greater benefits of the TPS over a defined contribution scheme are also illustrated by the fact that, in the example at [S/76] (Example B – 'what if security is important'), the projected annual income of around £22,000 if B moves to a defined contributions pension is derived roughly as much from a notional eighteen years in the TPS as from a notional twenty-eight years in the defined contributions scheme. In other words, the eighteen years in the TPS contribute almost as much to B's annual pension income as the twenty-eight years in the defined contributions scheme.

35. Generally, the projections from LCP show that each of the example teachers would be worse off under a defined contribution scheme than under the TPS. There are some scenarios where this is not always the case. For example, if example A or example B chose regularly to draw capital from their pension fund (under a defined contributions scheme) once they reached the age of 68, this could give them a higher annual income at the age of 68 than the TPS [S/73; S/78]. However, they would then be considerably worse off by the age of 88.

36. The conclusion set out in the presentation is as follows [S/68]:

> *The illustrations show that a teacher in a DC alternative could expect a lower pension than from TPS, assuming the teacher wishes to purchase a pension (annuity) similar to a TPS pension from an insurance company when they retire. A further key advantage of DC schemes is the ability to take benefits in different forms when reaching retirement. The illustrations also demonstrate that flexibility by illustrating different options in the way the DC benefits can be taken. These present different results and show that the comparison between DC benefits and TPS benefits can be significantly influenced by the way in which the DC benefits are taken.*

37. We observe, however, that notwithstanding the reference in the presentation to the benefits of flexibility offered by DC schemes, there is no example in the presentation in which a teacher is better off under the DC scheme than under the TPS at both age 68 and age 88. In those scenarios in which the teacher is better off under the DC scheme at 68, they are invariably worse off at 88 because they have depleted capital in order to achieve a higher income earlier. In all scenarios in which income remains steady throughout retirement, the TPS appears clearly more beneficial.

38. The decision of the Board following the February 2019 away day was that membership of the TPS would be retained for the time being, but that alternative pension arrangements would be looked into [736]. A further meeting of the Board was held on 21 March 2019, at which it was agreed to freeze salaries in order to save the additional costs which the Respondent would incur as a result of the increase in its TPS contributions [740-745].

39. In September 2019, the Board agreed a ten-year financial plan for the Respondent. At that time, it was agreed that the Respondent would continue as a member of the TPS until at least August 2021. However, this was said to be conditional on there being no further unexpected shocks to the Respondent's finances [748-752]. A letter was sent to the Respondent's teaching staff confirming this [334].

40. Unfortunately, references in September 2019 to avoiding further economic shocks are now, with the benefit of hindsight, heavy with irony. In early 2020 came the Covid-19 pandemic, and, on 23 March 2020, the announcement of the nationwide 'lockdown'. It is hard to imagine many things more economically disruptive in many sectors, including education. As is well-known, children were generally prevented from attending school, and while the Respondent provided remote teaching, there was parental pressure for fee discounts, and at around Easter 2020 the Board agreed to an average 18% fee discount. The Respondent also froze fees for the 2020/21 school year. We were told that the combination of the discount and the fees freeze left the

Respondent around £3.5m worse off than it had budgeted for in September 2019. The Respondent took a £5m Coronavirus Business Interruption Loan to tide itself over in the short term.

41. A further consequence of the impact of Covid and lockdown was that the possibility of withdrawal from the TPS became (in Mr Doherty's words) 'a much more serious and necessary discussion'.

42. On 16 September 2020 the Respondent's finance director, Kate Venables, prepared a series of spreadsheets showing the Respondent's financial position [335-346]. These were checked and approved by Mr Doherty. Of particular significance was a document at [337], headed '10 year forecast'. This is a detailed financial projection for the eleven school years from 2020/21 up to 2030/31. We take the following key points from it:

(1) At the commencement of the 2020/21 school year, the Respondent's cash reserves were approximately £4,530,000.

(2) The Respondent expected to make losses in all of the eleven school years covered by the projection, other than (for reasons which were not explored before us) 2029/30. The initial loss projected for 2020/21 was £314,000, but thereafter it rose steadily, to be over a million pounds in every year except 2029/30, and in some cases several million pounds.

(3) The upshot was that the Respondent's cash reserves would be depleted. The projection showed them at £4,216,000 by the end of 2020/21, at £2,641,000 by the end of 2021/22, and at £917,000 by the end of 2022/23. Thereafter, the projection showed the Respondent's cash reserves as negative.

(4) Ultimately, the projection showed that, by the end of the 2030/31 school year, the Respondent would have a deficit of £28,653,000.

(5) As it was expressed before us, this meant that the Respondent had an approximately £30m 'black hole' to fill if it was to maintain its existing financial position.

43. A Board meeting took place via video conference on 24 September 2020 [347-355]. One of the items for discussion was the TPS, and this part of the meeting was attended by Luke Hothersall, a partner in LCP. Mr Doherty also gave a presentation, in which he explained the financial pressures that the Respondent was under, and invited the Board to consider the Respondent's long-term pension arrangements for its teaching staff [350-351]. The minutes then show a relatively lengthy discussion, at the end of which the Board unanimously resolved to enter into a period of consultation with teaching staff in respect of proposed withdrawal from the TPS from the start of the 2021/22 school year [351352].

44. The estimated saving to the Respondent from withdrawing from the TPS was £9m over ten years (it is not clear precisely when this figure was identified, but it was certainly well before the end of the subsequent consultation period, and the Claimants did not really challenge the accuracy of the figure). Given that the 'black hole' was £30m, other savings were clearly needed. At the 24 September meeting, it was noted that the Board's Recovery Strategy Working Group ('RSWG'), which had been established in June 2020 and was chaired by Mr Tony Jones, was actively considering other cost-saving options. We were told that initially 55 options were considered, and by the time of the 24 September meeting these had been narrowed to 20.

45. Following the 24 September meeting, LCP were instructed to identify a suitable DC scheme to replace the TPS. A recommendation was subsequently made that the Respondent should join APTIS.

46. The Respondent proposed that the employer's contributions to APTIS should be 16.5% (apparently made up of 15% being paid into the DC fund, with a further 1.5% funding the provision of life assurance and income protection policies), with employee's contributions of 7% [369]. This would provide a total contribution rate of 23.5%. We note that this was lower than in any of the scenarios in LCP's presentation given in February 2019.

47. The Respondent was not unique among independent schools in proposing to withdraw from the TPS. According to a document entitled 'Teachers Pension Scheme – Options Brief', prepared by Mr Doherty on 16 February 2021 [S/225-S/248], 207 of the 1,171 independent schools which had been members of the TPS in March 2019 had withdrawn from the TPS by February 2021, and around 170 more were in consultation regarding leaving. Expressed in percentage terms, that suggests that around 17.7% had left, and around 14.5% more were considering leaving, with the remaining 67.8% neither leaving nor considering doing so. It is, however, important to observe that each of those 1,171 school will have its own concerns and financial imperatives, and it is difficult to draw a great deal of conclusions relevant to this case either from the fact that the majority of schools did not envisage leaving the TPS, or from the fact that a substantial minority either had done or were considering doing so, other than to note that the Respondent was certainly not a unique outlier in its approach.

48. The Respondent's proposed withdrawal from the TPS was made known to teaching staff at a meeting held via Microsoft Teams on 6 October 2020. There then followed e-mails sent the same day on behalf of the then-chair of the Board, Sir Trevor Soar, which were accompanied by a letter from the Respondent's HR manager, Kate James, a detailed business rationale, a summary of the proposed changes, and a set of FAQs [357-378].

49. Ms James' letter explained that a consultation process would take place, and provided for the election of staff representatives to take part in the consultation process, as there was no recognised trade union. Eight staff representatives were subsequently elected. The Claimants were not among the staff representatives, and none of the staff representatives gave evidence before us.

50. At around the same time, three governors (collectively referred to before us and in the remainder of these Reasons as 'the consulting governors') were appointed to represent the Respondent in the consultation process. These were Louise Webb, Tony Jones, and Alan Dodson. Mr Jones gave evidence before us.

51. The collective consultation process was commenced by the service of letters on the staff representatives on 2 November 2020 [757-760].

52. The first collective consultation meeting took place on 11 November 2020. This was attended by the eight staff representatives, the three consulting governors, Mr Doherty, Ms Venables (finance director), Ms James (HR manager), and a notetaker. A document was created following the meeting [385-390], which consists of questions from the staff representatives, and answers on behalf of the Respondent. As the document makes clear, some of the answers were provided or expanded upon after the meeting, presumably as a result of the consulting governors or Mr Doherty or one of his subordinates obtaining further details in response to the questions. Follow-up questions were also provided by the representatives, and the Respondent provided answers to these [391402].

53. From the initial consultation meeting, we note the following in particular:

    (1) An extension of the consultation process was agreed, so that it would now end on 3 February 2021, an extension of seven weeks from the original end date.

    (2) There was considerable discussion of possible alternatives to withdrawal from the TPS, and a number of possible alternatives were raised at this time, although they do not appear at this stage to have included the 'tandem' scheme which (as set out below) was subsequently to assume significant importance.

    (3) The possible cost-saving measures considered by the RSWG (see paragraph 44 above) were discussed. Following the meeting, the staff representatives asked to see the 55-item list of proposed cost-savings prepared by the RSWG. This was not provided, although some specific items were listed.

    (4) The staff representatives in turn said that they had identified around 35 cost-saving initiatives, as an alternative to withdrawal from the TPS. The governors expressed a wish to see these as soon as possible.

54. During and after the meeting, the staff representatives asked for various documents to be provided, including financial information and the Respondent's ten-year financial plan. Various documents were placed in a secure digital 'vault', which the staff representatives could access, but which could not, it appears, be downloaded or otherwise removed from the vault. The full extent of the vault's contents was not clear to us, although it appears to have included the ten-year financial plan, a report from a firm of consultants (Baines Cutler) prepared in October 2016 on the topic of 'Fee affordability and parental time' [220-261], the financial projections at [335-346], and other (unspecified) financial data. It appears that the vault was updated with further information from time-to-time. There was some suggestion in cross-examination of Mr Doherty by Ms Cheung that the staff representatives did not have sufficient information, or were not being provided with information that Mr Doherty and the Board had, but while there was doubtless some information that was kept confidential, the staff representatives clearly had enough information to allow them to prepare detailed presentations and proposals, as is set out below, and we do not fault the Respondent in this regard.

55. A second consultation meeting took place on 24 November 2020. Notes of the meeting were prepared, and like the notes of the previous meeting these appear to include both contemporaneous notes and clearlyidentifiable further information subsequently included on behalf of the Respondent [404-418]. This had the same attendees as the previous consultation meeting, except that Mr Doherty did not attend. As stated by Ms Webb at the start of the meeting, the key purpose of the meeting was to understand the views of teaching staff on the proposed withdrawal from the TPS, and to obtain staff suggestions for alternative ways of making savings.

56. During the course of the meeting, the staff representatives presented the results of a survey of staff that they had conducted earlier in November 2020 [S/15-S/54]. This showed that the general view of teaching staff across the Respondent's four schools was opposed to withdrawal from the TPS. A variety of suggestions had come from staff as to possible alternatives.

57. The staff representatives also gave a presentation to the consulting governors, entitled 'TPS Consultation: Financial Savings' [S/266-S/299]. Among other things, this made various suggestions as to how financial savings might be made, including reducing the size of the central services division headed by Mr Doherty, removing some staff benefits such as free lunches and private medical insurance, a hiring freeze, an increase in school fees, and performance-related pay. The presentation did not at this stage suggest a pay freeze or the 'tandem' scheme referred to below.

58. A third consultation meeting was held on 7 December 2021 [421-429], with the same attendees as on 24 November. During the meeting, there was a presentation from staff representatives concerning the differences between the APTIS and the TPS schemes. It was still clear that the staff representatives were opposed to the move away from the TPS, which they

viewed as a materially more generous scheme than APTIS or other DC alternatives.

59. During the 7 December meeting, a question was raised by the staff representatives concerning the possibility of what was then referred to as a 'mixed economy'. The 'mixed economy' is what was more commonly referred to before us as the 'tandem' scheme. Under such a system, members of staff would have two options in respect of their pension provision. They could choose to stay in the TPS, in which case they would pay a higher level of employee pension contributions in order to meet the greater costs of the TPS. Alternatively, they could choose to join APTIS, in which case they would pay lower employee pension contributions. Under the tandem scheme, an employee who elected to join APTIS would thus receive a higher amount of net pay (because their pension contributions would be lower), but would not have the benefit of continuing membership of the TPS.

60. At the 7 December meeting, there was also reference to a 'phased withdrawal' from the TPS. As it was explained to us, a phased withdrawal would involve closing membership of the TPS to new members, but allowing existing members to stay in the TPS. At the time, such an arrangement was not lawful, although we understand that the law was changed in September 2021 such that it became permissible. There was no restriction on operating a tandem scheme, however, so long as membership of the TPS was not closed to new staff.

61. On 7 December, the staff representatives also presented a revised version of the 'TPS Consultation: Financial Savings' presentation that they had given at the previous meeting [S/300-S/326]. This has been amended following discussions between the representatives and Mr Doherty and his staff. As part of the follow-up to the presentation, the representatives raised the following query [S/423]:

> *To help inform future discussions can someone financially model the bullets below to calculate possible savings. If one or a combination of them would provide the ability to retain the TPS then it gives something to discuss with staff…*

The list of bullet points then includes 'pay freeze' and 'mixed economy of pension provision'.

62. The Board's response [S/429] calculated that a three-year pay freeze would yield a £10.9m saving, which was greater than the £9m saving to be derived from withdrawal from the TPS. 'Mixed economy' was apparently construed by the Board simply as meaning that new members of staff would not be permitted to join the TPS (i.e. the phased withdrawal, described at paragraph 60 above, rather than the tandem scheme described at paragraph 59). This was projected to save £558,388 over ten years.

63. It appears, however, that the tandem scheme had attracted the attention of the Board, because on 7 January 2021 Mr Doherty gave a presentation on the scheme to the Board [461-490]. This was an important document, which was explored in some detail in the evidence before us. From it, we note the following points in particular:

    (1) Mr Doherty began by noting that '*the teaching staff have made it clear that they would be prepared to give up other reward/benefits if this meant that they could retain the TPS'* [464].

    (2) He went on to write that '*pay cuts and pay freezes coupled with the removal of other benefits might be acceptable to (some) current staff, however they are unlikely to be acceptable to all staff and indeed "future" staff*' [464]. We return to the question of the acceptability of pay freezes below.

    (3) The tandem scheme was said to be '*potentially a [sic] another way…which would allow staff to remain in the TPS, whilst still meeting the longer-term financial goals*' [464].

    (4) The tandem scheme, as formulated by Mr Doherty, included an element of phased withdrawal, in that new members of staff would not be permitted to join the TPS.

    (5) Mr Doherty made the point that, were TPS employer contributions to rise in the future, then the operation of a tandem scheme would mean that those employees who had chosen to remain in the TPS might have to take a pay cut in order to allow the Respondent to continue to control costs [465, 467]. While the reason for this was not spelled out in Mr Doherty's presentation, it is plainly because under a tandem scheme, staff would effectively be compensated on a 'total remuneration' basis – i.e. their employment would cost the same whether they were members of the TPS or APTIS, but members of APTIS would receive higher net pay, and members of the TPS would receive higher pension contributions. If the pension contributions for TPS members increased, then the only way that their total remuneration would remain the same as equivalent APTIS members would be for their pay to fall.

    (6) Mr Doherty's calculations indicated that introducing a tandem scheme would save around £8.5m over ten years, on the basis of assumptions that (i) there would be no pay rise in the 2021/22 school year, (ii) there would be a 1% pay rise in the next three school years, and (iii) there would be 2% annual pay rises thereafter. This contrasted with a £9m saving from total withdrawal from the TPS [469].

    (7) At [472] Mr Doherty presented the pros and cons of total withdrawal from the TPS. The pros that he identified included the £9m (or £9.1m) saving over ten years, the avoidance of any risk from future rises in

the TPS contributions rate, and the greater potential that it would allow to increase staff salaries. The cons included the adverse impact on staff morale.

(8) At [473-475] Mr Doherty presented the pros and cons of the tandem scheme. The pros included the £8.5m saving referred to above, and the fact that it would reduce goodwill less than total withdrawal. The cons included the fact that the cost savings would be 'backloaded' in that they would take longer to come into effect, the increased administrative costs to the Respondent of operating two schemes (said to be around £50,000 per annum), and the dangers of needing to consult staff again about changes to pay or pension provision, should a further review result in increased TPS contributions.

(9) Mr Doherty's presentation concluded by asking whether Board '*members believe that the phased withdrawal/tandem scheme is a viable option that should be pursued further'*? [476]

64. It is clear to us that, while a wide variety of alternatives to TPS withdrawal had previously been mooted, by the start of January 2021, some form of tandem scheme (probably in combination with some form of pay freeze or restrictions on pay increases) had emerged as the main alternative to full withdrawal.

65. A fourth consultation meeting took place on 14 January 2021 [496503], attended by the same attendees as the previous two meetings, save that Ms Venables (finance director) was not present. Mr Doherty was also not present. At the meeting, the staff representatives gave a presentation described in the notes of the meeting as 'Financial Alternatives – staff view'. We were told by Ms Cheung, on instructions, that the presentation at [780-812] is the one that was made on 14 January, and in the course of evidence Mr Jones agreed that this was probably right. However, we note that the presentation at [780-812] is entitled 'TPS Consultation: Alternative Hypothetical Options', and that a presentation with this title is noted as having been shared by the representatives at the final consultation meeting on 26 January 2021. Accordingly, we consider it more likely than not that the document at [780-812] was shared on 26 January, in which case we do not appear to have the representatives' presentation from 14 January. In any case, it can be seen from the notes that the representatives were still opposed to the withdrawal from the TPS.

66. The meeting notes show that the following question was asked by the consulting governors [501]:

Is it the Reps' intention to distil this information down to a firm proposal on an alternative for Governors/Board to consider?

The staff representatives' response to this is recorded as follows:

We would have liked the Board to provide alternatives so that the Reps could take them to staff and we didn't get anywhere. We as Reps could come up with a proposal but we have to go back to the staff with it. We haven't got the time for the dialogue with staff.

The governors' response to this (apparently provided after the meeting) is then recorded as:

It is the Board's proposal to withdraw from the TPS. It is the Reps' role to propose any viable alternatives to this proposal for the Board to consider. A list of alternative actions that staff might consider were provided in the business case document at the start of the consultation.

67. Subsequently, the meeting notes record a question from the staff representatives as follows [502]:

It seems that the Reps are coming up with a proposal, are we now entering a negotiation phase?

The governors' answer is recorded as follows:

This is a consultation process. There is a firm proposal that the Board are putting to staff and seeking their agreement on. We need to make sure that teachers understand the changes that are proposed. The Rep's role is to help staff understand the changes that are being proposed, to listen to their feedback, share it and put forward any counter-proposals for the Board to consider. Through this process the Board hopes to reach an agreement to proceed with the proposed changes.

68. The significance of the governors' question as to whether the representatives intended to produce a 'firm proposal' emerged during cross-examination of Mr Jones in particular. In response to a question from Mr O'Dair concerning the text quoted at paragraph 67 above, Mr Jones referred back to the third section of text quoted at paragraph 66. He then told us that:

We were trying to get from the reps what their proposal was. They had not given us a firm proposal…Their response was it's for the governors to come up with alternative proposal. This was hardly likely as we had made a proposal on which we were consulting.

69. Subsequently, Mr Jones made a number of further references to what he (and, as we understood his evidence, the other consulting governors) saw as a lack of a concrete proposal from the staff representatives. For example, when Mr O'Dair put to Mr Jones that [787] showed that the staff were willing to accept lower pay (not necessarily a pay cut, but a pay freeze or below inflation pay rise) in order to keep the TPS, Mr Jones's response was:

The reps were saying that. Don't know about the staff as a whole. This may be why the reps did not come up with a concrete proposal. They came up with possible options. What we wanted to know was what is their proposal.

70. Mr Jones also told us that he did not consider the proposals for the tandem scheme to have been made very clear by the staff representatives. Towards the end of his cross-examination by Ms Cheung, Mr Jones confirmed that the governors had placed on the staff representatives the 'burden' (Ms Cheung's word, adopted by Mr Jones) of coming up with one firm alternative proposal. He added that the Board needed to see something from the representatives that could be compared with the proposal to withdraw from the TPS.

71. Ms Cheung then referred to Mr Doherty's presentation on the tandem scheme, and suggested that based on that, the Board could have suggested a tandem scheme combined with a limited 1% annual pay rise for three years. Mr Jones's response was that that would not be feasible, because it would amount to the Board negotiating against themselves. We understood Mr Jones to have taken this view because his opinion (and, we infer, that of the other consulting governors) was that, the Respondent having made its proposal to withdraw from the TPS, it would undermine the Respondent's position for the Respondent now to suggest other options.

72. Overall, the clear impression that we took from Mr Jones's evidence and the contemporaneous documentation was that the approach of the consulting governors was that the starting point for the consultation process was that withdrawal from the TPS was going to happen, unless the staff representatives produced a single clear alternative proposal, the

'concrete' alternative, as Mr Jones called it. If, and only if, such a proposal was produced would the consulting governors or the Board as a whole assess its suitability as an alternative to the proposal to withdraw from the TPS. The production of such a proposal, in the view of Mr Jones and, we infer, his colleagues who did not give evidence, required the representatives to identify not simply various ideas about alternative means of saving costs, but a specific costed proposal. It is also clear, in our view, that the consulting governors did not view it as the Respondent's responsibility to do what they considered to be the representatives' work for them by, for example, analysing or putting forward a tandem scheme. While Mr Jones said in the course of his evidence that the process was a consultation not a negotiation, it really seems that the governors' view was that the process was a form of negotiation, in which each side would put forward a single 'offer', rather than a consultation in which the representatives could raise points for the Respondent to explore. Our ultimate view was that in the absence of a single concrete proposal of the kind that Mr Jones and his colleagues wished to see, the consulting governors (and, later, the Board as a whole) treated the presumption that there would be withdrawal from the TPS as not having been rebutted.

73. A final consultation meeting took place on 26 January 2021 [507-509]. At this meeting, the staff representatives gave their presentation headed 'TPS Consultation: Alternative Hypothetical Options' [780-812]. The presentation appears quite clearly to present the tandem/mixed economy approach as the key alternative [782]. It also suggests a variety of other cost-saving measures, which we note include pay freezes of various durations, capped pay increases, and a combination of the two.

74. Following the presentation, the governors asked '*do staff categorically not want a TPS phased withdrawal*', and were told '*that's correct, the Reps are not planning on submitting this option to the Board*'. Somewhat later in the meeting, the governors are recorded as thanking the representatives for their presentation, and indicating that '*Governors will need an opportunity to discuss and give feedback but agreed that Reps have made a great deal of progress to pull these thoughts together. Scenarios presented are appreciated and will be looked at in more detail*'.

75. On 4 February 2021, the formal consultation period came to an end.

76. On 11 February 2021 the staff representatives made a presentation to the entire Board. Others, including Mr Doherty, were also present. This presentation was the last opportunity that the staff representatives had to present their case to the governors, before a decision was made on whether to withdraw from the TPS. It was also the first and only opportunity that the staff representatives had to address the entire Board.

77. The oral presentation was accompanied by a detailed and multifaceted Powerpoint presentation [516-565]. A considerable amount of time was spent looking at this document in evidence. Its key points, at least insofar as they were relevant to our consideration of this case, were as follows:

    (1) It made clear that the staff were strongly opposed to withdrawal from the TPS [520-522; 528-529]. It was said that no staff member to whom the representatives had spoken was in favour of APTIS as opposed to the TPS.

    (2) Examples were given to illustrate the way in which the withdrawal from the TPS and its replacement with APTIS would leave individual members of staff significantly worse off in their retirement [527].

    (3) The results of a survey showing the reactions of staff to various cost saving measures was presented [551]. This was said to have been based on a 66% return rate from affected staff. It indicated that by some way the least popular option among staff was withdrawal from the TPS. A 3-year pay freeze was the second least popular option, with a 'reduced pay rise of only 1% for 3 years' being the third least popular option. The most popular options were removing free staff

lunches and removing private medical insurance as a staff bonus. Further on in the presentation, another slide indicated that the TPS was the benefit most valued by the Respondent's teaching staff, above even pay [560].

(4) A variety of other cost-saving options, with projected costsavings over ten years, were suggested [554-555]. These focused largely on various permutations of pay freeze and capped pay increases. Next to each option is a column marked 'Y/N'. The option of a capped pay increase of 1.5% per annum has been marked with a 'Y', and it is suggested that this would yield a saving of £6,691,479 over ten years. The other options are not marked with either a 'Y' or an 'N'. In his oral evidence, in response to a question from Mr O'Dair, Mr Doherty told us that the staff representatives' oral presentation 'focused on pay freezes rather than pay cuts' as an option, and we note that general pay reductions (as opposed to pay reductions for senior staff only) were not referred to in the presentation.

(5) A tandem scheme was put forward [556] as the preferred alternative of staff to withdrawal from the TPS.

(6) Another alternative proposed was described as the 'Stamford Model' on the basis that staff at Stamford School had agreed to something similar [557]. This appears to have been a variant on the tandem solution.

78. Following the presentation, the staff representatives were asked one question by Sir Trevor Soar, the then-chair of governors. This appears to have been something of an omnibus question, because Sir Trevor asked the representatives whether they had consulted with staff as to whether staff would take a pay cut, and whether staff would take a pay cut. One of the representatives answered 'no', but it was not clear (because the question was really two questions) whether this 'no' meant that staff had not been asked their views on pay cuts, or whether it meant that pay cuts would not be acceptable to staff (or indeed, whether the single 'no' was intended as the answer to both questions). There was no follow-up question to clarify this.

79. Nor were any questions asked about the acceptability or otherwise of pay freezes or caps on pay increases which, as noted above, appear to have been a substantial focus of the staff representatives' presentation. In his evidence, Mr Doherty told us that it was considered that pay freezes had been fully addressed in the presentation. Generally, however, it appeared to us that there was a lack of clarity in the minds of the governors as a whole as to the acceptability of pay freezes (and we comment further on this at paragraph 81 below). As we read the presentation given on 11 February 2021 pay freezes were something that the staff representatives were putting forward as an alternative option to withdrawal from the TPS. In particular, at [554], to which we have already referred, a series of calculations show other ways of saving

money, the majority of which feature pay freezes or restricted pay increases. There are then two bullet points, as follows:

- *Based on solutions proposed by staff & data provided by LSF.*

- *There are so many alternative solutions to losing the TPS that should have been explored.*

80. In our view, this indicates a clear willingness to contemplate pay freezes or reduced pay increases as an alternative to withdrawal from the TPS. However, when asked about the figures at [554], Mr Jones told us that he did not accept that staff would have agreed to pay freezes or below inflation pay increases.

81. Mr Jones was also asked about a number of tables of options [784789] put forward by staff representatives at the earlier meeting on 26 January 2021. In particular, at [787] is a table which appears to suggest a combination of withdrawal of free staff lunches, and a pay increase capped at 1% per annum for three years. It was put to Mr Jones that this indicated that staff were willing to accept restricted pay increases in order to avoid withdrawal from the TPS. Mr Jones's response to this was to say that the staff representatives were saying that, but he did not know about the views of the staff as a whole (the employment judge's note of Mr Jones's answer is set out at paragraph 69 above). He rejected, however, the suggestion that if the governors doubted the representativeness of what the representatives were saying, then they could have balloted the staff, saying that the representatives had been elected to speak on behalf of the staff. In this he was plainly correct, but we did discern a tension between on the one hand questioning the representatives' representativeness, and on the other hand not being willing to take steps to investigate staff views further. We consider that a consequence of this approach was that the governors gave less weight to the proposals based on pay freezes or limited pay increases than they could have done.

82. Returning to the presentation on 11 February, there was also no discussion of how a tandem scheme, which by this stage was clearly the preferred option of the staff representatives, would work in practice. Indeed, other than Sir Trevor Soar's question about pay cuts, no other questions were asked of the staff representatives by the governors. Mr Doherty told us that it had been agreed beforehand that only the chair would ask questions. Mr Harrison said that questions could have been asked by other governors, but that in the event they were not. Either way, it does not appear that the governors as a whole sought to engage in any detail with the representatives, or to clarify any questions or doubts that they had about the content of the representatives' presentation. We do, of course, note that there had been five consultation meetings at which a greater degree of dialogue had occurred, albeit that at those meetings the bulk of the questions were directed from the staff representatives to the governors, rather than vice versa. Nonetheless,

given that it appears to us that there was still confusion in the governors' minds as to such a fundamental issue as the acceptability of pay freezes, it is surprising that the opportunity to explore at least this issue was not taken on 11 February.

83. No minutes were taken of the 11 February meeting.

84. On 19 February 2021, just over a week after the representatives' presentation, the Board met again to decide whether to withdraw from the TPS. In advance of the meeting, the governors were presented with an options brief prepared by Mr Doherty [S/225-S/230]. This document:

    (1) Set out the two main alternatives, being either withdrawal from the TPS or the tandem scheme (without a phased withdrawal).

    (2) Noted that the staff representatives favoured a tandem scheme.

    (3) Recorded that the consulting governors considered that withdrawal from the TPS was the option best-placed to deliver the Respondent's financial objectives, but that if the Board regarded the risk in respect of staff goodwill from withdrawal to be unacceptable then '*the Tandem Scheme Option could deliver the [Respondent's] objectives albeit over the next two or possibly three years and only be restricting pay increases'*.

    (4) Set out the views of the heads of the four schools within the Respondent Foundation. The head of LGS recorded that he favoured the tandem option, as did the head of FPS. Dr Miles, the head of LHS, said that the tandem option was 'worth considering', albeit that she considered that the TPS was unsustainable in the long-term and that she appears to have had some concerns about the operability of the tandem scheme. The head of LAS favoured withdrawal from the TPS.

    (5) Set out the pros and cons (according to Mr Doherty) of the two options. We have touched on Mr Doherty's views on the options already.

85. Minutes of the Board meeting on 19 February 2021 are at [856-863]. The following salient points emerge:

    (1) In his introduction, the chair, Sir Trevor Soar, summarised the background to the matter. He also commented on the proposals put forward by the staff representatives on 11 February as follows:

        The Board noted two observations on this presentation. Firstly, that it was unclear the extent to which the views expressed were representative of the full teaching staff body, and secondly that the Representatives had chosen to not engage in any discussion regarding the proposed alternative, and as such Governors did

not have the benefit of the views of staff on the alternative scheme being proposed.

We found these observations surprising. As to the first, the representatives had been elected to speak on behalf of the staff as a whole, and had clearly engaged with staff in the preparation of their presentations (including, as noted at subparagraph 77(3) above, conducting a survey to which 66% of affected staff responded). As to the second, it is not at all clear why it was said that the representatives had not engaged in discussion, when it was the governors who had chosen not to ask questions of the representatives on 11 February. It may possibly be that the reference to 'the proposed alternative' was intended to refer to the APTIS scheme, but if that is the case then it is quite clear that throughout the consultation process the representatives had conveyed the teaching staff's strong opposition to withdrawal from the TPS, and had made clear the view that APTIS and other DC alternatives were inferior to the TPS.

(2) There was further questioning of the representativeness of the staff representatives when the governors came to discuss the proposals. For example, the minutes record that [861]:

Governors queried the extent to which the views expressed by the Representatives reflected the wider staff body. Heads commented that some of the views reported should be considered with caution. There was a sense that some of the feedback (such as that suggesting a divide between teaching staff and school leadership) was overstated.

It was noted that some staff had privately expressed concern regarding the approach being taken by the representatives, and that they had not fully reflected all staff views…

We observe that the scepticism expressed as to whether the representatives were truly representing all the staff was reflected in Mr Jones's evidence, to which we have referred at paragraph 81 above.

(3) The tandem option was discussed in particular at [862], where it is recorded that:

Governors gave due consideration to the alternative proposals presented by the teachers' Representatives. They noted that the Tandem proposal would require a further three years of frozen pay for teaching staff in order to provide sufficient financial savings to off-set the increased employer contribution. It was felt that this would be more detrimental to the Foundation staff in the longer term.

The minutes do not in terms indicate why the pay freeze was considered to be more detrimental to staff than the removal of the TPS, particularly

given the indications in the representatives' presentations that staff were more concerned with membership of the TPS than with salary. At [860], the minutes record a perceived risk that

> *…a sustained pay freeze in order to "off set" the cost of retaining the [TPS] would have an adverse impact on both staff retention in the medium term, and more immediately staff recruitment. Anecdotal feedback indicated that salary, rather than TPS, was a key consideration for prospective staff.*

It may therefore be that concerns about future recruitment under a tandem scheme underlay the remarks about pay freezes. Given, however, that the tandem scheme would in essence have given staff the choice of higher net pay and an APTIS pension (i.e. the same outcome as that which would result from withdrawal from the TPS), or lower net pay and a TPS pension, it is not immediately apparent why it would have adversely affected recruitment any more than withdrawal from the TPS.

It is also appropriate to note that, rather than a three-year pay freeze, Mr Doherty's projected £8.5m saving from the introduction of a tandem scheme was predicated on a one-year pay freeze, followed by three years of 1% pay increases, and not on a three-year pay freeze. As such, it is not quite clear why the governors were discussing a threeyear, as opposed to one-year, pay freeze.

86. The ultimate conclusion reached on 19 February was that the Respondent should push ahead with withdrawal from the TPS. This was the unanimous vote of the governors, save for one governor who withdrew from the meeting prior to the vote due to a potential conflict of interest.

87. The formal announcement was made to staff on 22 February 2021 [568]. That invited staff to give their voluntary agreement to a contractual variation removing the right to a TPS pension.

88. On 25 February [572], Sir Trevor Soar wrote again to the staff to address concerns that had been raised. Clear there was some kick back from the workforce and representatives in response to the 22 February letter, and, it appears, the rejection of the tandem scheme in particular. Sir Trevor's letter assured staff that the tandem scheme had been fully considered.

89. On 18 March, the Governors met. During the course of that meeting, the number of staff who had voluntarily signed up to the contractual variation removing the right to a TPS pension was considered. At that stage it was 118, out of around 293 affected staff. That is around 40% of the total. A further 22 staff were said to have contracts that allowed the Respondent to unilaterally vary their pension provision.

90. That left a large number of staff who had not voluntarily agreed to the change. The precise number is a bit unclear. The minutes of the 18 March meeting refer to 142 staff not agreeing to the change, but arithmetically, if a

total of 140 staff had either agreed to the change or did not need to agree in order for the change to be effected, that figure should be 153. Either way, a very significant number, possibly a majority, of staff had declined to agree to the contractual variation proposed by the Respondent. They did so in the context of union advice not to accept the proposals, although we were not told what proportion of teaching staff were union members.

91. At the 18 March meeting, the decision was taken to enforce the change by dismissing those staff who did not voluntarily agree, and then offering them reengagement on the amended terms.

92. All the affected staff were offered individual consultation around the same time. The Second Claimant took this up, and attended a consultation meeting with her head, Dr Miles, on 18 March 2021. The First Claimant did not take up the offer of individual consultation. We took the view that the nature of the individual consultation was relatively perfunctory, with the minutes seeming to suggest that at least part of the focus of the meeting was on persuading the Second Claimant to agree to the contractual variation. Ultimately, our view of the individual consultation process was that it made little difference to the case. The decision to withdraw from the TPS had already been made, and the dismissal of those who did not agree to this was more or less inevitable. If the Respondent had acted reasonably up until that point then the nature of the individual consultation would not have rendered any dismissal unfair, but, equally, if the Respondent had acted unreasonably, then the nature of the individual consultation would not have salvaged the fairness of the dismissal. In closing submissions, we understood Mr Hignett on behalf of the Respondent to agree with this approach.

93. Neither Claimant agreed to the proposed contractual variation. We were not told whether any of the 140 (or possibly 151) other employees who had not signed up to the contractual variation by 18 March subsequently changed their minds and avoided dismissal, but the evidence did not suggest that a substantial number of these employees had changed their minds. Before us, all parties proceeded on the basis that the figures from the governors' meeting of 18 March were the most reliable indicator of how many staff did or did not accede to the change.

94. Letters of dismissal were sent out on 24 March. We have see the Claimants' dismissal letters. In short, these set out how they had already been asked to agree to vary their contracts and had not done so. They were given contractual notice to the end of the next term, relying on the reason of the significant business need to restructure the terms of employment. The letter also made the offer of those new terms which could be agreed to and would take effect on 31 August on the expiry of their period of notice.

95. Both claimants unsuccessfully appealed against their dismissals. We have seen the minutes of their appeal meetings, and take the same view of the appeal meetings that we took of the Second Claimant's individual consultation meeting – namely, that it would not make an otherwise fair

dismissal unfair, but that neither would it render an otherwise unfair dismissal fair. We observe that very little time was spent in crossexamination of any of the witnesses on the appeal process.

96. Of those remaining staff sent letters of dismissal, the vast majority, when given the choice of losing their jobs or being re-engaged on the new pension terms, took the latter course. Three did not, and still refused to sign up to the new terms; two of those are the Claimants before us.

97. Subsequently, part of the workforce, namely the teaching staff at LGS, went on strike over a period of six weeks from June 2021. The dispute had commercial implications with some parents removing their children.

98. In September 2021 the new terms and conditions, including the APTIS scheme, came into effect. Further negotiations took place with the unions, with representation at a national level. Dealing with the implications of that caused the Respondent to revisit its plans and, from November 2021, it changed its plans, and the tandem scheme was thereafter adopted. Of course, those events postdate the dismissals, and cannot have an impact on our assessment of the fairness of the dismissals, which must be based on the facts known at the time.

99. The Claimants both completed the ACAS early conciliation process and issued claims. By his claim, the First Claimant alleged that he had been unfairly dismissed, and that he had been subjected to unlawful indirect discrimination on the grounds of age. By her claim, the Second Claimant alleged that she had been unfairly dismissed and subjected to unlawful indirect discrimination on the grounds of both age and sex. Amended Particulars of Claim filed on behalf of the Second Claimant on 14 January 2022 also sought to bring an equal pay claim, but, as noted above, that claim was struck out by Employment Judge Ahmed at a hearing on 30 August 2022. At some point there was also a suggestion of a breach of contract claim by at least the Second Claimant, but that was withdrawn before the final hearing.

The Issues

100. As has already been observed, this matter has had a lengthy case management history. A substantial portion of time has been spent, in particular, on clarifying the bases for the indirect discrimination claims advanced by both Claimants, and both Claimants have filed two sets of further and better particulars articulating the bases for these claims.

101. On 14 December 2022, further to an order made by Employment Judge Ahmed at a preliminary hearing on 9 November 2022, the parties agreed a list of issues. A copy (excluding issues relating only to remedy) is annexed to this judgment.

102. At the outset of the hearing before us, it was confirmed by counsel for all parties that the issues remained as set out in the list of issues, and, in particular, counsel for the Claimants confirmed that the provisions, criteria, and practices identified in the list of issues were the ones that they invited the Tribunal to consider when we came to address the various indirect discrimination claims.

103. Given that there was an agreed list of issues, that all parties had at all times been legally represented, and that counsel at the hearing confirmed their continued agreement to and reliance upon the list of issues, it has formed the basis for our deliberations. Where we have adopted a different approach, this is identified below, but we have not departed from the list of issues in any substantive way.

104. As is discussed below, there was, in our view, a difficulty with the First Claimant's indirect discrimination case in particular, in that the framing of the particular disadvantage relied upon did not seem to fit with the provision, criterion, or practice ('PCP') identified by the First Claimant, but rather with a somewhat different PCP. Mr O'Dair on behalf of the Second Claimant also suggested in his closing submissions that in respect of his client's claims we could adopt a broader framing of the PCP than was set out in the list of issues. Our conclusions on this point are articulated more fully below.

Relevant Law: Unfair Dismissal

105. Pursuant to section 98 of the Employment Rights Act 1996, a Tribunal hearing a claim of unfair dismissal must consider the following points:

(1) The Respondent must prove the reason for dismissal. This is essentially a question of fact, at least in the majority of cases.

(2) The Respondent must also prove that that reason was a potentially fair reason. We address the law in relation to this at paragraphs 107-110 below.

(3) If the Tribunal finds that there was a potentially fair reason for dismissal, it must consider whether, in all the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably in dismissing for that reason. We address the law in relation to this at paragraphs 111-112 below.

106. Our determination as to fairness should be in accordance with equity and the substantial merits of the case.

<u>Potentially fair reason</u>

107. Potentially fair reasons for dismissal are enumerated in section 98 of the Employment Rights Act. They include, at section 98(1)(b), the wordy

catch-all '*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*', commonly referred to as 'some other substantial reason' or 'SOSR'.

108. Here, the Respondent contends that it dismissed the Claimants in order to effect a change to the terms and conditions relating to their pension, in circumstances where the change could not be effected without dismissing (and, had the Claimants agreed to it, subsequently rehiring) the Claimants. It is quite clear on the authorities that this is capable of constituting SOSR: see *Hollister v National Farmers' Union* [1979] IRLR
238. In *Hollister*, the Court of Appeal observed that it was not necessary that an employer's business would otherwise fail or come to a standstill before the employer could dismiss in order to effect a change of terms and conditions. Rather, the ability to establish SOSR in such a case was not limited to cases

> *…where it came absolutely to a standstill but to where there was some sound, good business reason for the reorganisation…It must depend on all the circumstances whether the reorganisation was such that the only sensible thing to do was to terminate the employee's contract unless he would agree to a new arrangement.*

(per Lord Denning MR, at paragraph 12).

109. While an employer has a considerable discretion as to how it organises its business, it is not every business reorganisation (or every wish to alter employees' terms and conditions) which will amount to SOSR. The commentary in *Harvey on Industrial Relations and Employment Law*, Division DI, [1862ff] identifies three factors to which a Tribunal should have regard when assessing whether an employer has proved SOSR in a case like this, and these can be summarised as follows:

(1) The employer must demonstrate that the reorganisation has discernible advantages to the business. A mere statement that the reorganisation is advantageous will not be enough. We note, however, that the employer is not required to demonstrate a particular 'quantum of improvement': *Kerry Foods Ltd v Lynch* [2005] IRLR 680.

(2) The interests of employees are not to be ignored when considering whether the employer has a 'sound, good business reason' for its decision.

(3) It may be relevant to assess the extent to which employees across the employer's workforce have voluntarily agreed to the proposed changes to their terms and conditions.

110. It is at least arguable that the criteria at paragraphs 109(2) and 109(3) above should more appropriately be regarded as aspects of the question of reasonableness, rather than of whether there is an SOSR. Indeed, as regards the question of the extent of employee agreement to proposed

changes, *Harvey* cites paragraph 23 of the judgment of Langstaff J in *Garside and Laycock Ltd v Booth* [2011] IRLR 735, which was expressly addressing the question of reasonableness, and not the question of whether there was a potentially fair reason. As such, when we come to consider whether the Respondent has shown a potentially fair reason, we focus primarily on the first of the three issues identified at paragraph 109 above, and on the more general question of whether a 'sound, good reason' for seeking to make changes to the pension provision has been shown, and we postpone consideration of the impact on employees and the extent of employee agreement to the changes to the reasonableness stage.

Reasonableness

111. The mere fact that a dismissal is for a potentially fair reason does not, of course, mean that it is fair in the particular circumstances of the case. Rather, the Tribunal must consider whether, in all the circumstances, the Respondent acted reasonably in dismissing these employees because of the potentially fair reason. We remind ourselves that the mere fact that we might have acted differently from the Respondent is not determinative of this question. Rather, the question is whether a reasonable employer could have acted as the Respondent did.

112. In Volume 14 of the *IDS Employment Law Handbooks*, at paragraph 9.28, three particular factors are identified as relevant to reasonableness in a case where the potentially fair reason for dismissal is said to be the employee's refusal to agree a change of terms and conditions. These are: meaningful consultation, assessment of the impact of the changes on employees, and consideration of alternatives. These are not the only factors. As we have observed above, it may also be relevant to consider matters such as the number of employees who agreed to the changes voluntarily. The reasonableness of a dismissed employee's refusal to agree to changes may also be a relevant factor, although ultimately the Tribunal is concerned with the reasonableness of the employer's actions in dismissing, rather than with the reasonableness of the employee's actions: *Garside & Laycock Ltd v Booth* [2011] IRLR 735.

Discussion and Decision: Unfair Dismissal

113. In this section of the judgment, we deal with the claims of both Claimants together. This is because the reasons relied upon for the dismissals were the same, and in large part the same factual issues arose in respect of both Claimants, such that to a very considerable extent their claims stand or fall together. This is also in accordance with the approach that was adopted to the case in the evidence and submissions that we heard, where the circumstances of the two Claimants were addressed together. Having said that, we recognise that these are two distinct claims, but the distinction between their individual circumstances arises more in relation to remedy than at the stage of determining liability.

Potentially Fair Reason

114. We begin with issue 1.1 from the list of issues, namely, whether the Respondent has satisfied us that the reason for the dismissal of the Claimants was a potentially fair one.

115. We had no difficulty in concluding that the Respondent has satisfied us that the reason for the dismissal of each Claimant was that the Respondent wished to change the terms and conditions applicable to the Claimants' pensions, and that this could not be achieved save by dismissing the Claimants.

116. We also had little difficulty in concluding that this was a potentially fair reason for dismissal, falling within the general category of 'some other substantial reason', for the following reasons in particular:

(1) We accepted that the Respondent was genuinely and reasonably concerned about the long-term viability of its existing pension arrangements. While the Respondent was not in a state of being immediately loss-making, the detailed and reasoned ten-year forecast produced by Ms Venables on 16 September 2020 showed that, without significant steps being taken to place the Respondent on a more solid financial footing, its position would become perilous (to say the least) over the course of the next decade – we note the projection of a deficit of nearly £30million in the forecast. We accepted the evidence of Mr Doherty, Mr Jones, and Mr Harrison that this was a matter of considerable concern to the Respondent.

(2) We accepted that it was both reasonable and, indeed, imperative for the Respondent to take some action to address this.

(3) We also accepted (and, indeed, it could hardly be doubted) that moving from the TPS to APTIS would achieve a substantial reduction in the Respondent's employer pension contributions. This would go a substantial way towards avoiding the dire financial consequences shown in the ten-year forecast.

117. In short, we concluded that the Respondent had shown a genuine and substantial reason for seeking to alter employees' contracts to remove their entitlement to the TPS, and for dismissing those who did not agree to this. This is, in our view, sufficient to establish SOSR.

Reasonableness

118. We now turn to consider whether it was reasonable for the Respondent to dismiss the Claimants because of their refusal to agree to the variation of their pension entitlements.

119. Issue 1.2.1 of the agreed list of issues identifies, as the first specific question relating to reasonableness, the question of whether the Respondent had shown a sound business reason for the change. It seems to us that this might more accurately be regarded as a factor going to whether there was some other substantial reason for the dismissal, since if there was no sound business reason, SOSR was unlikely to be established. However, whether analysed as a question relating to the existence of a potentially fair reason or to the reasonableness of dismissing for that reason, we accept that there was a sound business reason.

120. The more fundamental question, at this stage in our deliberations, was whether the Respondent had acted reasonably in all the circumstances in treating the established SOSR as a sufficient reason for dismissing these employees (issue 1.2.2). The list of issues goes on to ask two sub-questions, namely whether the decision was within the band of reasonable responses available to a reasonable employer, and whether
the Respondent followed a fair procedure in dismissing the Claimants. We have not addressed these two matters as separate questions. The first does no more than restate the general requirement for reasonableness, although it does helpfully remind us of the range of reasonable responses test. Moreover, as to both sub-issues, we consider that in a case such as this what is required is a holistic analysis of all the circumstances surrounding the dismissals, to determine whether they were reasonable. Procedure is important, but we do not take the view that in a case such as this procedure may easily be hived off from a general consideration of the circumstances. For these reasons, we prefer to begin by considering the three elements of reasonableness identified in the *IDS Handbook* above, rather than specifically looking at the two sub-issues identified in the list of issues. We will also consider other relevant factors, before arriving at an overall assessment of the reasonableness of dismissals in this case.

Meaningful Consultation

121. We took a clear view that there had not been meaningful consultation. On the face of it an extensive consultation process occurred, with regular meetings between the three ‘consulting governors’ and the staff representatives. However, while it could hardly be disputed that there was a consultation process, we found it impossible to characterise that as one that was meaningful in substance. We found the several criticisms of the Respondent’s approach raised by the claimants to the consultation process to be well-founded, and to amount to fundamental flaws in that process.

122. First, as we have observed, the staff representatives put a very large amount of effort into analysing information provided to them and coming up with alternative suggestions for cost-saving measures, which did not involve wholesale withdrawal from the TPS. A particular example of this is the extensive PowerPoint presentation prepared for the meeting with the governors on 11 February 2021, but there had already been a number of other documents produced by the representatives which included

suggested alternatives, most particularly, that produced for the meeting on 26 January 2021.

123. This work by the representatives plainly merited and necessitated engagement by the hypothetical reasonable employer. This Respondent did not, we found, engage in substance with the representatives. Having heard the evidence of Mr Jones in particular, we could not avoid the conclusion that the proposals and suggestions put forward by the staff representatives were essentially disregarded.

124. We consider that the following points particularly illustrate the defects in the Respondent's approach to consultation:

(1) We considered that the Respondent's approach was broadly to treat withdrawal from the TPS as a starting point and, unless some single concrete alternative were fully and clearly articulated by the staff representatives, as an end point. See paragraph 72 above in particular. In our view, this approach led to a somewhat closed mind, in which the Respondent was unwilling to fully engage with the proposals being made by the representatives. The essence of consultation by an employer in circumstances like this does not merely lie in inviting proposals, but in being willing to engage with them, in substance and with an open mind. We do not consider that the Respondent did have a truly open mind.

(2) The consulting governors in particular seemed to us to be dismissive of the employee representatives. This is partly illustrated by the unwillingness to consider options unless they could be framed as a single concrete solution. It is also illustrated by the view, apparently prevalent among the Respondent's governors and senior decision-makers, that the staff representatives were not, in truth, speaking on behalf of the staff as a whole (despite having been elected by the staff for this precise purpose). We refer in particular to the evidence summarised at paragraphs 69 and 85(1) and (2) above. This led, in our view, to a discounting of proposals, including the proposal for a tandem scheme accompanied by some form of pay freeze. Having regard to the matters set out at paragraph 85(3) above, it seemed to us that the tandem scheme was rejected based on an assumption that staff would not be willing to accept a pay freeze, notwithstanding the indication from the representatives that this was preferred to withdrawal from the TPS.

(3) When the representatives presented to the entire Board on 11 February, there was an overt lack of engagement. Doubt about the reliability of the representatives' views about pay freezes were not tested with the representatives. The only point at which the governors touched on testing the proposals was the single question from Sir Trevor Soar as to whether staff had been asked if they would accept a pay cut, and whether they would. Aside from the ambiguity of such an omnibus question, there was never a proposal or suggestion of

pay cuts; the issue was pay freezes or reduced pay rises. It reflects poorly on the Respondent that on the one hand the representatives were not asked about pay freezes or given the opportunity to respond to any suggestion that their views on this point did not reflect the views of staff as a whole, but on the other hand their views on the point were substantially discounted on the basis that they were not reliably representative.

125. Overall, we took the view that there was not meaningful engagement by the Respondent in the consultation process. Rather, the process was very much a drive towards an inevitable result (withdrawal from the TPS), with alternative options not treated anywhere near as seriously as they should have been.

Assessment of the impact of the changes on employees.

126. There is no doubt that the respondent was clearly aware the removal from TPS was unpopular and would have a detrimental effect or adverse impact generally on the workforce. Perhaps because of the failure to properly engaged with the consultation, the Respondent may not have appreciated just how adverse even though the presentations during consultation showed it was the most valued term in the contract. Knowing the value that the teaching staff placed on the TPS, the reasonable Respondent is beholden then to give reasonable consideration to the impact of withdrawing it. We have to conclude that the Respondent disregarded how significant it was. Whether this aspect is properly to be considered a separate limb of the test of fairness, or forms part of the assessment of the meaningful consultation, we are satisfied the approach of this Respondent to engaging with the impact on staff fell outside the range of the reasonable responses of a reasonable employer.

127. We also had regard to the overall number of staff that accepted the proposal, and did so in the context of the Respondent's argument that the fact that a substantial majority of staff agreed to the changes is itself indicative of the reasonableness of the proposal. Whilst we accept that can be a valid argument in cases such as this, we do not accept it carries force in this case. A majority of the workforce did not agree to the change at a time before they faced dismissal. About 118 did, which is approximately 40% of the workforce. Of the remaining staff, 22 were employed on contractual terms which enable the employer to vary without agreement and the rest were sent letters of dismissal. Of those, somewhere between 139 and 150 (as we have already observed, there appeared to be an arithmetical inconsistency in the documents that we saw) did sign up, but only when faced with the choice of accepting the change or being dismissed.

128. We do not, therefore, accept that that analysis demonstrates a weight of popular opinion amongst the workforce than can properly be used to support a conclusion it fell within the range of reasonable responses. This is not to say that because staff were opposed to the proposal the Respondent was acting unreasonably, but it does mean that the

Respondent cannot be heard to say that the Claimants were part of a tiny and unreasonable minority. Where there was widespread staff dissatisfaction with the proposal, this was a factor that the Respondent should have borne in mind, and we are not satisfied that this was given sufficient weight.

Consideration of Alternatives

129. In practice, very similar observations apply here to the question of meaningful consultation. Specifically, the principal alternative to withdrawal from the TPS was the tandem scheme. This was rejected by the Respondent, and, as we have set out above, was in our view not given the full consideration that it should have been.

130. We also considered that, in light of the fact that the tandem scheme would (as Mr Doherty's options brief acknowledged) have delivered the Respondent's goals, albeit over two or three years and only by restricting pay increases, we would have expected to have a clearer understanding than we did of why this was rejected. One explanation appears to have been concerns about the impact of a pay freeze or restriction on pay increases, but in this regard we consider that the Respondent failed to give proper weight to the information that it was being given by the staff representatives.

131. The other main point of explanation for how and why the tandem alternative was rejected was the backloading argument (summarised at paragraph 63(8) above). However, in Mr Doherty's presentation, it was acknowledged the lesser savings in the initial years of the forecast caught up over the later years. The result was that the Respondent still faced a deficit, whichever scheme was adopted, that each delivers virtually the same savings over the same period (c.£8.5m v c.£9m) and to avoid the deficit, substantial other savings are required beyond those coming from staffing costs.

132. Backloading is a factor that a reasonable employer was entitled to take into account when assessing the tandem scheme and, against the limited explanations for rejecting the tandem scheme, appeared to us to be the high point of the Respondent's argument. However, we are unable to conclude that the Respondent actually did reasonably analyse this apparently viable alternative (the tandem scheme), and the associated lesser impact on staff that came with it, in a way which a reasonable employer would have done. When deciding what actually to do, the Respondent appears to have concluded that the tandem scheme was viable if it restricted pay increases for a period. The dismissal of the proposal is fundamentally linked to the Respondent's unreasonable and unverified view that the representatives were not speaking as the voice of the staff when they suggested that pay freezes were preferable to withdrawal from the TPS. We do not accept that that analysis of the alternatives fell within the range of reasonable responses.

Other matters

133. As regards other factors relevant to the unfair dismissal claims, we have already touched upon the level of staff opposition to the changes, and on the individual consultations and appeals that were held. As set out above, our view is that these matters do not in themselves contribute to the unfairness of the dismissals. However, what they also do not do is rescue the dismissals from a finding of unfairness based on the flaws in the process that we have identified above.

134. Another point that is potentially relevant is the reasonableness of employees' actions in refusing to agree to the changes. Here, we have little hesitation in concluding that the Claimants (and others) acted reasonably in refusing to agree to what, we are satisfied, they reasonably perceived as changes that were substantially to their detriment. However, we do not base our decision on this. At most, the reasonableness of the opposition to the Respondent's proposals is a factor that feeds into the matters we have addressed at paragraphs 121 to 132 above. The fact that there was reasonable opposition meant that the duty of the Respondent to consult meaningfully, consider alternatives, and consider the impact on employees was an important one. But the reasonableness of opposition would not in itself render any dismissal unfair, since the focus is on the reasonableness of the Respondent's actions.

Unfair Dismissal: Conclusion

135. As is set out at paragraphs 121 to 132 above, we consider that the way that the Respondent went about imposing the change in pension terms (the ultimate reason for the dismissal) fell outside the range of reasonable responses. In particular, there was a failure to engage properly with consultation, an unwarranted dismissiveness of the employee representatives' representativeness, and a consequent failure to properly assess the viability of the main alternative approach. It follows that the dismissal of both claimants was unfair.

Relevant Law: Indirect Discrimination

136. There was no real dispute between the parties on the law to be applied to the Claimants' various indirect discrimination claims. Section 19 of the Equality Act 2010 provides:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

137. For the purpose of this claim, both age and sex are relevant protected characteristics.

138. We considered *Dziedziak v Future Electronics Ltd* (2012) UKEAT/0270/11 on the relationship between the four constituent parts of section 19 and section 136. We agree with Mr Hignett that the burden lies with the Claimants to establish the first three elements of section 19, before the Respondent is called upon to justify the PCP as a proportionate means of achieving a legitimate aim. The starting point, accordingly, is that the Claimants must (i) prove the existence of a PCP, (ii) prove that the PCP caused the requisite element of group disadvantage, as defined in section 19(2)(b) of the Equality Act, and (iii) prove that they themselves were put to that disadvantage. Only if they can prove all of that, do we get on to considering whether the Respondent can justify the PCP.

139. It is for the Claimant to identify and define with precision the PCP applied: *Allonby v Accrington and Rossendale College* [2001] ICR 1189 CA. *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699.

140. When considering whether there is group disadvantage, the pool being considered to assess that should consist of the entire group that the PCP affects, (or would affect), either positively or negatively, while excluding those who are not affected by it: *Essop v Home Office* [2017] ICR 640.

141. If a Claimant establishes the first three elements, then in order to justify the indirect discrimination, the Respondent must show the PCP was a proportionate means of achieving a legitimate aim. This has two aspects.

142. First, the Respondent must prove the existence of one or more legitimate aims. It was common ground that the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim: *Heskett v Secretary of State for Justice* [2021] ICR 110. However as *Heskett* makes clear, an aim which seeks, in part, to save costs may be legitimate if there is also some part of the aim which is not directly concerned with costs saving (a so-called 'costs plus' aim).

143. Second, the means by which the Respondent seeks to achieve its aim must be proportionate. In *Department for Work and Pensions v Boyers* [2022] EAT 76, dealing with the analogous test under section 15 (but apparently acknowledging that the same approach would apply to a section 19 claim), Judge Barry Clarke emphasised the importance of applying the four-stage approach to proportionality set out by the Supreme Court in

Akerman-Livingstone v Aster Communities Ltd [2015] 1 AC 1399. At paragraph 28 of her judgment in *Akerman-Livingstone*, Baroness Hale identified the limbs of the test to be applied as follows:

(1) Is the objective (the legitimate aim(s)) sufficiently important to justify limiting a fundamental right?

(2) Are the means rationally connected to the objective?

(3) Are the means chosen no more than is necessary to accomplish the objective?

(4) Finally, in any event the Tribunal should balance the legitimate aim(s) of the Respondent against the discriminatory impact on the Claimant. As we read Baroness Hale's judgment, this limb of the test is primarily directed towards what is likely to be a small minority of cases, where a Respondent establishes that the answer to each of the three previous questions is 'yes', but nonetheless the overall analysis shows that the means are not proportionate.

144. We now turn to consider the indirect discrimination claims. As the same PCP is relied upon in support of each of the three indirect discrimination claims before us, we begin by considering whether the Claimants have proved the existence of a PCP (and the precise identify of that PCP). We will then consider questions of group disadvantage, individual disadvantage, and (if relevant) proportionate means of achieving a legitimate aim. In respect of these matters, the issues are specific to each claim, so we will consider each claim individually once we have addressed the question of the PCP.

<u>Issue 2.1 - Did the Respondent apply a provision, criterion or practice ("PCP") of requiring all staff to withdraw from the Teachers' Pensions Scheme ("TPS")?</u>

145. Although there are three claims of indirect discrimination between the two claimants, the PCP alleged to have been applied is the same in all cases.

146. The PCP with which we are concerned is that set out above in issue 2.1 and quoted above. That arises from an agreed list of issues which is itself the product of earlier pleading and re-pleading. This is a case where all parties are professionally represented and have prepared for this hearing on the basis of the issues as identified and agreed. At the outset of the hearing we confirmed that the issues remained as stated and all three counsel agreed.

147. These points are relevant to note because during the course of closing submissions there was some effort on behalf of the Claimants to recast the PCP. In particular, Ms Cheung on behalf of the First Claimant sought to recast the PCP as one which related to the move to the APTIS scheme, rather than the removal of TPS. Mr Hignett understandably

objected to the formulation of a different PCP from that which had been previously agreed.

148. We took the view that we would not permit the Claimants to reframe or expand the previously agreed PCP, and that we would determine the case based upon the PCP identified in the list of issues.

149. This is not about being pedantic about the words used to identify the PCP. Formulating PCPs is difficult, and we consider that a Tribunal would commonly be entitled to and right to permit the reformulation of a PCP where, for example, the PCP as originally formulated does not quite fit the circumstances that have arisen, but a slightly different PCP would do so without materially changing the substance of what was alleged and without prejudicing the opposing party. Where, as here, the reformulation is one of substance which changes the arguments in the case at a very late stage, that is a matter of substance requiring an amendment. Similarly, the same set of facts may give rise to a range of ways of articulating a PCP. All agreed it is for the Claimants to articulate the PCP they allege gives rise to the disadvantage. That has happened in the agreed list of issues put before us. It is therefore that PCP that we have considered.

150. We accept the Claimants' alleged PCP (quoted above) is capable of amounting to a PCP. In our judgment, to amount to a PCP for the purpose of section 19, it is sufficient that some state of affairs arising within the employment relationship is applied or would be applied on an apparently neutral basis. The statutory language of 'provision, criterion or practice' is a broad description of that concept, not a limitation to it. We consider that a requirement to withdraw from the TPS was clearly something that the Respondent imposed upon teaching staff, and that the imposition of this requirement across the teaching body (some 293 staff) was sufficient to amount to a PCP.

151. Mr Hignett's skeleton argument appeared to argue that the logical PCP was the act of substituting one scheme for another, and not simply the act of withdrawing from the TPS scheme. As we have already observed, however, it is for the Claimants to formulate the PCP, and the fact that a different PCP could be formulated from the same facts does not invalidate an otherwise valid PCP formulated by the Claimants.

152. We accordingly find that the Respondent did apply to both Claimants, and to its teaching staff as a whole, a PCP of requiring them to withdraw from the TPS.

153. Consequently, we now consider that PCP against the remaining limbs of section 19 for the three differently formulated claims of indirect discrimination. In this regard, it is necessary to consider each of the claims individually, and therefore we first address the First Claimant's indirect age discrimination claim, before turning to consider the indirect age discrimination and indirect sex discrimination claims brought by the Second Claimant.

First Claimant – Indirect Age Discrimination

Issues 2.1, 2.2 & 2.3: Group Disadvantage

154. The First Clamant defines the shared protected characteristic of age as being '50 and above'. Although the list of issues at paragraph 2.2 caveats the definition as being 'provisionally' defined as such, the case was run on this basis and no alternative formulation advanced.

155. It is for the First Claimant to show that that PCP put those members of the teaching staff aged 50 and above at a particular disadvantage compared to those who were aged below 50.

156. The First Claimant expressed the disadvantage as being that staff younger than 50 who were subject to the PCP in 2021 will have had an increased opportunity to take advantage of APTIS. It was said that the time that their pensions will thereafter be invested in the markets means that employees over 50 are likely to have their defined contribution pensions invested for less time in the markets in comparison to younger employees. Therefore, it was said that over 50s are exposed to a greater risk that the investments in their pension will not be able to recover from bear markets prior to their normal retirement age, whereas younger members with longer time invested will experience comparatively less overall impact of any specific downturn in the market.

157. Paraphrasing, the argument is that older employees face more risk to pension benefits from any adverse movements in the markets as they have less time remaining in the scheme for markets to stabilise and recover before drawing the pension benefit.

158. It is necessary to identify the pool of individuals against whom to assess whether the PCP has caused (in this instance) employees aged 50 or over a particular disadvantage. In assessing the evidence of disadvantage, it is not contentious that we are to apply the formulation found in *Essop* at paragraph 41. Thus, when analysing the impact of a PCP, the pool being considered should consist of the entire group it affects, (or would affect), either positively or negatively, while excluding those who are not affected by it.

159. In this case, the pool is (as the Claimants contended) all of the teaching staff employed by the Respondent who were previously members of TPS and who were required to withdraw from it. We thus need, at this stage, to assess whether it has been shown that the PCP put those of the Respondent's teaching staff who were members of the TPS and required to withdraw from it *and* who were aged 50 or over at a particular disadvantage compared to those who were members of the TPS and who were required to withdraw from it *but* who were aged under 50.

160. Ultimately, we have come to the clear conclusion that the First Claimant has failed to prove group disadvantage, and that accordingly his age discrimination claim must fail. This is for at least two fundamental reasons.

161. The first problem that the First Claimant faces is that the PCP is framed entirely by reference to leaving the TPS. The group disadvantage alleged, if it arises at all, is one that cannot be said to derive from leaving the TPS; rather, if it arises, it arises from joining the APTIS scheme. There has been no attempt to demonstrate any group disadvantage to employees aged 50 or over arising from the requirement to withdraw from TPS *per se*. We have already referred to our decision not to permit expansion or recasting of the agreed and pleaded PCP. If we apply that PCP in the list of issues, it is unclear how this could be said to have caused any disadvantage to older employees generally or to the First Claimant in particular. On this basis alone, the claim fails.

162. But even if we can look past the particular formulation of this PCP so as to consider the implications of APTIS (by, for example, allowing the PCP to be reformulated as 'requiring teaching staff to withdraw from membership of the TPS and join APTIS'), there was simply no evidence adduced from which we could make a finding that group disadvantage arises. We were directed to a small number of press reports of the poor performance of the UK stock market during 2020. We did not find that particularly helpful, however. The first observation is that the PCP was applied in 2021 and the performance of the stock markets in 2020 does not tell us a great deal about the impact of the PCP at the time that it was actually applied (and, of course, 2020 was for obvious reasons a particularly unusual year in the markets). Secondly, we do not have specific evidence of how the investments making up the various employees' pension funds would have been managed by APTIS, or of how closely the performance of APTIS investments would have reflected the generally poor market performance reflected in the press articles. It does not follow, that from the fact that the UK stock market performed poorly in 2020 that older employees joining APTIS in 2021 would face any disadvantage.

163. Perhaps more fundamentally, the press articles, and our own general knowledge of the state of the UK stock market in 2020 and thereafter, does not allow us to assess the comparative impact of the market conditions described in the press articles on any particular age group. Accordingly, these articles come nowhere close to establishing either group or individual disadvantage.

164. We are thus left with an attempt to establish group disadvantage based on what can in our view be characterised as broad conjecture, or at its highest, an invitation for us to take judicial notice of the general propositions underlying the First Claimant's claim. We do not agree that the disadvantage alleged is something of which we can take notice without direct evidence. We do not accept that we can conclude on the basis of a mere proposition or assertion that the less time spent in APTIS, the greater

the risk of adverse effect on the pension benefits of someone with, say 10 years' potential membership left in the scheme compared to someone with, say, 20 or 30 years left in the scheme. In the case of an employee of any age, much will depend on not only on the amount of time that they are members of the scheme but on the events that occur during the period of membership and on the economic conditions at the time the pension is drawn. In the absence of evidence on which to found a conclusion, all we can say is that markets go up and down over time, that pensions benefits can be drawn at a time when the market is comparatively high or low, and that any employee member of APTIS may incur a benefit or a disbenefit, when compared to another employee member of the scheme, from the combination of circumstances. None of this is remotely sufficient to establish group disadvantage.

165. We also note that it is commonly the case that the pension contributions of older employees are more likely to be invested in safer or fixed return investments. We heard no evidence about whether this was the case in respect of the APTIS scheme, but in such circumstance older employees might actually be less exposed to fluctuations in the market compared to younger employees. While this is itself speculation, it does illustrate why we cannot treat the First Claimant's propositions as selfproving in the absence of evidence.

166. Mr Hignett made the point that an older employee is likely to have more years in the highly beneficial TPS and that this at least balanced out any comparative disadvantage deriving from the APTIS scheme. We have considerably sympathy with this analysis as it applies to the First Claimant's claim but have not ultimately need to resolve the First Claimant's indirect age discrimination claim on this basis.

167. We observe, finally, that is not sufficient to simply say APTIS is less advantageous than TPS. It almost certainly will be in most cases, as the LCP scenarios that we have summarised above show. In this case we are concerned with whether the PCP asserted creates the particular group disadvantage alleged. That is for the First Claimant to prove. We are not satisfied that he has done so.

<u>Issue 2.2.4 - Individual Disadvantage</u>

168. In the absence of group disadvantage being established, it is artificial to go on to grapple with whether the First Claimant has shown that he was individually subject to that disadvantage when we have not been satisfied there is such a disadvantage. Having said that, we can observe that we did not see any evidence of individual disadvantage to the First Claimant. The points that we made above concerning the unhelpfulness of the press articles as evidence on group disadvantage apply equally if they are relied upon to attempt to establish individual disadvantage, and our unwillingness to engage in speculation as to disadvantage applies as forcefully, if not more forcefully, when dealing with the disadvantage to an individual. In short, we

consider that there is no evidence with which the allegation of individual disadvantage could be substantiated.

Issue 2.3 Proportionate Means of Achieving a Legitimate Aim

169. As the claim has failed to establish the necessary first three limbs of section 19 of the Equality Act 2010, the question of justification does not arise.

Second Claimant – Indirect Age Discrimination

Issues 2.2.1, 2.2.5. & 2.2.6: Group Disadvantage

170. The Second Claimant defines the shared protected characteristic of age as being 'at her age or younger at the time of the withdrawal of the TPS', that is 36. The shared characteristic is therefore those aged 36 and under, while the comparator group is those aged 37 and over. As with the First Claimant's claim, the pool is all of the teaching staff employed by the Respondent who were previously members of TPS and who were required to withdraw from it.

171. The particular disadvantage alleged to be suffered by those aged 36 and under compared to older workers is that those older workers will have had an increased opportunity to take advantage of the TPS before the PCP was applied and are likely to have a higher average salary for the purpose of calculating final salary entitlement. In practice the argument focused on the former point, and we heard no evidence and no real argument concerning the salary question. We also note that this was a career average scheme, not a final salary scheme, although this might not materially alter the nature of the argument. However, given that we were not presented with evidence or submissions on the final salary issue, we focus below on the 'increased opportunity' point.

172. Paraphrasing, the basic point made in respect of the 'increased opportunity' point was that the longer an employee's time in the TPS, the better off they would be following the requirement to withdraw from the TPS, even allowing for any countervailing benefits provided by APTIS. As a younger employee was necessarily limited in the amount of time that they could have been a member of the TPS in a way that most older employees were not, it was said that the impact of being deprived of the TPS benefit would hit younger employees harder, as they would generally have accrued fewer benefits under the TPS before being required to move to a less favourable scheme.

173. We repeat the observation that we made in respect of the First Claimant, that the issue is not whether APTIS is less advantageous generally, it is whether those with the shared protected characteristic suffer a particular disadvantage. Some of the argument before us focused on proving the general preferability of TPS over APTIS, and while this is a factor that we need to assess and have regard to, this would not in itself be

sufficient to allow the Second Claimant to succeed in her indirect age discrimination claim.

174. Nonetheless, in this claim, by contrast to the First Claimant's claim, we did have evidence to engage with. The key elements were:

(1) The LCP report to which we refer in our findings of fact above.
(2) A spreadsheet at [S/191] from the TPS itself containing details of the length of service of members of staff within the pool.
(3) Mr O'Dair's document entitled 'Calculation of pension loss which would have been borne by [the Second Claimant] had she remained in employment'.
(4) Calculations by Mr O'Dair of the length of service of younger teachers in the scheme born in and after 1984 compared to those born before.

175. The two documents provided by Mr O'Dair were subject to extensive argument between counsel as to their admissibility. We took the view that they were matters to which we could have regard. We did not regard the documents as primary evidence. Rather these were in the nature of his submissions, analysing and drawing inference from the primary factual evidence. We add that we did not consider that Mr O'Dair was impermissibly seeking to give expert evidence. His calculations of average length of service (item (4) at paragraph 174 above) were based on simple arithmetic – calculating a mean average – and his document 'calculation of pension loss…' (item (3) above) sought to apply wellestablished principles of calculation from the employment tribunals' own document, which is routinely used by counsel without any suggestion that they are thereby seeking to assume the role of an expert.

176. Having said that, we did not ultimately consider that Mr O'Dair's 'calculation of pension loss…' analysis (item (3) at paragraph 174 above) assisted us. In this document Mr O'Dair sought to use an approach derived from the Employment Tribunals' publication *Principles for Compensating Pension Loss* to show that the Second Claimant would have suffered substantial financial detriment (on his calculation nearly £300,000 over her working life) as a result of withdrawal from the TPS.
We did not consider this assisted our task. In the first place, this calculation would not be sufficient by itself to prove indirect discrimination, even if we had accepted every part of the analysis embodied within it. It would still be necessary to prove group and individual disadvantage.

177. Moreover, while considering the impact of the withdrawal from the TPS is a relevant, albeit not a sufficient, part of the assessment of disadvantage, Mr O'Dair's calculation involved a number of assumptions which did not appear to be satisfactorily evidenced. In particular, Mr O'Dair calculated the value of the APTIS scheme based on an annual growth rate of 1.5 % over 30 years. This seemed to us to be extremely low and lower than the growth assumptions on which LCP based its analysis. LCP assumed annual growth of 5% with a figure of 2.5% being used to illustrate poor investment performance. In these circumstances, assuming a growth

rate of 1.5% seemed to us to unjustifiably low. In order to have regard to calculations based on this assumption we would have required a sound evidential basis for using this growth rate rather than the growth rates used by the specialist actuaries. No such evidence was before us. This significantly undermined the reliability of the figures derived from Mr O'Dair's calculations and greatly limited the extent to which we could accept them as evidence to establish that the Second Claimant would be worse off outside the TPS. Ultimately, therefore, we have reached our conclusions without regard to this particular set of calculations.

178. We did give weight to Mr O'Dair's other analysis (described at paragraph 174(4) above) which simply involved an averaging of the length of service of various employees based on the raw information provided by the TPS. This analysis was admissible and did not suffer from the defects of his other document (for example, it did not rely on making assumptions).

179. We consider the LCP evidence to be significant. Whilst it was not prepared having regard to the particular facts of this case, it deals with highly germane scenarios and was prepared by well-known specialist actuaries. We also note that LCP's calculations were said to apply irrespective of which DC scheme was ultimately chosen: see paragraph 31 above.

180. What the LCP evidence shows is that a person with more years' membership of TPS at the date of drawing pension will in almost all circumstances be significantly better off than a person with fewer years' membership, even allowing for the compensatory benefits of a defined contribution scheme. We refer in particular to our summary of the LCP evidence in paragraphs 31-34 above. The upshot is that a person who is required to leave the TPS after a relatively short period of membership is highly likely to be worse off in retirement than a person who is required to leave the TPS after a longer period of membership. We consider that the difference is sufficient to enable it to be said that if two people are required to leave the TPS at the same time, the person who has been in the TPS for a shorter period is disadvantaged compared to the person who has been a member for a longer period – this is because they have accrued fewer benefits, and will in all likelihood be worse off in retirement as a result. We repeat that this disadvantage is present, even when one allows for the compensatory benefits of a DC scheme such as APTIS.

181. It follows that, if it can be shown that employees aged 36 and under had shorter periods of TPS membership on average than employees aged 37 and over, then the element of group disadvantage would, on the face of it, be made out.

182. As a general proposition, it seems logical to conclude that younger employees would be more likely to have shorter periods of membership, and thus to be disadvantaged compared to older employees by a requirement to withdraw from the TPS. This is because they will inevitably have had a limited period in the TPS (for example, a person aged 36 could not have more than 14 years' membership, since no one would start a

teaching career before the age of 22, whereas a person aged 50 had the potential to accrue far greater membership). If needs be, we would have been prepared to take judicial notice of the fact that older employees would on average have longer periods of membership.

183. In any event, however, we did not find it necessary to rely on judicial notice as to the shorter period of membership of younger employees. In this regard Mr O'Dair's calculations of the average length of service described above supported such a conclusion. They showed that the average length of TPS membership of employees within the pool born before 1984 (i.e. those aged 37 or more at the point of withdrawal) was 15.5 years. By contrast, the average length of TPS membership of those born in or after 1984 (i.e., those aged 36 or below) was 7.7 years.

184. Thus, it seems to us that two things have been shown. One is that employees with shorter periods of membership of the TPS would be worse off as a result of withdrawal than those with longer periods of membership. The second is that employees aged 36 and younger had, on average, considerably shorter periods of membership of the TPS than those aged 37 and over. We consider that the combination of these two elements is sufficient to establish group disadvantage to the younger age group. It is not simply that at the point of withdrawal, those in the younger age group have had less opportunity to accrue membership in TPS, but the actuarial evidence from LCP demonstrates the substantial reduction in the ultimate pension benefits for this group as a result.

185. There are, of course, employees (such as the First Claimant) who come to teaching as a second career and who therefore begin accruing membership at an older age. There will, therefore, be people in the older age group with less service than some of those in the younger age group (and, indeed, the documents produced by the TPS show the existence of some such people). It is trite law that the fact that not all members of the older age group share in the older age group's advantage does not prevent group disadvantage from being suffered by the younger age group.

186. It follows that the evidence does show those in the relevant pool that share the particular protected characteristic relied upon by the Second Claimant were subject to a particular disadvantage by the application of the PCP.

Issue 2.2.7 - Individual Disadvantage

187. The Second Claimant did have more TPS membership than the 7.7 years' average for those in the group aged 36 and blow, but less than those in the comparator group aged 37 and above. She had 13 years' membership, compared to 15.5 in the comparator group.

188. However, while the Second Claimant was closer to the average length of membership found in the comparator group, she nonetheless

remained clearly below it. She therefore has established to our satisfaction that she too had suffered the particular disadvantage alleged.

189. Put simply the Second Claimant, with 13 years' TPS membership, would be likely, as a result of the withdrawal from TPS, to be worse off in retirement than the average member of the older comparator age group. The fact that she may not suffer this disadvantage to the same extent as the average member of her own age group does not mean the individual disadvantage was not present.

Issue 2.3: Proportionate Means of Achieving a Legitimate Aim

190. The Respondent has set out five aims that it says lie behind the decision to apply the PCP. Namely:

(1) The need to obtain control over the Respondent's pension overhead.
(2) Ensuring a financially sustainable cost base for its teaching staff
(3) To make decisions about the allocation of its resources
(4) To provide affordable schooling in a competitive market
(5) Providing and maintaining and affordable pension provision for its staff

191. Mr Hignett reminded us of the judgment in *Heskett V Secretary of State for Justice*, cited above. In *Heskett*, the Court of Appeal drew a distinction between costs-only aims, which were concerned solely with saving costs, and costs-plus aims, which involved the aim of saving costs but also involved something additional to that. Costs-only aims may not constitute a legitimate aim capable of justifying indirect discrimination but costs-plus aims may do so.

192. Mr O'Dair's closing submissions suggested that the aims identified by the Respondent amount to an impermissible costs-only argument. We do not agree. Whilst it is true that cost is a factor, to one degree or another, in each of the identified aims, they all go beyond mere cost saving, and engage with the long-term operation of the Respondent's business and its customer base. They are thus costs-plus aims, properly understood.

193. Mr O'Dair also suggested the possibility of further arguments, were the Supreme Court to overturn the Court of Appeal's decision in *Heskett*. So far as we are aware, *Heskett* has not been overturned and indeed has never been before the Supreme Court, nor (to the best of our knowledge) has permission to take *Heskett* before the Supreme Court either been sought or given. As such, we doubt that further arguments of the kind suggested by Mr O'Dair are likely to arise.

194. We are satisfied that all the aims relied on are legitimate ones for the Respondent to pursue. We therefore turn to consider whether the PCP was a proportionate means of achieving those aims.

195. We analyse the test of proportionality adopting the four stages drawn from *Akerman-Livingstone*, as applied in the employment context in *Boyer* (see paragraph 143 above). Whilst there are five aims, all of which we have found to be legitimate, we do not propose to repeat Baroness Hale's four-stage test in respect of each of them individually. It seems to us that, given that the essence of the proportionality test is the balancing of the Respondent's interest in the legitimate aims against the discriminatory effect of the means used to achieve them, it would be artificial to isolate each of the aims for separate analysis. Indeed, where there are multiple legitimate aims that potentially effects the balancing exercise as the multiplicity of aims may add more weight to the Respondent's side of the scale which would be missed if each aim was dealt with individually.

196. The first stage is whether the aim is sufficiently important to justify the treatment. We are satisfied they all are sufficiently important. Each of these aims is potentially fundamental to the operation of the Respondent's business.

197. The second stage is whether the measure, in this context the PCP applied by the Respondent, is rationally connected to the objective, in this case the legitimate aims relied on. It seems to us plain that there is such a connection. The £9m saving derived from the withdrawal from TPS would inevitably make a significant contribution to all five of the pleaded aims.

198. The third stage is whether the means chosen are no more than is necessary to accomplish the aims. This will inevitably involve considering whether a less discriminatory measure could have achieved the aims.

199. This third stage is where the parties focused the bulk of their submissions. It is also the stage where we have concluded that the Respondent has failed to establish that the means used to achieve its legitimate aims were proportionate. We have disregarded, for this purpose, the fact that we have already found the dismissal to be unfair. The finding of unfairness derived substantially from procedural issues in the Respondent's consultation process, and not from any assessment by us of the merits of the substantive decision to withdraw from the TPS. However, when we come to assess proportionality, it is for us to make an objective assessment of the steps taken by the Respondent.

200. It seems to us that there is a magnetic factor here which is the existence of an alternative course of action that would have achieved the aims relied on by the Respondent. We found that the tandem scheme would have delivered, on Mr Doherty's own projections, broadly the same saving in broadly the same timescale. We note that on Mr Doherty's projections there was a difference in the total saving over ten years of around £½m. However, the projections relied on particular assumptions about pay rises going forward including the annual pay rises from 2022 onwards. Given what we have found was the willingness of staff representatives to consider a longer pay freeze, the difference would reduce further. This is consistent with Mr Doherty's options brief in which he indicated that the tandem

scheme could have delivered the Respondent's objectives (see paragraph 84(3) above).

201. It seems plain that the tandem scheme was a less discriminatory means of achieving the aim as the essence of the discriminatory effect lies in the requirement to leave the TPS, and there was no such requirement under the tandem scheme.

202. Having regard to the above, we did not consider that the Respondent has satisfied us that the third limb of the test in *AkermanLivingstone* is made out. The burden is on the Respondent to prove proportionality and, having regard to the above, it has not done so.

203. The final stage of the test is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure. Strictly, this does not arise because of our conclusion under the third stage (and we repeat the observation that the fourth stage is most likely to apply as a cross-check, in a case where a Respondent has satisfied all of the first three stages). However, to the extent that it remains necessary to consider the general balance between the Respondent's aims and the discriminatory effect, the existence of a less discriminatory means of achieving the aim tips the balance in favour of the Second Claimant. At its highest, the Respondent could invoke the difference between the level of savings identified by Mr Doherty derived from the two respective measures of around £½m, together with the backloading argument previously addressed. However, in addition to the points we have already made in respect of these, we do not consider they change the fact that the aims would have been substantially achieved by the tandem scheme and even such differences as there are said to have been do not in our view outweigh the discriminatory effect.

204. It follows from the above that the Second Claimant's indirect age discrimination claim succeeds.

Second Claimant – Indirect Sex discrimination

Issue 3.1 - PCP

205. The Second Claimant relies on the same PCP as applied to both claimant's claims of indirect age discrimination. We are satisfied the PCP was applied for the reasons given above.

Issue 3.2 – Group Disadvantage

206. The same pool applies as before. That is all the teaching staff.

207. The Second Claimant puts the group disadvantage in terms that female employees in the pool are more likely to take and/or to have taken maternity leave and/or career breaks than male employees and

therefore to require membership beyond exit to obtain parity. The Second Claimant's position is that the group disadvantage is the loss of the opportunity to compensate for gaps in service due to maternity leave or career breaks by remaining in the TPS beyond exit. In this regard, a similar point is ultimately relied upon to that on which the Second Claimant has succeeded in her indirect age discrimination claim – namely, that withdrawal from the TPS will have a particular adverse effect on employees with shorter periods of service and/or with more breaks in service. It is then said that women generally have shorter periods of service and/or more breaks in service, due to maternity leave and/or other career breaks.

208. We did not accept the Second Claimant had proved this group disadvantage for the following reasons:

(1) We can only consider this in relation to staff within the pool. It is not an abstract analysis of men and women in the workplace generally. As regards the men and women actually in the relevant pool, there was no evidence adduced to show discrepancies in service arising from career breaks or maternity leave as alleged, or parental leave more generally so as to analyse the actual impact of the PCP across the two groups.

(2) We do not consider it is an appropriate case in which to take judicial notice of, for example, the general proposition that women are more likely than men to take time away from work for the purpose of childcare. There was here a finite pool of employees in respect of which the relevant evidence could have been obtained. It is not appropriate for us to fill in the absence of that evidence with generalised assumptions based on historic behaviours of the population at large.

(3) Turning to the specific question of maternity leave, the Second Claimant's own evidence suggests that pension contribution continued to be paid during maternity leave. Moreover, time spent on maternity leave continued to count towards continuous service for the purpose of calculating pension entitlement. For the purpose of calculating pension benefits on the career average basis would be the same even where there had been a period of maternity leave.

(4) We finally note that, if group disadvantage can be established, then it is not necessary to show the reason for that disadvantage. There is some risk that, in focusing on the question of maternity leave and career breaks, we might fall into the error of looking at particular potential causes of disadvantage, and not at disadvantage itself, notwithstanding the fact that the Second Claimant's case has been advanced by reference to maternity leave and career breaks, and not on the basis of a general difference in periods of qualifying membership of the TPS between men and women. Nonetheless, we have considered whether, forgetting about the reasons for any

difference in periods of qualifying membership, the evidence would establish any particular disadvantage to women in this regard. Ultimately, it does not. We heard no evidence at all to suggest that women within the pool had shorter periods of qualifying membership than men.

209. In short, whether one looks at the general question of the length of membership of the TPS, or at the more specific question of whether disadvantages were caused to women by maternity leave and/or career breaks, we do not find group disadvantage to be established.

Issue 3.3: Individual disadvantage

210. We find in any event that the Second Claimant has failed to show individual disadvantage. Given that she has failed to establish group disadvantage the reasons for our conclusions on individual disadvantage can be stated swiftly:

(1) The Second Claimant did not adduce evidence that she had taken career breaks other than maternity leave. This being so, even if she had established group disadvantage in respect of non-maternity leave career breaks, her claim would have failed at this individual stage.

(2) Whilst the Second Claimant had taken maternity leave, there was no evidence of disadvantage for the reasons given above in respect of the same group disadvantage alleged.

(3) While we did have evidence as to the Second Claimant's length of membership of the TPS (thirteen years) it was not possible to establish whether, even putting to one side any particular reasons for disadvantage, she had suffered any disadvantage compared to male employees in this regard, because we had no evidence of the average length of membership of male and female employees within the pool.

Issue 3.4: Proportionate Means of Achieving a Legitimate Aim

211. Given the failure of the indirect sex discrimination claim at the group and individual disadvantage stages, it is unnecessary to consider the question of whether, had we found indirect discrimination to have occurred, the Respondent has justified this.

Indirect Sex Discrimination: Equal Pay Exclusion

212. Mr Hignett's skeleton argument referred to a previous judgment of this Tribunal sitting at Nottingham in 2022 in Boyd v Oakham School (2601656/2021). In Boyd, a claim alleging that withdrawal from the TPS was an act of indirect sex discrimination was dismissed on the ground, *inter alia*,

that it fell within the equal pay exclusion in section 70 of the Equality Act 2010, and hence was not within the Tribunal's jurisdiction. Given that the indirect sex discrimination claim has failed, we do not propose to spend long on the question of the applicability of the equal pay exclusion. Suffice to say, however, that we do not share the view that the Tribunal took in Boyd.

213. The Tribunal in Boyd relied on sections 67 and 70 of the Equality Act. Section 70 provides that a discrimination claim in relation to employment cannot be brought in respect of the inclusion of a term in an occupational pension scheme which is modified by the sex equality rule in section 67 of that Act. However, section 67 itself applies to cases where the *terms* of the pension scheme are less favourable to one sex than the other. Where a term is less favourable, it will (absent certain particular exclusions) be modified so as not to be less favourable, and then a claim cannot be brought in respect of discrimination.

214. However, here, the Second Claimant's complaint is not about the *terms* of the pension scheme (either the TPS or APTIS), it is about the PCP of requiring withdrawal. There is thus no particular term on which the sex equality clause in section 67 would bite, and as such the exclusion in section 70 does not apply. We therefore did not consider section 70 to preclude the claim, but for the reason given above it has failed on its merits in any event.

Conclusion

215. For the reasons set out above, both Claimants' claims of unfair dismissal succeed. The Second Claimant's indirect age discrimination claim also succeeds. The First Claimant's indirect age discrimination claim fails and is dismissed, as is the Second Claimant's indirect sex discrimination claim.

216. From the success of some of the claims, it follows that there will be a remedy hearing unless remedy can be agreed between the parties. Directions for a one-day remedy hearing will be issued shortly. At that hearing, the Tribunal will hear any *Polkey* or quasi-*Polkey* arguments that are to be made, and as part of that we will need to consider the impact of our conclusion that the Second Claimant's indirect sex discrimination succeeds (and, if that affects a *Polkey* assessment, whether that effect is limited to the Second Claimant's claim, or whether it also applies to the First Claimant's claim). Naturally, any other arguments that any party wishes to make will also be considered at the remedy stage.

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Employment Judge Varnam
15 August 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

....16 August 2024.....

.....

FOR EMPLOYMENT TRIBUNALS

Appendix to Judgment: Agreed List of Issues

1. **Unfair Dismissal**

1.1. Was the reason (or the principal reason) for the First Claimant's and/or the Second Claimant's dismissal a potentially fair reason under section 98 of the Employment Rights Act 1996 ('**ERA**')? The Respondent's position is that this was some other substantial reason to justify dismissal of an employee holding the position that the employee held. Specifically, to change the terms and conditions relating to the pension provided by the Respondent.

1.2. Was the First Claimant's and/or the Second Claimant's dismissal reasonable for the purposes of section 98(4) ERA? In particular:

1.2.1. Was there a sound business reason for the change (based on the view of a reasonable employer);

1.2.2. Did the Respondent, in all the circumstances, act reasonably in treating that reason as a sufficient reason for dismissal?

(a) Was the decision within the band of reasonable responses available to a reasonable employer?

(b) Did the Respondent follow a fair procedure in dismissing the First Claimant and/or the Second Claimant?

2. **Indirect Age Discrimination**

2.1. Did the Respondent apply a provision, criterion or practice ("**PCP**") to the First Claimant and/or the Second Claimant? The First Claimant and the Second Claimant allege that the policy of requiring all staff to withdraw from the Teachers' Pension Scheme ("**TPS**") was a PCP applied by the Respondent.

2.2. If so, did such PCP put the First Claimant and/or the Second Claimant at a particular disadvantage in comparison with others?

2.2.1. The Claimants' position is that the appropriate pool for comparison is teaching staff employed by the Respondent.

2.2.2. The First Claimant's position is that older teachers are disadvantaged when compared to younger teachers; specifically, teachers who are younger than him. Provisionally, it is anticipated that the age group which is disadvantaged would be those 50 years and above.

2.2.3. What is the particular disadvantage suffered by those aged 50 and above when compared to those aged below 50? The First Claimant claims that

the particular disadvantage suffered by those aged 50 and above when compared to those aged below 50 is that staff younger than 50 will have had an increased opportunity to take advantage of
APTIS and the time that their pensions will be invested in the markets, and are likely to have a greater opportunity to maintain returns. The First Claimant submits that in APTIS, a defined contributions pensions scheme, all members' pensions are invested in the markets until retirement age. However, as a result of their age, those staff members who are 50 and over have their pensions invested for less time in the markets in comparison to younger staff members. Therefore older members are exposed to greater risk that their pensions entitlements will not be able to recover from bear markets prior to normal retirement age. The First Claimant's position is that in comparison, due to the comparatively longer amount of time their pensions are invested in APTIS and/or the markets, younger members will experience, comparatively, less overall impact of a downturn in the markets.

2.2.4. What is the individual disadvantage suffered by the First Claimant? The First Claimant's position is that the individual disadvantage suffered by the First Claimant is that the opportunity to stay invested in the markets to minimize the impact of bull [sic][2] markets on his pension investments was less than the opportunity given to younger members. The First Claimant alleges that under APTIS, he would have had just over 5 years of his pension held in the APTIS scheme and/or invested in the markets.

2.2.5. The Second Claimant's position is the disadvantaged group is those teachers on the Respondent's staff who were of the Second Claimant's age or younger at the time of the withdrawal of the TPS.

2.2.6. What is the particular disadvantage suffered by "younger teachers" compared with older teachers? The Second Claimant claims that the disadvantage is that the [sic] those older than the alleged disadvantaged group will have an increased opportunity to take advantage of the TPS and are likely to have a higher salary for the purpose of calculating FS entitlement.

2.2.7. What is the individual disadvantage suffered by the Second Claimant? The Second Claimant's position is that she has had a lesser opportunity to take advantage of the TPS than teachers who are older than herself.

The Respondent denies that persons of the First Claimant's and/or the Second Claimant's age or age group were placed at a particular disadvantage as compared to others who are not of their age or age group.

2.3. If a PCP was applied by the Respondent which put the First Claimant and/or the Second Claimant at a particular disadvantage as compared to others who are not of their age or age group, was the PCP applied by

[2] The Tribunal observes that this should presumably have read 'bear', and has so construed this paragraph when considering the First Claimant's indirect age discrimination claim.

the Respondent a proportionate means of achieving a legitimate aim? Were the following legitimate aims?

2.3.1. The need to obtain control over the Respondent's pension overhead.

2.3.2. Ensuring a financially sustainable costs base for its teaching staff.

2.3.3. To make decisions about the allocation of its resources.

2.3.4. To provide affordable schooling in a competitive market.

2.3.5. Providing and maintaining and [sic] affordable pension provision for its staff.

2.4. If so, was the decision to withdraw from the TPS and the provision of a defined contribution scheme in its place and other benefits to mitigate the impact on staff proportionate and in pursuit of the legitimate aims stated above?

3. **INDIRECT SEX DISCRIMINATION**

3.1. Did the Respondent apply a provision, criterion or practice ("PCP") to the Second Claimant? The Second Claimant alleges that the Respondent's policy of requiring all staff to withdraw from the TPS was a PCP applied by the Respondent. The Second Claimant's pool for comparison is the staff employed by the Respondent.

3.2. If so, did such PCP put women on the Respondent's staff at a disadvantage compared to men? The Second Claimant alleges that the disadvantage is that women on the staff are more likely to take and/or have taken maternity leave and/or career breaks than men and therefore to require membership beyond exit to obtain parity. The Second Claimant's position is that the group disadvantage is the loss of the opportunity to compensate for gaps in service due to maternity leave or career breaks by remaining in the TPS beyond exit (ie the date when membership of the TPS was withdrawn).

3.3. What was the disadvantage suffered by the Second Claimant? The Second Claimant alleges that the individual disadvantage is the loss of the opportunity to compensate for gaps in service due to maternity leave or career breaks by remaining in the TPS beyond exit (ie the date when membership of the TPS was withdrawn).

3.4. The Respondent submits that the decision to withdraw from the TPS affected all staff who were part of the TPS in the same way to the extent that they were all withdrawn from the TPS and offered alternative packages. It is denied that persons of the Second

Claimant's gender were placed at a particular disadvantage as compared to others who are not female.

3.5. If a PCP was applied by the Respondent which put the Second Claimant at a particular disadvantage as compared to others who are not of her sex, was the PCP applied by the Respondent a proportionate means of achieving a legitimate aim?

3.6. Were any of the above at paragraph 2.3 legitimate aims?

3.7. If so, was the decision to withdraw from the TPS and the provision of a defined contribution scheme in its place and other benefits to mitigate the impact on staff proportionate and in pursuit of the legitimate aims stated above?