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Case No: CA-2023-002204

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HONOURABLE MRS JUSTICE EADY DBE
[2023] EAT 135

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 June 2024

Before:

LORD JUSTICE UNDERHILL
(VICE-PRESIDENT of the COURT of APPEAL (CIVIL DIVISION))
LORD JUSTICE LEWIS
and
LORD JUSTICE WARBY

Between:

NICOLA CLARK
MICHAELA BELL

Claimants/
Appellants

- and -

(1) CHIEF CONSTABLE OF DERBYSHIRE
CONSTABULARY
(2) CHIEF CONSTABLE OF WEST MIDLANDS
CONSTABULARY
(3) SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Respondents

Karon Monaghan KC and Jack Feeny (instructed by Pennington Manches Cooper LLP)
for the Appellants

Peter Lockley (instructed by East Midlands Police Legal Services and Joint Legal Services
for Staffordshire Police and West Midlands Police) for the First and Second Respondents

Adam Tolley KC and Elizabeth Hodgetts (instructed by the Government Legal
Department) for the Third Respondent

Hearing dates: 22 and 23 May 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the question of whether an employment tribunal has jurisdiction under the Equality Act 2010 (“the 2010 Act”) to determine a complaint alleging that the operation of regulation 12 of the Police (Injury Benefit) Regulations 2006 (“the 2006 Regulations”) governing payment of a disablement gratuity to a former police officer gives rise to unlawful discrimination. In essence, a disablement gratuity is payable if a police officer is injured in the execution of his or her duty, ceases or has ceased to be a member of a police force, and, within 12 months of receiving the injury, becomes totally and permanently disabled as a result of the injury.
2. The appellants, Ms Clark and Mrs Bell, were formerly police officers who had been injured in the execution of their duty. The injuries subsequently led to each of them becoming totally and permanently disabled. As that disablement did not occur within 12 months of receiving the injury, they were not entitled to a disablement gratuity. They each sought to bring a complaint in an employment tribunal alleging that the requirement that the permanent and total disablement occur within 12 months of the injury constituted discrimination contrary to section 15 or 19 of the 2010 Act. The respondents are the Chief Constable of Derbyshire Constabulary and the Chief Constable of the West Midlands Constabulary (i.e. the chief constables of the police forces of which the appellants had formerly been members) and the Secretary of State for the Home Department who is responsible for making the 2006 Regulations.
3. By virtue of section 120 of the 2010 Act, an employment tribunal has jurisdiction to determine a complaint of discrimination in relation to an occupational pension scheme under section 61 of the 2010 Act. It also has jurisdiction to determine complaints of a breach of section 108 of the 2010 Act which deals with discrimination in relation to conduct arising out of, and closely connected to, relationships that have ended.
4. As a preliminary issue, the employment tribunal held that it had jurisdiction to hear the complaint as the 2006 Regulations governing payment of a disablement gratuity fell within the definition of an occupational pension scheme within the meaning of section 61 of the 2010 Act. It also held that it did not have jurisdiction under section 108 of the 2010 Act as the complaint did not fall within the scope of that section.
5. On appeal, the Employment Appeal Tribunal (“the EAT”) held that the employment tribunal did not have jurisdiction to hear the complaint. It held that the 2006 Regulations governing payment of a disablement gratuity did not form part of an occupational pension scheme within the meaning of section 61. It also rejected a submission that the disablement gratuity was pay within the meaning of European Union law so that section 61 had to be interpreted in a way that ensured that the employment tribunal had jurisdiction to determine the complaint. It also dismissed a cross-appeal in relation to the employment tribunal’s decision that it did not have jurisdiction to consider the complaint under section 108 of the 2010 Act.
6. The appellants applied for and were granted permission to appeal by the EAT on two grounds, namely:

“Ground 1: The EAT erred in concluding that the regulation 12 gratuity, and/or the Policy (Injury Benefit) Regulations 2006 more generally did not meet the definition of an “occupational pension scheme” in s. 1 of the Pension Schemes Act 1993.

Ground 2: The EAT erred in concluding that the regulation 12 gratuity is not pay within the meaning of EU law.”

7. On 2 January 2024, the appellants applied to this Court for permission to amend their grounds of appeal to include a third ground of appeal, namely:

“Ground 3: The EAT erred in concluding that the alleged discrimination in failing to pay the regulation 12 gratuity did not fall within s. 108...”

8. At the hearing, all parties made submissions on whether the appellants should be granted permission to amend their appellants’ notice to enable them to argue ground 3, and on the substantive issue raised by that ground of appeal, so that, if permission were granted, the Court could deal with ground 3 in its judgment. The respondents also issued respondent’s notices seeking to argue that the decision of the EAT ought to be upheld for additional reasons.

THE LEGAL FRAMEWORK

The 2006 Regulations

9. Section 1 of the Police Pensions Act 1976 (“the 1976 Act”) provides that regulations may be made by the Secretary of State making provision, amongst other things, “as to the pensions which are to be paid to and in respect of members of police forces, whether as of right or otherwise”. Section 11(3) of the 1976 Act provides that “pension”:

“in relation to a person means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of him, and includes a lump sum or gratuity so payable, and a return of contribution”.

10. The 2006 Regulations were made in the exercise of the power conferred by section 1 of the 1976 Act. They make provision for different types of payments. Part 2 of the 2006 Regulations deals with awards on injury or death. Regulation 11 provides for payment of what is called a “police officer’s injury award”. In essence, regulation 11 applies to a person who was formerly a police officer and is permanently (but not totally) disabled as a result of an injury received in the execution of his duty. Such persons are entitled to payments described as a gratuity and an injury pension calculated in accordance with Schedule 3 to the 2006 Regulations. The gratuity is calculated by reference to the degree of disablement and ranges from a payment of 12.5% of pensionable pay if disablement is 25% or less, to 50% of pensionable pay if disablement is more than 75%. Other factors are relevant to the calculation of an injury pension payable under regulation 11.

11. Regulation 12 of the 2006 Regulations provides for payment of what is described as a disablement gratuity. It provides, so far as material, as follows:

“12.— Disablement gratuity

(1) This regulation applies to a person who—

- (a) receives or received an injury without his own default in the execution of his duty,
- (b) ceases or has ceased to be a member of a police force, and
- (c) within 12 months of so receiving that injury, becomes or became totally and permanently disabled as a result of that injury.

(2) Subject to the provisions of regulations 22 and 23 (abatement), the police pension authority for the force in which a person to whom this regulation applies last served shall pay to him a gratuity of an amount equal to whichever is the lesser of the following amounts, namely—

- (a) five times the annual value of his pensionable pay on his last day of service as a member of a police force;
- (b) the sum of four times his total remuneration during the 12 months ending with his last day of service as a member of a police force and the amount of his aggregate pension contributions in respect of the relevant period of service.”

12. Regulation 7(6) defines “totally disabled” as meaning “incapable by reason of the disablement in question of earning any money in any employment”. The person responsible for paying the disablement gratuity is the police pension authority of the last police force in which the officer served (see regulations 12(2) and 41). The police pension authority means the chief constable (see section 11(2) of the 1976 Act). There is provision for the police pension authority to determine whether a person is eligible for an award and for the reference of certain questions, including whether a person is totally disabled and whether the disablement is likely to be permanent, to a qualified medical practitioner (see regulation 30). The individual has a right of appeal against the decision of the qualified medical practitioner to a board of medical referees (see regulation 31). Subject to those regulations, a disablement gratuity becomes payable as soon as the entitlement to it arises (see regulation 43(6)).

The 2010 Act

13. As appears from its preamble, the 2010 Act, amongst other things, makes provision reforming equality law, restating the enactments relating to discrimination and harassment and prohibiting victimisation.
14. The 2010 Act defines and prohibits discrimination over a wide range of activities in specified fields including employment. It does that in the following way. Part 2 of the

2010 Act is headed “Equality: Key Concepts”. Chapter 1 of Part 2 sets out the personal characteristics that are protected characteristics for the purpose of the Act. These include characteristics such as sex, race, age, and disability. Chapter 2 is headed “Prohibited Conduct”. The first group of sections defines different forms of discrimination including direct discrimination (i.e. treating a person less favourably because of a protected characteristic: section 13), discrimination on grounds of disability (that is, treating a person unfavourably because of something arising in consequence of that person’s disability: section 15) and indirect discrimination (section 19). Under the heading “Other prohibited conduct”, the 2010 Act defines harassment (section 26) and victimisation (section 27).

15. Parts 3 to 7 then deal with specific areas of activity. Part 5 deals with employment and sets out the circumstances in which an employer must not discriminate against a person. By way of example, section 39(2) of the 2010 Act provides that an employer must not discriminate against a person as to the terms of that person’s employment or in the way the employer affords access to, or receipt of, any benefits, facilities or services or by subjecting him or her to a detriment. Chapter 1 of Part 5 also deals with other relationships in, broadly, the employment field. In relation to police officers, who do not have a contract of employment, section 41 provides that holding office as a police constable is to be treated as employment by the chief constable.
16. Section 61 of the 2010 Act (which appears in chapter 2 of Part 5) deals with discrimination in relation to occupational pension schemes. It provides, so far as material, that:

“61 Non-discrimination rule

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

.....

“(7) A breach of a non-discrimination rule is a contravention of this Part for the purposes of Part 9 (enforcement).”

17. Section 212(1) of the 2010 Act provides that an occupational pension scheme “has the meaning given in section 1 of the Pensions Act 1993”. That is discussed below.

18. Part 8 of the 2010 Act is headed “Prohibited Conduct: Ancillary”. Section 108 provides:

“108 Relationships that have ended

(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

(2) A person (A) must not harass another (B) if—

(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.

(3) It does not matter whether the relationship ends before or after the commencement of this section.

(4) A duty to make reasonable adjustments applies to A if B is placed at a substantial disadvantage as mentioned in section 20.

(5) For the purposes of subsection (4), sections 20, 21 and 22 and the applicable Schedules are to be construed as if the relationship had not ended.

(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.

(7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.”

19. Part 9 of the 2010 Act deals with enforcement. That Part determines, amongst other things, which courts or tribunals have jurisdiction to deal with particular complaints. Chapter 3 deals with employment tribunals. Section 120(1) provides so far as material as follows:

“120 Jurisdiction

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);

(b) a contravention of section 108, 111 or 112 that relates to Part 5.”

Occupational Pension Schemes

20. Section 1 of the Pension Schemes Act 1993 (“the 1993 Act”) defines the meaning of occupational pension scheme. The section as originally enacted defined such schemes in the following way:

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

21. By virtue of section 239 of the Pensions Act 2004, section 1 of the 1993 Act was amended with effect from 1 July 2005 and provides so far as material:

“(1) In this Act, unless the context otherwise requires—

“occupational pension scheme” means a pension scheme—

(a) that—

(i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or

(ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, and

(b) that has its main administration in the United Kingdom or outside the member States,

or a pension scheme that is prescribed or is of a prescribed description;

.....

(5) In subsection (1) *“pension scheme”* (except in the phrases “occupational pension scheme”, “personal pension scheme” and “public service pension scheme”) means a scheme or other arrangements, comprised in one or more instruments or

agreements, having or capable of having effect so as to provide benefits to or in respect of people–

- (a) on retirement,
- (b) on having reached a particular age, or
- (c) on termination of service in an employment.”

THE BACKGROUND

The Appellants

22. The material facts for the purpose of appeal are not in dispute. Ms Clark had been a serving police officer with Derbyshire Police. She sustained a head injury following an incident whilst she was on duty in September 2001. She developed seizures which lasted until about 2007. The seizures began to recur in 2017. In October 2018, it was determined that Ms Clark could not perform the core duties of a police officer due to epilepsy. She retired on the grounds of permanent disablement on 15 February 2019. On 20 March 2019, Ms Clark applied for an award under the 2006 Regulations. She was assessed to be entitled to an award under regulation 11 of the 2006 Regulations at the highest level as she was 100% disabled. She was held not to be entitled to a (more valuable) disablement gratuity under regulation 12 as more than 12 months had elapsed between Ms Clark receiving the injury in September 2001 and her becoming totally and permanently disabled. Ms Clark was notified of the decision on 18 June 2020. On 4 November 2020, Ms Clark presented a complaint to the employment tribunal alleging that she had been discriminated against on grounds of disability.
23. Mrs Bell had been a serving police officer with the West Midlands police force. Following experiences in the workplace in 2015, Mrs Bell was diagnosed with general anxiety disorder and mild depression on 15 December 2017. On 26 September 2018, Mrs Bell was found to be permanently disabled from carrying out the ordinary duties of a police officer and retired on grounds of ill-health on 9 December 2018. Mrs Bell applied for an award under the 2006 Regulations. On 24 June 2019, Mrs Bell was assessed to be entitled to an award under regulation 11 of the 2006 Regulations at the highest level as she was 100% disabled. She was held not to be entitled to a (more valuable) disablement gratuity under regulation 12 as more than 12 months had elapsed between her injury and her disablement. On 21 January 2021 Mrs Bell presented a complaint to the employment tribunal alleging that she had been discriminated against on grounds of disability.

The Decision of the Employment Tribunal

24. The employment tribunal (Employment Judge Blackwell) held a preliminary hearing to determine if it had jurisdiction to determine the complaints. It held that the complaints did not fall within section 108(1)(a) as, essentially, as it said at paragraph 9 of its reasons:
 - “on the facts, the refusal to pay gratuities under Regulation 12 arose out of the relationship between the First Respondents

exercising his duties under the [2006 Regulations] and the Claimants seeking benefit thereunder”.

25. The employment tribunal also held that the claim did not fall within section 108(1)(b) as the refusal of a disablement gratuity was not something that could have occurred during the employment relationship. A person could only claim such an award after the employment relationship ended and as a consequence of it ending.
26. The employment tribunal did, however, conclude that the 2006 Regulations were an occupational pension scheme within the meaning of section 1 of the 1993 Act, and, therefore, also section 61 of the 2010 Act. It considered that the awards made under the 2006 Regulations involved an entitlement to an injury award arising after retirement and also arose on termination of the employment relationship. It concluded that it had jurisdiction to determine the complaints as they involved an allegation of a contravention of section 61 of the 2010 Act.

The Appeal to the EAT

27. The respondents appealed against the decision of the employment tribunal contending that the employment tribunal had erred in its interpretation of section 1 of the 1993 Act and in its conclusion that regulation 12 was an occupational pension scheme. Ms Clark and Ms Bell appealed against the finding that the employment tribunal did not have jurisdiction under section 108 of the 2010 Act. The cross appeal was said to be brought to protect their position if the EAT upheld the appeal by the Chief Constables and the Secretary of State on section 61. In that event, it was said that the EAT would be invited to consider whether the employment tribunal had jurisdiction on the alternative basis of section 108. It was said that it followed that no grounds of appeal were being put forward upon which it was said that the employment tribunal's conclusion on this issue involved an error of law but asked that the cross-appeal be allowed to proceed “so that the point can be considered and if need be, determined alongside the arguments on the s. 61 issue”. That approach was reiterated in the skeleton argument filed on behalf of Ms Clark and Ms Bell. \paragraphs 54 and 55 of the skeleton argument are set out in full at paragraph 66 of the EAT's judgment.
28. The EAT concluded that regulation 12 was not an occupational pension scheme. Section 1(5) of the 1993 Act provided that a scheme was an occupational pension scheme if it provided for the payment of benefits on one of three events, i.e. on retirement, on having reached a particular age, or on termination of the relationship. The EAT concluded that regulation 12 did not do so. The material part of the EAT's reasoning is in paragraphs 70 to 72 of its judgment which are in the following terms:

“70. As for regulation 12 [of the 2006 Regulations], three conditions have to be fulfilled for the benefit to be payable. The officer must (a) have received an injury in the execution of duty (not of their own fault), *and* (b) ceased to be a member of a police force, *and* (c) within 12 months of receiving the injury, have become totally and permanently disabled. Logically, condition (a) (injury in the execution of duty) has to precede conditions (b) (cessation of service) and (c) (total and permanent disablement as a result of the injury). There is, however, no requirement that the cessation of service

(condition (b)) must have any causal connection with conditions (a) or (c), although, as in the present cases, that may well be so. Indeed, recognising (as regulation 12 plainly does) that total and permanent disablement might not arise for some time after the injury, entitlement to a disablement gratuity allows for the possibility that the cessation of the officer's service might be entirely unrelated to the injury they previously received in the execution of their duty. Unlike entitlement to ill-health pension (which, by regulation 29 Police Pensions Regulations, arises upon an officer's "compulsory retirement on the ground of disablement", see para 7 *supra*), entitlement to a disablement gratuity under regulation 12 [of the 2006 Regulations] requires no causal link between the cessation of the officer's service and the injury, and subsequent disablement, they suffered.

71. Another way of making the point is to note that ceasing to be a member of a police force is only one of the three conditions that must be satisfied for the entitlement to arise. Given that an officer's service could cease *before* they became totally and permanently disabled—a question to be determined by the selected medical practitioner, pursuant to regulation 30 [of the 2006 Regulations]—(a possibility further underlined by the provision for a death gratuity under regulation 21, see para 18 *supra*), it cannot be said that the entitlement arises *on* cessation: cessation of service is a necessary but not sufficient condition, such that it could not be said that entitlement to the benefit under regulation 12 arises "on retirement" or "on termination of service".

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

29. The EAT also addressed arguments as to the significance and meaning of the reference to "capable of having effect" in section 1 of the 1993 Act and said this at paragraph 73:

"73. For the claimants it is said that the words "capable of having effect" within section 1(5) PSA 1993 would cover both regulations 11 and 12 [of the 2006 Regulations], as this would extend the definition to schemes or arrangements where there *could be* entitlement if other conditions were met (the scheme or arrangement would thus be *capable* of having that effect). I am not, however, persuaded that that can be correct. In my judgment, the phrase "capable of having effect" clarifies that a scheme or other arrangement will be a pension scheme in relation to a member without that member having yet drawn any benefits from it. It is a necessary part of the definition as,

absent such clarification, the literal reading of the subsection would seem to exclude that possibility; it thus provides the answer to the claimants' objection that the respondents' construction would exclude pension schemes where an entitlement arises on retirement or termination but the actual payment of the benefit is delayed in certain circumstances: the scheme would still be *capable* of providing benefits *on* retirement or termination. I cannot, however, see that it would make sense to read this reference as meaning that a scheme or arrangement is a pension scheme for these purposes provided that in one possible permutation of circumstances it could be capable of satisfying the conditions for being such a scheme."

30. The EAT said that its conclusion was reinforced having regard to the broader legislative context and history of the 2006 Regulations. Further, it noted that other words could have been used (and were used in other statutes) where benefits were to be payable on the onset of ill-health.

31. The EAT also considered arguments that the disablement gratuity constituted "pay" within the meaning of EU law so that the phrase "occupational pension scheme" ought therefore to be interpreted in a way that included the 2006 Regulations. That would ensure that there was an effective and equivalent remedy available in the employment tribunal to enable the claimants to enforce their right to equal treatment in respect of pay. The EAT concluded that the disablement gratuity was not pay for the reasons given at paragraphs 95 of its judgment.

32. The EAT concluded therefore that:

"98. For the reasons I have provided, I consider the ET erred in its approach to the construction of section 1 [of the 1993 Act]. A disablement gratuity under regulation 12 [of the 2006 Regulations] is not part of an occupational pension scheme for the purposes of section 61 of the 2010 Act] and the [employment tribunal] was thus wrong to hold that it had jurisdiction to determine the claimants' claims under that provision. I duly allow the respondents' appeal."

33. Dealing with the cross-appeal in relation to section 108, the EAT noted that although Ms Clark and Mrs Bell had formally cross-appealed against the employment tribunal's judgment on section 108, in reality their submissions on that issue were used in support of their argument under section 61. In particular, they were arguing that the disablement gratuity was pay within European Union law and a remedy had to be available before an employment tribunal and if that could not be done under section 61 then it would have to be done under section 108 instead. The EAT concluded as follows:

"100. Given my conclusions (i) as to the proper construction of section 1(5) [of the 1993 Act] and (ii) on the claimants' arguments under EU law, and for the reasons I have already provided, I do not accept these submissions. As the claimants accept, the ET made no error of law in its reasoning in respect

of the claims made under section 108 [of the 2010 Act]; I therefore dismiss the cross-appeal.

Ancillary Matters

34. We were told that the employment tribunal has subsequently held that it does not have jurisdiction to determine Ms Bell's complaint for a separate reason, namely that the complaint was presented out of time. An appeal has apparently been brought against that decision. Nothing said in this judgment affects, or is intended in any way to express any view on, that appeal. Further, we note that the employment tribunal has not yet determined whether the conduct complained of, namely the requirement that permanent and total disablement occur within 12 months of the injury, does in fact amount to discrimination contrary to sections 15 or 19. Again, nothing that I say in this judgment is intended to affect or influence the consideration of those issues, or any other issue that might arise.

THE APPEAL

35. The appellants sought permission from the EAT on two grounds only, namely the proper interpretation of the phrase "occupational pension scheme" in section 1 of the 1993 Act as a matter of domestic law and secondly the meaning of "pay" as a matter of European Union law. The EAT granted permission on those two grounds. The appellants did not seek permission to appeal on any ground concerning the interpretation of section 108 of the 2010 Act.
36. The appellants do now seek to amend their appellants' notice to include as a ground of appeal that the employment tribunal erred in concluding that the alleged discrimination in failing to pay the regulation 12 gratuity did not fall within section 108. The first issue is whether permission to amend should be granted pursuant to CPR 52.17 to allow them to rely upon that ground. In general, a court considering whether to grant permission to amend an appellant's notice will need to consider all the facts of the case including the overriding objective of dealing with a case justly and proportionately, the need to balance any injustice to the party seeking permission to amend if permission is refused against the prejudice to other parties if permission is granted, and the importance of finality and certainty in litigation. See generally, *Singh v Dass* [2019] EWCA Civ 360, at paragraphs 15 to 18, and *Notting Hill Finance Ltd. v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 at paragraph 26. In particular, there is a heavy burden on an appellant to justify a late amendment: see the judgment in *Nesbit Law Group LLP v Acasta European Insurance Company Limited* [2018] EWCA Civ 268 per Sir Geoffrey Vos C at paragraph 41.
37. In the present case, the application to amend to include a further ground of appeal was made very late. There is little if any justification or explanation given for the lateness of the application. The ground of appeal advanced was formally the subject of a cross-appeal in the EAT but, as explained above, no arguments were made to the EAT as to why the employment tribunal erred in its interpretation of section 108 of the 2010 Act. This Court, therefore, is deprived of the benefit of a judgment from the specialist appeal tribunal, the EAT, on this issue. Those factors point against the grant of permission to amend.

38. Against that, however, the issue raised is an issue of law as to the proper interpretation of section 108. The facts are not in dispute. There is no need for further evidence or for any further facts to be found. The respondents have not been prejudiced by the lateness of the amendment and have had the opportunity to advance all the arguments they wished to advance as to the proper interpretation of section 108 as confirmed by counsel for the third respondent (who dealt with this issue) at the hearing. Finally, and most significantly, if the proposed ground of appeal as regards the proper interpretation of section 108 succeeds, then there would be no need to consider ground 2 and the meaning of “pay” in European Union law. The appellants already have permission to argue ground 2. That ground only becomes relevant, however, if, as a matter of domestic law applying ordinary principles of statutory interpretation, the employment tribunal did not have jurisdiction under section 108 to determine the complaint. Only then would it be necessary to consider the meaning of European Union law and its relevance, if any, in the light of the European Union (Withdrawal) Act 2018 and the Retained EU Law (Revocation and Reform) Act 2023. It would therefore be artificial to consider ground 2 without first considering ground 3. For those reasons I would grant the appellants permission to amend their appellants’ notice to add ground 3.
39. In terms of the consideration of the issues, it is sensible to consider first as a matter of domestic law whether the employment tribunal has jurisdiction by virtue of (a) section 61 or if not (b) section 108 of the 2010 Act (i.e. grounds 1 and 3). Then, and only if the appellants fail on both of those grounds, will it be necessary to consider ground 2 and the scope and relevance of European Union law.

GROUND 1 – THE MEANING OF OCCUPATIONAL PENSION SCHEME

40. Ms Monaghan, with Mr Feeny, for the appellants, submitted that regulation 12 was an occupational pension scheme within the meaning of section 1(5) of the 1993 Act. She submitted that benefits under both regulations 11 and 12 of the 2006 Regulations were only payable if the person had ceased to be a police officer. There was no scope for a police officer to receive a gratuity if she was still a serving officer. Accordingly, the primary consideration for demarcation of those who were eligible for gratuities under regulations 11 or 12 was whether they were still in service. In those circumstances, the 2006 Regulations were a scheme providing for benefits on retirement or on termination of service. Further, a pension scheme was an occupational pension scheme if it were “capable of having effect” so as to provide benefits on retirement or termination. Ms Monaghan submitted that the EAT erred in concluding that those words were intended to make it clear that a scheme could be a pension scheme in relation to a particular person without that person having yet drawn any pension benefits. Rather, the use of those words indicated that a scheme could fall within the definition of an occupational pension scheme if it were capable of having the effect that payments would in fact be made at the time of retirement or termination.
41. Ms Monaghan also relied upon observations to the effect that the phrase “occupational pension scheme” has a wide meaning and should be interpreted liberally not restrictively, see per Chadwick LJ in *Parlett v Guppys (Bridport) Ltd (No 2)* [2000] Pensions LR 195 at paragraph 31, per Millett LJ in *Westminster City Council v Haywood* [1998] Ch. 377 at page 674B and per Hart J in *City and County of Swansea v Johnson* [1999] Ch. 189 at page 687F-H. She further relied on the fact that the enabling Act under which the 2006 Regulations were made conferred power on

the Secretary of State to make regulations as to pensions. That indicated that the 2006 Regulations were dealing with pensions. In addition, she submitted that the legislative history demonstrated that pensions and the benefits governed by regulation 12 were originally included in one scheme but were separated for tax reasons, not for any reason to do with any change in the status of the benefit payable under regulation.

42. Mr Tolley KC, with Ms Hodgetts, for the third respondent, made submissions on this ground of appeal (and Mr Lockley for the first two respondents adopted those submissions). Mr Tolley submitted that section 1 of the 1993 Act defined pension schemes as schemes which provided for benefits “on” a particular event occurring. The aim of the section was to define the circumstances in which entitlement to payment crystallised. It focussed on the relevant event bringing about the entitlement to benefit. Section 1(5) defined that event as retirement, having reached a particular age, or termination of service. Entitlement to the benefit arose “on” one of those events occurring. That was the ordinary and natural meaning of the language used in section 1(5). By contrast, the payment provided for in regulation 12 of the 2006 Regulations was not payable on one of the stipulated events. It was a gratuity paid if certain conditions were satisfied, namely that the officer had suffered an injury in the execution of his or her duties, ceased or had ceased to be a police officer and the injury had led to total and permanent disablement within 12 months. The disablement gratuity was not payable on retirement nor on termination of service (although it may, or may not, be coincident with one of those events). Consequently, regulation 12 was not an occupational pension scheme within the meaning of section 1 of the 1993 Act.
43. In relation to the words “capable of having effect”, Mr Tolley submitted that those words were intended to deal with a situation where a court or the pension ombudsman needed to determine if payments under a particular scheme would amount to pension payments even before any payments were in fact made. Such a scheme would be capable of having the effect of providing benefits on retirement or on one of the other qualifying events occurring. But the scheme would not necessarily have had that effect before payments were made. In any event, the scheme still had to be capable of having effect to provide benefits “on” the occurrence of the specified event. Further Mr Tolley submitted that Parliament could have used other words if it intended a scheme to cover benefits payable on the occurrence of total and permanent disability due to injury and had done so in other contexts where entitlement to benefits arose “on the onset of ill health”.

Discussion and conclusion on ground 1

44. Section 120 of the 2010 Act provides that an employment tribunal has jurisdiction to determine a complaint relating to a contravention of Part 5 of the 2010 Act. A breach of a non-discrimination rule in an occupational pension scheme is a contravention of section 61: see section 61(7). Section 212 of the 2010 Act provides that an occupational pension scheme “has the meaning given in section 1” of the 1993 Act. The issue therefore depends upon the proper interpretation of section 1 of the 1993 Act. That involves considering the words of the statutory provision, read in context and having regard to the purpose underlying the statute, and bearing in mind any legitimate aids to statutory interpretation: see per Lord Hodge in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at paragraphs 29 to 31 and see per Lord Nicholls in *R v Secretary of State for Environment, Transport*

and the Regions, ex p. Spath Holmes [2000] UKHL 61, [2001] 2 AC 349 at pages 397-398.

45. Section 1 of the 1993 Act provides a definition of various types of pension schemes including occupational pension schemes. In its current wording, section 1(1) of the 1993 Act provides that an occupational pension scheme means (1) a pension scheme which (2) is established by specified persons (3) “for the purpose of providing benefits to, or in respect of, people with service in employments of a description” or for that purpose and also for the purpose of providing benefits to or in respect of other people. Section 1(5) then defines the meaning of a “pension scheme”. That means “a scheme or other arrangements” comprised in one or more instruments or agreements “having or capable of having effect so as to provide benefits to or in respect of people” in the circumstances set out in section 1(5)(a) to (c). Those circumstances are “on retirement”, “on having reached a particular age” or “on termination of service in an employment”.
46. In context, and indeed on the ordinary and natural reading of the words, subsection 1(5) is defining the circumstances in which a scheme provides for benefits to be provided. The key word is “on”. To be a pension scheme within the meaning of section 1(5), the scheme must provide, or be capable of providing, benefits to people “on retirement” or “on termination of service” not during, or after, or coincident with, retirement or termination of service. The occurring of one of the events specified in section 1(5)(a) to (c) must be the event, or the trigger, giving rise to the entitlement to benefits. That conclusion is reinforced by the use of the word “on” in section 1(5)(b). A scheme will be a pension scheme if it provides benefits “on a person having reached a particular age”. It is clear that having reached the particular age is the event which gives rise to the entitlement to benefits.
47. On analysis, regulation 12 does not provide an entitlement to benefits on retirement or on termination of service in the sense described above. A disablement gratuity is payable if all three of the conditions specified in regulation 12 are satisfied: (a) the person has suffered an injury in the execution of his or her duty (b) the person ceases or has ceased to be a member of a police force and (c) the injury has resulted in permanent and total disability within 12 months of receiving the injury. Satisfaction of conditions (a) and (c) does not involve the provision of benefits on retirement or on termination of service. Condition (b) requires the person to cease, or have ceased, to be a member of a police force. The regulation does not, however, require any causal connection between ceasing to be an officer and condition (a), i.e. having suffered an injury, or condition (c), i.e. becoming permanently and totally disabled within 12 months as a result (although there may in fact be a causal connection, as it is in the case of these two appellants). Furthermore, the person may already have ceased being a police officer before the injury results in permanent and total disablement and before he or she becomes entitled to the payment of a disablement gratuity. It cannot be said, therefore, that the scheme provides benefits “on retirement” or on “termination of service”. As the EAT observed at paragraph 71 of its judgment, cessation of service is a necessary but not sufficient condition of entitlement. It is not the event which triggers entitlement to the benefit. Consequently, regulation 12 is not a pension scheme within the meaning of section 1(5) and cannot be an occupational pension scheme within the meaning of section 1(1) of the 1993 Act.

48. I have considered whether the words “capable of having effect” in section 1(5) lead to a different result. Mr Tolley submitted that the words enabled a court or ombudsman to determine whether a scheme was a pension scheme where no benefits had yet been paid. The EAT, essentially, adopted a similar approach. I doubt whether the inclusion of those words would be necessary to ensure that a court or tribunal had jurisdiction to determine whether a scheme was a pension scheme in circumstances where benefits had not yet been paid out. Section 1(5) is concerned with the definition of a pension scheme. It is not concerned with the particular payment of benefits to an individual under a scheme. It would be possible to determine whether a particular scheme or arrangement was one having effect so as to provide benefits whether or not any particular benefits had yet been paid out. Indeed, it is not immediately apparent that the words “having or capable of having effect so as” are, strictly, necessary to achieve the definitional function that the opening words of section 1(5) is meant to achieve. The subsection could simply have defined a pension scheme as a scheme to provide benefits to people on certain events. It is not, therefore, immediately apparent what the words “capable of having effect” mean. I am satisfied, however, that those words are still governed by the remainder of the words in the subsection. The scheme must be one capable of having effect “so as to provide benefits to or in respect of people” on the occurrence of the events specified in subsection 1(5)(a) to (c). It is not enough if the scheme provides for benefits in circumstances which coincide with the events specified in subsection 1(5)(a) to (c). For the reasons given above, on its true analysis, regulation 12 is not a scheme providing for benefits on retirement or on termination of service as, whilst cessation of service is a necessary condition for entitlement to benefits, it is not the event giving rise to the entitlement to benefits.
49. Nor do I consider that the cases relied upon by Ms Monaghan assist. I doubt that generalised observations that particular words should be liberally or widely interpreted are a useful guide to determining whether a particular scheme is an occupational pension scheme. In any event, those observations need to be read in context and, when seen in that light, do not assist in this case. All three of the cases were ones where the benefits in question were to be provided “on termination” or “on retirement” albeit, in at least in two of the cases, there was some other specific reason leading to retirement or termination, such as redundancy or ill-health. The references to giving a wide or liberal interpretation to the phrase “occupational pension scheme” were, broadly, made in a context where the courts did not regard the reasons leading to retirement or termination as justifying giving a narrow or limited interpretation to the words “on retirement” or “on termination of service” thereby excluding a scheme which did in fact provide benefits on retirement or on termination from the scope of an occupational pension scheme.
50. In *Haywood*, the individual concerned was entitled to pension benefits and severance payments on the termination of his employment at the age of 50. In that context, Millett LJ observed that the local authority’s pension scheme and its severance scheme were each an occupational pension scheme within the meaning of section 1 of the 1993 Act and noted that the definitions in section 1 were “very wide definitions”: see at page 405B. The issue that the Court went on to determine was whether the individual concerned was an authorised complainant for the purposes of section 146 of the 1993 Act so that the pension ombudsman had jurisdiction to entertain his complaints about a reduction in the amount of severance pay he received. The Court determined that the pension scheme and the severance scheme were in fact two

separate schemes. The individual was not an authorised complainant for the purposes of the severance scheme so the pension ombudsman did not have jurisdiction to entertain a complaint about that scheme: see at pages 408B-409F. The decision does not therefore assist on the question of interpretation that arises in this case.

51. In *Johnson*, the individual was entitled under the terms of the relevant scheme to an allowance if he ceased to be employed as a result of injury or disease. Hart J considered, intuitively, that benefits provided on a no-fault basis on the termination of employment as a result of injury sustained or disease contracted in the course of employment would not be an occupational pension scheme. However, he concluded that such a scheme did provide “benefits, in the form of pensions or otherwise, payable on termination of service”. In those circumstances, given that the definition of occupational schemes in section 1 of the 1993 Act was “of wide ambit”, it was not possible to exclude the scheme from the definition: see at pages 195F-196D.
52. In *Guppys*, the scheme in question involved the payment of benefits on the individual’s retirement. The issue was whether the scheme was an occupational pension scheme. Chadwick LJ observed at paragraph 31 of his judgment that “Such assistance as there is, therefore, encourages me to take the view that ‘occupational pension scheme’ should be construed liberally and not restrictively”. He then noted that the scheme provided for benefits payable “on his retirement” (paragraph 33). In those circumstances, the scheme fell within the definition of an occupational pension scheme in section 1 of the 1993 Act.
53. Each of these three cases involved a situation where a scheme provided for the payment of benefits on termination or on retirement and, consequently, the scheme fell within the definition of an occupational pension scheme. The scheme in the present case, regulation 12 of the 2006 Regulations, does not provide for the payments of benefits on retirement or on termination of service for the reasons given above. These cases do not assist in resolving the question of whether such a scheme is an occupational pension scheme.
54. Ms Monaghan relied upon the fact that the relevant regulations were made in the exercise of powers conferred by section 1 of the 1976 Act to make provisions “as to pensions”. That is true. But section 11(5) of the 1976 Act defines pension as a pension of any kind whatsoever and “includes a lump sum or a gratuity”. The reference in the enabling Act to the word “pension”, widely defined, does not mean that any regulations made under that Act are part of a pension scheme as defined by section 1 of the 1993 Act. The key is to look at the characteristics of the schemes defined by the 1993 Act as being occupational pension schemes and then to assess whether regulations enacted under the 1976 Act have the characteristics of an occupational pension scheme and, when that is done, regulation 12 does not have those characteristics. Ms Monaghan also relied upon the legislative history of the 2006 Regulations and the fact that benefits which would be occupational benefits were contained within one set of regulations together with disablement gratuities until 1987. She submitted that nothing had occurred to change the status of disablement gratuities under the different regulations that had been made at different times. Again, however, the question is whether a scheme providing for disablement gratuities is an occupational pension scheme within the meaning of section 1 of the 1993 Act. For the reasons given, it is not.

55. Mr Tolley in submissions, and by the respondents' notice, relies on additional arguments as to why regulation 12 does not amount to an occupational pension scheme. Those arguments, if correct, would do no more than reinforce the conclusion reached upon a consideration of the words of the relevant provisions read in their statutory context. It is not, therefore, necessary to address those arguments.
56. For those reasons, regulation 12 does not fall within the definition of an occupational pension scheme within the meaning of section 1 of the 1993 Act. Ground 1, therefore, fails.

GROUND 3 – SECTION 108 OF THE 2010 ACT

57. Ms Monaghan submitted that section 108(1) applied in this case as the dispute concerned access to benefits or the subjecting of the appellants to a detriment within the meaning of section 39(2) of the 2010 Act. The legislative history demonstrated that the intention of Parliament was to prohibit discrimination arising out of the employment relationship and there was nothing to indicate that the 2010 Act was intended to reduce the protection available. Ms Monaghan relied, in that respect, upon the observations of Underhill LJ, with whom the other members of the Court, agreed in *Rowstock Ltd v Jessemey* [2014] EWCA Civ 185, [2014] 1 WLR 3615.
58. Ms Hodgetts for the third respondent (whose submissions Mr Lockley for the other respondents adopted) submitted that the complaint in the present case did not fall within either section 108(1)(a) or (b). The complaint did not concern conduct which arose out of and was closely connected to an employment relationship which used to exist. Rather, it concerned access to a welfare benefit payable under a statutory scheme, namely the 2006 Regulations. The conduct did not fall within section 108(1) (b) as that subsection only applied if the conduct would contravene the 2010 Act "if it occurred during the relationship". As the disablement gratuity was only payable after the relationship had ended, refusal of the gratuity could never have occurred during the relationship. Ms Hodgetts further submitted that the wording in section 108(1) set out a test that reflected the decision of the House of Lords in *Rhys-Harper v Relaxion Group plc* [2003] UKHL 33, [2003] ICR 867. She relied upon the observations of Lord Nicholls at paragraphs 37 to 44, which, she submitted, tied the scope of section 108 to incidents of the employment relationship whereas the present case arose from the imposition of an obligation on the chief constable to administer a welfare benefit under the terms of a statutory scheme. She submitted that that approach was also consistent with the observations of Lord Hope at paragraphs 117 to 124. Ms Hodgetts further relied upon the observations of Lord Hobhouse particularly at paragraph 141 where he indicated that the relevant starting point was "whether the same conduct during the employment would be unlawful". She submitted that that language was now to be found in section 108(1)(b). She also relied upon the observations of Lord Scott at paragraphs 194 to 196, and 200 to 203 as indicating that the approach, reflected now in section 108(1), was to consider whether the employment relationship was still in existence when the conduct complained of occurred.

Discussion

59. This ground of appeal depends upon the interpretation, and then application, of section 108 of the 2010 Act. As indicated at paragraph 44 above, that issue of interpretation depends upon the meaning of the words used by Parliament, read in

their statutory context and having regard to the purpose underlying the legislation, and any legitimate aid to construction.

The Meaning of Section 108

60. Section 108 of the 2010 Act is dealing with discrimination occurring after the end of the relevant relationship. The opening words of section 108(1) provide that a person must not discriminate against another person if two conditions are satisfied. The first condition is set out in subsection 108(1)(a). The discrimination complained of must be such that it “arises out of and is closely connected to a relationship which used to exist”. The meaning of that subsection is clear and does not call for further interpretation.
61. The second condition is set out in subsection 108(1)(b). That defines the conduct which falls within the scope of the section, namely “conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act”.
62. Subsection 108(1)(b) is seeking to identify the kind of conduct following the end of the relevant relationship which can give rise to a complaint under section 108. It is conduct “of a description” which would, if it occurred during the relationship, contravene the Act. Those words indicate that the subsection is focussing on the type or kind of conduct which would be unlawful discrimination under the Act. That, in turn, must be a reference back to the conduct described earlier in the Act. That is, the conduct is prohibited, i.e. it falls within one of the definitions of discrimination within Part 2 of the 2010 Act and it occurs in relation to activities within one of the specified areas in Parts 3 to 7 where discrimination is prohibited, in particular in this case, employment in Part 5. The reference in subsection 108(1)(b) to conduct “which if it occurred during the relationship” is not intended to act as a limitation on the scope of the section, that is, that the conduct must have been capable of occurring during the employment. Rather, these are words of identification, explaining what kind of conduct is meant to be caught by section 108(1)(b), namely the sort of conduct constituting discrimination as defined by Part 2 and falling within the scope of Parts 3 to 7 of the 2010 Act.
63. That interpretation is consistent with the effect of section 108 as explained in the Explanatory Notes to the 2010 Act. It is permissible to use such notes as an aid to interpretation as they may assist in identifying the context and the mischief, or problem, that the statute is addressing: see per Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956 at paragraphs 4 to 6. Paragraphs 349 to 350 of the Explanatory Notes deal with section 108 and relationships that have ended and says the following:

“Effect.

349. This section makes it unlawful to discriminate against or harass someone after a relationship covered by the Act has ended.

350. It covers any former relationship in which the Act prohibits one person from discriminating or harassing another,

such as in employment, or in the provision of good and services. It is designed to ensure that treatment of the kind made unlawful by the Act which results from, and is closely linked to, the existence of a relationship is unlawful even though the relationship no longer exists.”

64. That is reflected in the words of section 108 itself. As paragraph 349 of the Explanatory Notes recognises, the section is dealing with the circumstances in which conduct occurring after the end of the relationship is prohibited because it amounts to discrimination under section 108(1) (or harassment under section 108(2)). It is evident from the opening words of section 108(1) (“A person (A) must not discriminate against another”) that the section is defining prohibited conduct. That also appears from the heading to the section (“Prohibited Conduct: Ancillary”). Discrimination is prohibited, if it arises out of and is closely connected to the relationship which used to exist as provided for by section 108(1)(a) of the Act. Further, as paragraph 350 of the Explanatory Notes recognises, conduct is prohibited if it is “treatment of the kind made unlawful by the Act”. That is echoed by the words of section 108(1)(b) which prohibit “conduct of a description constituting discrimination” which would, if it occurred during the relationship, contravene the 2010 Act. Provided that the conduct arises out of and is closely connected to the past relationship, and is of the kind that would constitute discrimination prohibited by the Act, section 108(1) provides that a person must not engage in that conduct after the end of the relationship.
65. So, if as a matter of contract or practice, employers provide benefits for former employees such as concessionary travel, or access to social or sports clubs, or gratuities for those injured in the workplace, it is unlawful for the employer to discriminate in respect of such benefits. Discrimination in relation to such benefits is the kind of treatment that would be unlawful during the employment relationship and would contravene Part 5 of the 2010 Act. It remains unlawful if conduct of such a description occurs after the end of the employment relationship. There is no reason to suppose that Parliament intended to make it unlawful to discriminate *only* in respect of those benefits which, as it happens, could have been provided during the relationship, but where the discrimination occurs after the end of the relationship. The effect of the section is, as the Explanatory Notes recognise, to apply the prohibition on discrimination by conduct of the kind prohibited by the Act to conduct occurring after the end of the relationship which arises out of and is closely connected to the relationship that used to exist.
- 66 Finally, I do not accept the submission of Ms Hodgetts that section 108(1) of the 2010 Act was intended to adopt the test set out in the speeches in *Rhys-Harper*. The House of Lords in that case was dealing with different, and differently worded, legislation. The decision established that the statutory language used in that legislation was capable of applying in certain circumstances to discrimination against (or victimisation of) former employees although, as Underhill LJ observed in *Rowstock* at paragraph 9 “there are in fact some differences between the speeches”. On one reading of the speeches, three of their Lordships considered that the relevant statutory provisions, properly interpreted, prohibited discrimination where there was a sufficient connection between the employment relationship and the discriminatory conduct even if the conduct occurred after the end of the relationship: see per Lord Nicholls at paragraphs 44 to 45, per Lord Hobhouse at paragraph 137, and per Lord

Rodger at paragraph 215. Lord Scott and Lord Hope adopted a different interpretation of the scope of the relevant provisions. I accept that Parliament would not have intended the 2010 Act to provide less protection than that recognised as available under the former legislation by the House of Lords in *Rhys-Harper* (and the interpretation of section 108 that I consider to be correct does not provide a lesser degree of protection). I do not, however, consider that there is any proper basis for concluding that the wording used by Parliament in section 108(1) of the 2010 Act was intended to reflect the differing approaches by the members of the House of Lords dealing with the interpretation of differently worded legislation.

The application of section 108(1) in the present cases

- 67 The next question is whether the alleged discrimination in this case would, if proved, amount to a contravention of 108(1) of the 2010 Act. I deal first with section 108(1) (a) of the 2010 Act. Entitlement to a disablement gratuity under regulation 12 of the 2006 Regulations arises out of the permanent and total disablement of a former police officer as a result of an injury sustained in the execution of his or her duty. The alleged discrimination is the application of a rule requiring that the disablement occur within 12 months of the injury. That alleged discrimination does arise out of and is closely connected to the relationship that used to exist between the appellants and the chief constable of the police force in which they served. It arises out of the rules governing disablement gratuities paid to former police officers in respect of injuries incurred during the execution of their duties which lead to total and permanent disablement.
- 68 I do not accept Ms Hodgetts' characterisation of the situation as one where the chief constable was simply making welfare payments under a statutory scheme which he was responsible for administering. The scheme involves payments made to former police officers as a result of injury in the execution of their duties. Regulation 12 does not apply to persons who were not formerly police officers and it is not a general scheme for the provision of disablement gratuities to those who suffer injury at work. It is a statutory scheme because police officers do not have contracts of employment and the conditions governing service are prescribed by regulations made under the relevant statute. The payment is to be made by the police pension authority (defined in most cases as the chief constable) of the police force in which the police officer last served.
- 69 I deal next with the application of section 108(1)(b) of the 2010 Act. The conduct alleged here is conduct of a description constituting discrimination which would, if it occurred during the relationship, have contravened the 2010 Act. The conduct – the application of the rule requiring that the disablement occur within 12 months of the injury – is capable of being discrimination within the meaning of sections 15 and 19 of the 2010 Act. The conduct is of a kind which falls within the scope of Part 5, notably section 39(2), as it involves access to benefits or, possibly, subjecting the appellants to a detriment.
- 70 In those circumstances, and subject to any other jurisdictional bar, the employment tribunal does have jurisdiction to determine whether the conduct complained of does amount to unlawful discrimination contrary to section 108(1) of the 2010 Act. I would allow the appeal on ground 3.

GROUND 2 – THE MEANING OF PAY

71 In the circumstances, it is not necessary to consider whether disability gratuities paid in the event of an injury in the carrying out of the duties of a police officer amount to pay for the purposes of European Union law for the reasons explained at paragraph 39 above.

CONCLUSION

72 The scheme contained in regulation 12 of the 2006 Regulations does not constitute an occupational pension scheme within the meaning of section 61 of the 2010 Act as it does not provide for the payment of benefits on retirement or on termination of service. Subject to any other jurisdictional bars, the employment tribunal does have jurisdiction to determine if the alleged discrimination contravenes section 108 as the alleged discrimination arises out of and is closely connected to a relationship which used to exist between the appellants and their respective chief constables and conduct of the description constituting the alleged discrimination would, if it occurred during the relationship, have contravened the 2010 Act.

LORD JUSTICE WARBY

73 I agree.

LORD JUSTICE UNDERHILL

74 I also agree. The result is that this appeal is allowed, though on a ground not pursued below. At the risk of spelling out the obvious, our decision means only that the employment tribunal has jurisdiction to entertain the claims, not that they will necessarily succeed: Mr Tolley made it clear that the Respondents will both challenge whether the twelve-month rule gives rise to *prima facie* discrimination under either section 15 or section 19 of the 2010 Act and if necessary advance a case of justification.