Neutral Citation Number: [2024] EAT 73

Case No: EA-2023-000150-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 May 2024

Before:

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

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Between:

ALEXANDER PADY AND OTHERS
("THE FDA CLAIMANTS")

Appellants

- and –

HIS MAJESTY'S REVENUE AND CUSTOMS; THE FOREIGN COMMONWEALTH AND DEVELOPMENT OFFICE; THE HOME OFFICE

Respondents

- -
- -

Ms I Omambala KC and Ms M Stanley (instructed by Slater and Gordon Lawyers UK) for the **Appellants**
Mr A Tolley KC and Ms V Brown (instructed by the Government Legal Department) for the **Respondents**

Hearing date: 12 March 2024

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JUDGMENT

SUMMARY

Practice and procedure – striking out – rule 37(1)(b) Employment Tribunal Rules 2013

The claimants (supported by the FDA union) sought to pursue claims of direct age discrimination in relation to the redundancy payment scheme under the Civil Service Compensation Scheme ("CSCS"). When they lodged their claims before the Employment Tribunal ("ET"), during the course of the summer of 2021, there were already (as those acting for the FDA claimants were aware) on-going claims of a similar nature relating to the CSCS that were subject to a Presidential Case Management Order ("PCMO"), which then extended to the FDA claimants' claims. Shortly after the FDA claims were lodged, in July 2021, those acting for the respondents also drew to their attention the fact that a preliminary hearing on justification, to be determined in sample cases, had been listed for December 2021. No applications were made by the FDA claimants in respect of the preliminary hearing, although legal observers attended on their behalf. On the preliminary hearing, the respondents' justification defence was upheld and the sample claims dismissed. The FDA claimants nevertheless sought to continue their claims, relying on expert evidence, which they contended to be material to the question of proportionality. The ET concluded that the continued pursuit of the claims would be an abuse of process, such as to be scandalous, unreasonable, or vexatious; in the particular circumstances it was determined that the claims should be struck out. The claimants appealed.

Held: dismissing the appeals.

The ET's power to strike out the claims as an abuse of process was an exceptional jurisdiction, underpinned by a public interest in finality in litigation and by the principle that a party should not be twice vexed in the same matter. Although there was no presumption that re-litigation in civil proceedings was an abuse, the ET was entitled to conclude that was so, in circumstances in which the FDA claimants were parties to proceedings that had been case managed under a PCMO, and in which it had been decided that the common issue of justification would be determined, using sample claims, at a preliminary hearing, expressly to reduce the prospect of further substantive hearings. Having regard to the procedural history, the ET had permissibly found that, had the FDA claimants sought to participate, it was inconceivable that their involvement would not have been accommodated. Although the FDA claimants had been entitled to sit on their hands, to then seek to re-litigate the point that had been determined at the preliminary hearing would undermine the ET's case management of the proceedings such as to put the respondents at risk of repetitive litigation and to bring the administration of justice into disrepute. The ET had taken into account the new evidence, but had concluded that this could reasonably have been obtained and/or highlighted prior to the December preliminary hearing, and that, having regard to the nature of the respondents' justification defence, it would not, in any event, have changed the aspect of the case; as such the ET had permissibly concluded that this did not alter its conclusion on abuse. Having applied the correct legal test, and taking into account all relevant factors, and not having regard to irrelevant matters, the ET had been entitled to conclude that allowing the issue of justification to be re-opened would be manifestly unfair to the respondents and would bring the administration of justice into disrepute. In these circumstances, no error of law arose from the striking out of these claims.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal raises questions about the approach to be adopted by an Employment Tribunal ("ET") when exercising its power to strike out a claim under rule 37(1)(a) of schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") on the basis that its continued pursuit would amount to an abuse of process and would thus be scandalous, unreasonable or vexatious. In giving this judgment, I refer to the parties as the claimants and respondents, as in the proceedings below. This is my determination of the claimants' appeal against a decision of the Bristol ET (Regional Employment Judge Pirani, sitting alone on 16 November 2022), sent out on 23 December 2022; by that decision, the claimants' claims were struck out as an abuse of process.

2. Representation below was as it has been on the appeal save that Mr Tolley KC is now assisted by Ms Brown of counsel.

The Claims

3. The claims in these proceedings are brought by 20 claimants who are all members of the First Division Union ("FDA"), an independent trade union representing professionals and managers in public service; before the ET they were referred to collectively as "*the FDA claimants*"; they are represented by Slater and Gordon Lawyers ("SG").

4. The claims arise out of the operation of the Civil Service Compensation Scheme (the "CSCS"), a statutory scheme governing (amongst other things) compensation payments made to those who fall within the ambit of the CSCS in the event of a redundancy. The CSCS was established by the **Superannuation Act 1972** and was previously part of the Principal Civil Service Pension Scheme (the "PCSPS"). Since 1995, the CSCS has been contained within a separate document, although it operates in conjunction with, and alongside, the PCSPS, which is an occupational defined benefit scheme with a normal pension age ("NPA") of 60. Crown employees do not have a statutory right to a redundancy payment under the **Employment Rights Act 1996**, but the CSCS provides for a non-contributory scheme of benefits such that civil servants dismissed on grounds of redundancy are, subject to eligibility, entitled to compensation calculated on the basis of one month's pay (within a defined range) and length of service, which is then tapered down as the

employee nears NPA, although (subject to six years' service) it is never tapered below six months' pay. What are referred to as the cap and taper provisions, that thus apply in relation to such redundancy benefits under the CSCS, are the subject of the claims in these proceedings; these are said to give rise to unjustified direct age discrimination contrary to the **Equality Act 2010** ("EqA").

The Procedural History

*Proceedings in **Elliott**, and in the **Newby** and **Paskins** Claims*

5. The CSCS redundancy scheme was initially the subject of challenge in an individual claim of direct age discrimination brought by a Ms Elliott against the Parliamentary and Health Service Ombudsman. That case was heard by the London Central ET in September 2019, with judgment in favour of Ms Elliott being sent out on 19 November 2019. An appeal was filed, but proceedings were subsequently resolved by agreement.

6. During the course of 2020, various further claims of age discrimination, challenging the provisions of the CSCS, were lodged in different ET regions in England and Wales; most, but not all, of the claimants were supported by the Public and Commercial Services Union ("PCS") and represented by Thompsons Solicitors.

7. The number of claims (both represented and unrepresented) led to a Presidential Case Management Order (the "PCMO") of 30 March 2020, which provided that the claims would be split between: (1) those relating to voluntary redundancy, or voluntary exit, compensation payments (schedule A claims); and (2) those challenging the provisions for compulsory redundancy compensation payments (schedule B claims); the former were to be stayed and transferred to the Bristol ET, the latter to Manchester. The claims subsequently proceeded under the title "*Newby and ors, and Paskins and ors*" ("**Newby**").

8. Having regard to the overriding objective and to the "*distribution of judicial and administrative workload and resources as between the Employment Tribunal regions*", it was specifically ordered that all the claims that had been filed at that time "*and all such future claims of a similar kind*" were thus to be stayed and transferred to the specified ET, where they would be "*combined and case managed in accordance with the directions of the Regional Employment Judge*". In respect of both schedule A and schedule B claims, particular cases were identified such that consideration was to be given to those cases

being treated as lead cases for the purposes of rule 36 **ET Rules**. In the event, however, no order was in fact made under rule 36.

9. The PCMO further provided:

> "AND in respect of claims in both Schedule A and Schedule B all currently listed hearings in these claims be vacated and all current case management orders stayed subject to the Regional Employment Judges at Bristol and at Manchester convening separate case management hearings on notice to all parties to determine how best to proceed in the light of the representations of the Government Legal Department dated 19 March 2020 and any representations that might be made by individual claimants.
> …
> AND any party or representative wishing to make representations for the further conduct of any such claims should do so upon application to the Regional Employment Judge at Bristol or the Regional Employment Judge at Manchester as the case might be (and copied to any other interested party or person)."

10. The PCMO was sent to the Advisory, Conciliation and Arbitration Service (ACAS) and to all known interested parties, and a copy was published on the Judiciary website.

11. The first case management preliminary hearings were convened (by video) on 16 October 2020 before the Regional Employment Judges for Manchester (in the morning) and Bristol (in the afternoon). Most of the claimants were members of PCS and were represented by counsel instructed by Thompsons, although some other claimants were present, represented by their solicitors or, in one case, appearing in person. There was consensus at the hearing that it would be appropriate for the Schedule A and Schedule B cases to be combined for hearing even if they remained in different regions for the purposes of case management. It was further suggested that sample claimants should be selected from those represented by Thompsons and reference was made to the need to ensure a sufficient selection of sample claimants if the issue of justification was to be dealt with as a preliminary point; case management orders were duly made, directing that written submissions be lodged on these questions by specified dates in November 2020. A written summary of the 16 October 2020 hearings, together with the case management orders that had been made, was sent out on 21 October 2020; it included a "*liberty to apply*" provision, in the following terms:

> "Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible."

12. At the hearings on 16 October 2020, there had been a dispute between the representatives as to whether justification under the **EqA** (an issue common to all claims) should be dealt with as a preliminary

issue; determination of this question had been reserved and the ET's reasoned decision on the point was sent out on 11 November 2020. By that decision, it was held that there should be a public preliminary hearing to deal with justification as that would maximise the possibility that there would only be one substantial hearing in the litigation. Subsequently, on the respondents' application, and for reasons explained in the ET's order following further case management hearings on 10 December 2020, that decision was revoked, although, having received additional submissions on the point, in a later decision sent to the parties on 10 March 2021 (as part of the record of the orders made on 10 December 2020), the ET again ruled that the issue of justification should be dealt with as a preliminary point. In reaching this conclusion, the ET accepted there was a risk that there might be jurisdictional issues (as to whether claims had been presented in time) in one or more of the sample cases, which might entail more than one hearing, but held this did not outweigh the potential benefits from proceeding with a preliminary hearing on justification: if the justification defence was successful, that would be an answer to all the claims; if rejected, it would still be open to the respondents to apply for any particular claim to be struck out on jurisdictional grounds.

13. The ET's decision also gave directions for the preliminary hearing, which was set down for eight days (to include time for deliberation and judgment) commencing 2 December 2021. In the event, the hearing commenced on 6 December, continuing over seven days, until 17 December 2021.

14. Although no unrepresented claimants or solicitors for non-Thompsons claimants were present at the hearing on 10 December 2020, the ET's order again provided a general liberty to apply (orders paragraph 11.1) and expressly stated (paragraph (9) of the case management summary) that any party or representative not present during the hearing might apply for a variation of any direction made as a result.

15. A further application by the respondents was then made in April 2021, raising the concern that the sample cases selected for the preliminary hearing on justification might include claimants who were unrepresented or represented by solicitors other than Thompsons. Having given the parties the opportunity to make written submissions, the ET considered this matter on the papers, sending out its decision on 5 May 2021. Rejecting the concerns expressed by the respondents, the ET observed that it was common for cases to involve claimants who were separately represented, or a mix of represented and unrepresented parties, and that the provisions of rule 41 of the **ET Rules** were sufficient to enable such a public preliminary hearing to be conducted in accordance with the overriding objective.

The FDA Claims

16. In June and July 2021, the FDA claimants, represented by SG, presented their claims, brought against various central government departments. At that stage, they were aware there was an extant appeal in **Elliott** (reliance was placed on the ET's determination in that case in the grounds attached to the FDA claimants' ET1s) and that other similar cases were pending before the ET.

17. In lodging claims on behalf of their clients, SG wrote to the Government Legal Department ("GLD") on 4 June 2021, saying they were issuing protective claims, subject to the decision of the EAT in **Elliott**. It was recorded that, as the employers were all central government departments and the claims involved the PCSPS, SG had asked the ET to join the claimants' claims and hear them together at London Central ET. The letter ended stating that the claimants would not object to the GLD "*seeking an adjournment to put in an ET3*" until after the determination of the appeal in **Elliott**.

18. Responding to a claim that had been brought against the Home Office, by email to the London Central ET of 1 July 2021, copied into SG, the GLD explained that it was acting for the Cabinet Office and:

> "a number of respondents to various claims which are subject to the Presidential Case Management Order dated 30 March 2020 … attached"

And sought to make an:

> "**Application for stay on proceedings and transfer to Bristol Tribunal**
> The PCMO addresses Schedule A and Schedule B claims. Given that this claim is a Schedule A claim, we hereby apply for the claim to be stayed and transferred to Bristol Employment Tribunal, and to be case managed with other similar claims."

Observing that:

> "… we confirm we have copied this application to the Claimant and advised that any objection to the application should be sent to the Tribunal as soon as possible."

A copy of the PCMO was duly attached to the GLD's email, although it is apparent (as explained in subsequent correspondence from SG of 14 June 2022) that SG had in fact also seen this on the Judiciary website.

19. By further emails to the Bristol ET dated 12 and 13 July 2021 (copied into SG), the GLD similarly provided responses to various claims lodged by SG against the Commissioner for Her Majesty's Revenue and Customs ("HMRC"), in each instance explaining:

> "1. We act for the Respondent in this matter, and write to file a Response to this Civil Service Compensation Scheme claim. The "Amended Response" (27 November 2020) is a generic response to this claim and similar claims that are

> subject to the Presidential Case Management Order dated 30 March 2020 ("PCMO") … attached …
> 2. We submit that the effect of the PCMO is that this claim was stayed on receipt, and that the PCMO suspended the obligation to present a Response in each of these CSCS cases. Nevertheless, we do so in order to avoid any question of default.
> 3. We understand that this case will now be stayed and managed at the Bristol ET with the other Schedule A voluntary redundancy claims."

20. By email of 12 July 2021, from the GLD to SG directly, similar points were made as to the case management of the FDA claims, as follows:

> "I understand you act for at least a few claimants who are complaining of age discrimination in relation to their Civil Service Compensation Scheme redundancy payments.
> I am writing to let you know (you may be aware) that these claims are now subject to a Presidential Case Management Order.
> These claims are proceeding to a hearing in December 2021 to determine the question of objective justification in respect of relevant lead or "sample" cases. The Regional Employment Judges at Manchester and Bristol have made case management orders to that effect and sample cases have been chosen.
> If you are able to share a list of the claimants for whom your firm acts, that would be very helpful."

21. On 16 July 2021, Bristol ET confirmed the responses lodged by HMRC had been accepted, stating:

> "The cases remain linked to the national multiple of Paskins & others and are being treated accordingly."

22. Later in July 2021, similar correspondence emanated from the GLD in respect of further claims lodged in the London Central ET by SG against HMRC, again adding the observation that, in relation to the application to transfer the cases to Bristol and for their case management under the PCMO, any objection on the part of SG should be made in writing to the ET as soon as possible. The same approach was adopted in relation to subsequent claims lodged by SG over the next few months.

23. No objection or any other observations were made by SG at that stage and, during July and August 2021, it was confirmed by the London Central ET that the claims that had been lodged with it had been transferred to Bristol in accordance with the PCMO of 30 March 2020.

24. It was only in the latter part of November 2021 that SG made contact with GLD regarding the case management of these claims. A telephone call took place on 23 November 2021, followed by an email of the same date, during which SG confirmed that it was acting for 20 claimants and sought to clarify the responses that had been filed. It was further noted that all but one of the claims had either been issued in, or subsequently transferred to, the Bristol ET and a request was made for a copy of the notice of the Preliminary Hearing for December "*for our records*". Also on 23 November 2021, shortly after

communicating with the GLD, SG emailed Watford ET (where there continued to be one claim that had not been transferred to Bristol), confirming that the transfer of that claim to Bristol was agreed and, referring to the earlier request for the cases to be dealt with by the London Central ET, that:

> "… we now agree all similar claims are being dealt with at Bristol or Manchester under the Presidential Case Management Order dated 30 March 2020."

25. On 8 December 2021, the GLD responded to SG, explaining that the preliminary hearing was due to begin hearing evidence the next day (by CVP), finishing the following week, and asking whether SG wished to have joining instructions (if these had not already been obtained). By email of 9 December, SG accepted the offer of joining instructions and I understand that a junior solicitor duly attended as an observer at the public preliminary hearing on 9, 10, 13, 16 and 17 December 2021. It was, however, only by email of 17 December 2021 that SG wrote to the GLD asking to be sent "*all orders relating to the PH as well as the bundle of documents and Counsel's written submissions*". By further email of 23 December 2021, SG wrote to Bristol ET asking to be copied into all future correspondence regarding the linked claims.

*The Decision in **Newby***

26. The preliminary hearing on justification had taken place before Judge Doyle, Ms Anne Gilchrist and Mr John Murdie ("the Doyle ET") and resulted in a 70-page decision, which was sent out on 17 January 2022. At the hearing, the respondents (represented by Mr Tolley KC) conceded the issue of less favourable treatment because of age, but contended this was a proportionate means of achieving a legitimate aim. The Doyle ET considered this question in five sample cases (recording that it had been agreed, and approved by the ET, that the issues should be resolved in this way), which covered the following categories of claim: (1) compulsory redundancy at or above NPA on termination of employment; (2) voluntary redundancy at or above NPA on termination of employment; and (3) voluntary redundancy within 15 months of NPA on termination of employment. Evidence was given by the five sample claimants (represented by Mr Mitchell of counsel) and from the single witness for the respondents, Mr Peter Spain, who was the Head of the Pensions Policy and Technical Team in the Civil Service and Royal Mail Directorate within the Cabinet Office.

27. The Doyle ET accepted that the seven aims relied on by the respondents were genuine and legitimate "*whether taken individually or collectively, particularly when viewed as a cohesive and coherent set of ends,*

aims or objectives" (paragraph 311, Doyle ET decision). Going on to consider the question of proportionality, the Doyle ET noted that the more serious the disparate adverse impact, the more cogent must be the justification, and that it was for the ET to weigh the reasonable needs of the undertaking against the discriminatory effect of the measure and make its own assessment as to whether the former outweighed the latter. Accepting the respondent's case on proportionality, advanced on eight bases in Mr Tolley's closing submissions, the Doyle ET considered that:

> "336. … The claimants' case is essentially one built upon a perception of unfairness in circumstances where any integrated scheme designed to compensate for loss of employment while also providing immediate or anticipated access to pension benefits must draw the line at some point by reference to length of service and/or age. The [CSCS], although not a perfect scheme by any means, and being also a scheme that also needs updating and reform, draws that line appropriately and with due regard for safeguarding the position of employees who fall marginally either side of the line."

28. Thus, while finding that the CSCS was an age discriminatory scheme, the Doyle ET concluded that it was also a proportionate means of achieving a legitimate aim. As such, the claims of direct age discrimination brought by the sample claimants failed and were dismissed.

*Events Subsequent to the Decision in **Newby***

29. After the decision of the Doyle ET was promulgated in **Newby**, by letter of 24 January 2022 the ET wrote to all claimants subject to the PCMO setting out the finding that had been made and explaining the time-limit for any appeal. It was stated that, if an appeal were pursued, it would be "*very likely that all cases will remain stayed until the conclusion of the appeal*"; if there was no appeal, however, it was advised that:

> "… the Tribunal is likely to write to the remaining claimants with a proposal that their claims be struck out because they have no reasonable prospect of success given the decision in the sample cases. There will be an opportunity to argue that a case should not be struck out on that ground …"

30. In the event, no appeal was pursued against the **Newby** decision. Accordingly, on or about 1 April 2022, the ET wrote out again to all claimants who were subject to the PCMO, explaining that:

> "Although in principle the concept of proportionality involves a balancing exercise between the discriminatory effect of the provisions and the legitimate aim, in practice it is very unlikely indeed that the outcome would be different in any individual case given that the same terms of the scheme were applied to all the claimants in this litigation."

and setting out the proposal that the remaining claims be struck out:

> "Accordingly it appears in the light of the [Doyle ET] Judgment … that none of the complaints of direct age discrimination brought by any of the claimants in these proceedings have any reasonable prospect of success …"

allowing for any objection to that course to be made within 28 days.

31. On 29 April 2022, SG wrote to the ET, objecting to the proposal to strike out the FDA claims and requesting an oral hearing. Observing that the claims of the FDA claimants had been presented in June and July 2021, that they had made no submissions on the terms of the PCMO, which was already in place, and had not been involved or represented during the case management stages in relation to the selection of the sample claimants and/or the arrangements for the hearing in December 2021, it was further contended that there were notable omissions in the manner in which the **Newby** claimants ran their claims before the ET, and it was stated that the FDA claimants would wish to obtain evidence which "*could entirely change this aspect of the case (in that it could lead to a different finding on whether the relevant provisions of the CSCS are a proportionate means of achieving a legitimate aim)"*. Subsequently, in further correspondence of 14 June 2022, SG sought to distinguish the case of **Ashmore v British Coal Corporation** [1990] 2 QB 338, again emphasising that the FDA claimants had not been represented at any hearing determining the identity of the sample claimants or invited to make any submissions as to who such claimants should be.

The ET's Decision and Reasoning

32. At the hearing on 16 November 2022, Regional Employment Judge Pirani ("the Pirani ET") approached the question of strike out on the following bases (ET decision, paragraph 67): (1) the burden is on the party seeking to strike out; (2) strike out is not inevitable, even if abuse is found; (3) the jurisdiction to strike out for abuse is an exceptional jurisdiction and re-litigation is not *prima facie* an abuse of process; (4) the bar to a finding of abuse is high. Proceedings may be abusive if it would be "*manifestly unfair*" to allow a challenge to earlier findings or if to permit such a challenge would "*bring the administration of justice into disrepute*"; (5) strike out must be in accordance with the overriding objective set out in rule 2 (**ET Rules)**, consideration should be given to whether there is a less draconian response; (6) the FDA claimants had discrimination claims which were of a high public interest; (7) the Tribunal decided *not* to deal with the claims by way of binding lead cases in accordance with rule 36 (**ET Rules)**. It was further observed that:

> "68. These cases were managed at the outset in accordance with the overriding objective set out in rule 2 of the Employment Tribunal Rules. In other words, in

> addition to ensuring that the cases were dealt with fairly and justly the tribunal sought to manage the multiple in ways which are proportionate to the complexity and importance of the issues as well as avoiding delay and saving expense. As is the case with other multiples involving cases with similar or identical factual and legal issues, it was necessary for the Employment Tribunal to devise some means of dealing with the cases in ways which avoided the need of trying each one separately. When devising such case management care must also be taken to ensure that the course of proceedings is not manipulated by a party for tactical advantage."

33. The Pirani ET referred back to the reasoning that had informed the decision to determine the question of justification as a preliminary issue, noting that re-litigation of the same points, using evidence which could have been obtained prior to the **Newby** hearing, would defeat the object of the PCMO and litigating sample cases (ET, paragraphs 69-70). Unless there was fresh evidence justifying re-opening an issue, it would, moreover, be no answer to say that, if the further claims failed, the respondent could be compensated in costs (**Ashmore**); that would fail to take into account the wider interests of justice, in particular when ETs were subject to a post-pandemic backlog. As in **Ashmore**, the ET had gone to considerable lengths to enable the parties to advance their best cases, so that as many issues of fact and law covering the various permutations of the schemes could be raised and decided after the fullest inquiry and investigation; and the PCMO had expressly provided for liberty to apply, so any party wishing to make representations for the further conduct of such claims could do so (ET, paragraphs 71-74).

34. Although it was common ground that the doctrine of *res judicata* estoppel was not in play, the Pirani ET noted the acceptance by the FDA claimants that, in relation to sample cases, there was no absolute right to re-litigate points that had been determined, and that (particularly in union-backed litigation) the determination of sample claims on points of principle would very often be sufficient for the parties to resolve the other claims that had been stayed (ET, paragraph 75). The Pirani ET further recorded that:

> "76. … as the CSCS schemes apply in the same way to all claimants, within the various categories, it is not contended on behalf of the FDA claimants that there are any relevant factual differences between any of the cases of the FDA Claimants and the circumstances of one or more of the sample PCS Claimants."

35. The FDA claimants had emphasised that they had been joined to the multiple relatively late in the day, but the Pirani ET noted that, from the outset, it was recognised that their claims were to be managed as one, because they all involved claims under the CSCS. Moreover, the GLD had sent SG a copy of the PCMO and had, in its email of 12 July 2021, explained that the claims were proceeding to a hearing in December 2021 to determine the question of justification in respect of relevant sample cases. SG had also

been provided with a copy of the generic response to the claims, which made clear the issues raised on the issue of justification; subsequently, a link to the CVP hearing was forwarded to SG and a legal representative attended as an observer. (ET, paragraphs 77-90). In the circumstances, while this case was not on all fours with **Ashmore**, the Pirani ET did not accept that the FDA claimants could not have participated in the December 2021 hearing:

> "90. … Had S&G, at any stage, prior to the hearing in December 2021, indicated that they either wished to have input into the hearing by way of (i) providing sample claimants (ii) providing other evidence, or (iii) just wished to make submissions at the hearing then it is inevitable that further case management would have taken place so this could be discussed. Of course, it is also trite law in ETs that a party who intends to rely upon expert evidence should usually explore with the ET whether that evidence is likely to be acceptable, either in correspondence or at a preliminary hearing.
> 91. It is inconceivable that an Employment Judge would not have facilitated their involvement. The ET would have then done what it could, in accordance with rule 2, to seek to ensure that there would be only one objective justification hearing. To do otherwise would have undermined the whole purpose and effect of previous case management orders.
> 92. Even if the FDA claimants had indicated during the December hearing itself that they wanted input into the hearing or indicated the possibility of calling evidence on the justification point it is virtually certain that the Doyle tribunal would have adjourned either to discuss the issue or to facilitate this process."

Allowing that it would not have been practicable for the FDA claimants to have prepared for full involvement in the December 2021 hearing, it was nevertheless noted that they had had a period of at least five months (possibly more than six months) to make a procedural intervention prior to that hearing (ET, paragraphs 93-95, and 98). As for the claimants' submission that inaction was not the same as abuse, the Pirani ET was clear:

> "96. The fact that S&G were not involved in the selection of the PCS sample claims is precisely the reason why they should have intervened had they wished to do so. A wait and see approach, if that is what occurred, is not compatible either with rule 2 or the desire to avoid overlapping and repetitive substantive hearings about objective justification.
> 97. If permitted, such an approach would encourage parties to sit on their hands and avoid costs to see if their interests and objectives could be achieved by the time and expense of others. Further, as the respondents have pointed out, it would clearly not be open to them, had they lost on objective justification, to re-run the same point against a different set of claimants, whether that be the FDA claimants or any others who were subject to the PCMO. Both these matters go to the effective administration of justice."

36. As for the additional evidence on which the FDA claimants sought to rely - which took the form of an expert report from a Mr Gibson - the Pirani ET noted that this had been served less than 24 hours before skeleton arguments had been directed, without prior reference, or explanation as to when it was

commissioned. Observing that the claimants were not seeking to say that the proposed fresh evidence could not, with reasonable diligence, have been obtained earlier and adduced at the December 2021 hearing, the Pirani ET was satisfied that evidence akin to the Gibson report could either have been obtained by the time of that hearing or its potential desirability and/or existence highlighted to the ET (ET, paragraph 102).

37. As it was the FDA claimants' case that their claims were not abusive because they were seeking to rely on fresh evidence which could entirely change an aspect of the case, and thus justified the re-opening of the issue of justification, the Pirani ET went on to consider the content of the Gibson report (albeit this was relied on only as indicating "*the sort of expert evidence the FDA Claimants would wish to call*"), and the criticism therein as to alleged "*systemic errors*" in Mr Spain's evidence as to the calculation of benefits and losses (ET, paragraphs 103-105). Observing that it was not said that the Gibson Report (or evidence like it), would be likely to have a decisive effect on the outcome of any further hearing, or even that it would probably have an important influence on the result (ET paragraph 106), the Pirani ET noted that the propositions to be derived from the statistical evidence produced by Mr Spain were relied on by the respondents as only one of numerous points in support of their case on justification:

> "106. … In the context of the overall justification defence, it was relied on as one of seven principal points relating to proportionality in opening, and one of eight in closing submissions. The **Newby** judgment accepted all the respondent's submissions on proportionality."

38. As for the suggestion in the Gibson report that more account should be taken of the value of pension benefits that the individual might have accrued had they continued in employment as well as the cost of the member contributions (it being said that the result of this omission was that the analysis "*slightly overstates the loss*"), the Pirani ET found that such points had been addressed by the Doyle ET, not least as some of the individual claimants had provided evidence on the same issue (ET, paragraph 112).

39. Having considered the reasoning of the Doyle ET on proportionality (ET, paragraphs 107-114), the Pirani ET concluded:

> "110. In essence, it was accepted by the Doyle Tribunal that the taper and minimum payment operate as part of an overall package which makes relatively generous provision for employees close to normal pension age, who lose their employment on grounds of redundancy and who would not otherwise be able to claim compensation."

Going on to find:

> "111. Mr Spain's evidence was material, but not determinative. Points can be made

> for and against the arguments set out in both the Gibson report and Mr Spain's evidence. This is the case with almost all litigation and almost all experts' reports. For example, the respondent says the Gibson report misses the key point about the purpose of the CSCS scheme bridging the gap between termination of employment and entitlement to receive full (in the sense of unreduced) payment of pension at normal pension age under the PCSPS."

40. Having regard to all the points identified in the Gibson report, and applying the test laid down in **Allsop v Banner Jones Ltd** [2021] EWCA Civ 7, [2022] Ch 55, the Pirani ET concluded that seeking to re-litigate the same points was, on the specific facts of this case, an abuse. Accepting that this was not a case where the bringing of the claims had been an abuse of process, the Pirani ET found that this became an issue post the judgment in **Newby**; at that point, considerations of public policy and the interests of justice in accordance with the overriding objective were paramount, and allowing the claims to proceed could cause a sense of injustice to those who have already lost. Holding that this was not a case where it could be said that the fresh evidence would, should or could entirely change the aspect of the case, or foundation of the claim or the defence to it (even accepting that a more fully formed report would be produced in due course), not only would it be manifestly unfair to the respondents that the same issues were re-litigated, but such re-litigation would bring the administration of justice into disrepute. In the circumstances, there was no less draconian response which would be suitable other than to strike out the claims (ET decision, paragraphs 115-116).

The Legal Framework

41. The claimants' claims were brought as complaints of direct age discrimination under section 13 **EqA**; as such, by section 13(2), it is allowed that a respondent may rely on a defence of justification if able to establish that the impugned treatment is a proportionate means of achieving a legitimate aim. The assessment of proportionality in this context requires that:

> "The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aim or aims in assessing the necessity of the particular measure chosen." *per* Lady Hale at paragraph 50(6) **Seldon v Clarkson Wright and Jakes** [2012] UKSC 16, [2012] ICR 716.

42. Where an employer seeks to justify the operation of what would otherwise amount to a discriminatory scheme or policy, it is the task of the ET to conduct a critical evaluation of the scheme in question; as Pill LJ observed, in **Hardys and Hansons Plc v Lax** [2005] EWCA Civ 846, [2005] ICR 1565:

> "32. … The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal … is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."

43. As was held in **Pitcher v The University of Oxford & Anor** and **University of Oxford v Ewart** [2022] ICR 338 EAT, the nature of the proportionality assessment is such that it is possible for different ETs to reach different conclusions when considering the same measure adopted by the same employer in respect of the same aims. The cases of **Pitcher** and **Ewart** had, however, not been subject to a PCMO and had not proceeded as sample claims. Moreover, the presentation of the claims in those cases, and the evidence before the two ETs, had differed in a number of material respects.

44. By rule 37(1) of schedule 1 of the **ET Rules**, it is provided that:

> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds— (a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

45. Considering a previous iteration of this rule, under schedule 1 of the **Industrial Tribunals (Rules of Procedure) Regulations 1980**, in **Ashmore v British Coal Corporation** [1990] 2QB 338, the Court of Appeal confirmed that a claim may be struck out as scandalous or vexatious where it seeks to re-litigate a case that has previously been determined. Ms Ashmore was one of some 1,500 women who had brought equal pay claims against British Coal, where that litigation had been case managed by the Tribunal by staying all but a selection of sample cases. After a trial of the sample cases, the claims were dismissed, it being found that the women had not been employed on like work with their comparators and, in any event, the difference in pay was due to a material factor other than the difference of sex. Upon Ms Ashmore seeking to proceed with her claim, it was struck out as vexatious. In upholding that decision, Stuart-Smith LJ (with whom the other two members of the court agreed) rejected the argument that, unless estopped by *res judicata*, issue estoppel, or agreement to be bound by the determination of the sample cases, Ms Ashmore

had an absolute right to have her claim litigated, holding (p 348B-E):

> "… A litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material. In *Hunter v Chief Constable of the West Midlands* [1982] A.C. 529, at page 536 Lord Diplock, with whose speech the rest of the House agreed, said:
>
> > 'My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.' "

46. Considering the various bases on which it might properly be determined that the bringing, or pursuit, of a claim should be struck out as an abuse of process, in **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 HL, Lord Bingham of Cornhill set out the following statement of principle:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all." (see p 31A-B)

concluding that the determination requires:

> "… a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before." (p 31C-D)

47. Similarly, in **Michael Wilson & Partners Ltd v Sinclair and ors** [2017] 1 WLR 2646 CA, it was held that, in cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests:

> "… the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter's* case [1982] Ac 529, Lord Hoffmann in the *Arthur J S Hall* case [2002] 1 AC 615 and Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the

> administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter's* case. Both or either interest may be engaged." (per Simon LJ at paragraph 48(1))

48. Returning to the decision in **Ashmore**, Ms Ashmore's attempt to pursue her claim after the determination of the sample cases was seen as analogous to a collateral attack on the earlier decision, such that its pursuit would be an abuse:

> "… where sample cases have been chosen so that the tribunal can investigate all the relevant evidence as fully as possible, and findings have been made on that evidence, it is contrary to the interests of justice and public policy to allow those same issues to be litigated again, unless there is fresh evidence which justifies re-opening the issue" (p 348H-349A)

49. In this regard, it is relevant to note that, in litigation involving multiple claimants pursuing similar claims, where a decision has been made on a sample case which has not otherwise been appealed, it can be open to one of the claimants whose cases have been stayed to seek to challenge that decision on appeal, see *per* Lewis J (as he then was) at paragraphs 21-31 **Martineau and Others v Ministry of Justice** [2015] ICR 1122 EAT.

50. In **Ashmore**, Stuart-Smith LJ further rejected the argument that, if Ms Ashmore's claim ultimately failed, the employer could be compensated in costs:

> "Even if an award of costs is made … it does not always amount to an indemnity, and is seldom compensation for the inconvenience and disruption caused by litigation. Moreover, it is not in the interests of justice that the time of the courts or tribunals is taken litigating claims that have effectively already been decided. Furthermore, if the applicant is to be at liberty to pursue her claim, I can see no reason in principle why the 1,486 other applicants, who were not among the sample claimants, should not also have a similar right. … That would plainly defeat the whole object of having the 14 sample cases. …" (p 349B-D)

51. Also rejecting the submission that such a claim could only be struck out as an abuse of process if it were a sham, not honest or *bona fide*, Stuart-Smith LJ continued:

> "… it is dangerous to try and define fully the circumstances which can be regarded as an abuse of the process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend upon all the relevant circumstances. In the present case there was a large number of claims which raised similar issues against the same employers. The tribunal went to great length to devise arrangements which would enable the legal representatives of the parties to put forward their best cases so that as many issues of fact as possible could be raised and decided upon after the fullest inquiry and investigation. If the applicant or her advisers wished her case to be one of the sample cases, they could have applied at any time before the hearing for that to be done; she did not do so." (p 352D-F)

52. Stuart-Smith LJ accepted that, if it was Ms Ashmore's contention that there was evidence that had

not been presented to the Tribunal in the sample cases but which might affect the decision that had been reached:

> "… we should have to consider that evidence and whether it satisfied the test which would make it inappropriate to strike the claim out …" (p 354D)

Although that issue did not in fact arise in Ms Ashmore's case, Stuart-Smith LJ in any event went on to consider the correct test that would then need to be applied:

> "… it appears to me that the correct test for determining whether fresh evidence is of such a kind that the court should permit a claim which would otherwise be an abuse of the process of the course is that it "should entirely change the aspect of the case". This was the test propounded by Lord Cairns LC in *Phosphate Sewage Co. Ltd v Molleson* (1879) 4 App.Cas. 801, 814 and adopted by Goff LJ in *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, 334, in preference to the less rigorous test applied on the admission of fresh evidence on appeals as laid down in *Ladd v Marshall* [1954] 1 WLR 1489, 1491, namely , that "it would probably have an important influence on the result of the case, although it need not be decisive." The judgment of Goff LJ was approved in the House of Lords when the case went there under the name of *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 545, per Lord Diplock." (p 354E-G)

Phosphate Sewage Co. Ltd v Molleson (1879) 4 App Cas 801 was a case where the principle of *res judicata* applied so as to prevent the attempted re-opening of the litigation. Although it was contended that the further claim was based on a new allegation of fraud, that was rejected as a potential basis for the re-litigation as the new facts relied on were known to the claimants previously (and could have been the subject of an application to amend the earlier claim) and would not, in any event, had been sufficient to change "*the whole aspect of the case*" (*per* Lord Cairns LC, at p 814). This test - which sets a higher standard for the admission of fresh evidence than that laid down in **Ladd v Marshall** [1954] 1 WLR 1489 ("*would probably have had an important influence on the result of the case*") - was expressly adopted by Goff LJ (as he then was) in **McIlkenny v Chief Constable of the West Midlands** [1980] QB 283, 334-335, when considering an attempt to pursue civil claims in respect of allegations that had been rejected within earlier criminal proceedings; Goff LJ's judgment was subsequently approved by the House of Lords in the appeal in that case, under the name **Hunter v Chief Constable of the West Midlands Police** [1982] A.C. 529.

In **Ashmore**, there was no attempt to rely on new evidence, and Stuart-Smith LJ was satisfied that:

> "… if the matter were relitigated on the applicant's claim, she would merely invite the tribunal to reach different findings of fact on the same evidence, as a result perhaps of different arguments being addressed to it. That, in my judgment, is not in the interests of justice; nothing could be calculated to cause a greater sense of injustice in those who lost in [the sample cases] …, if some other tribunal reached a different result on the same evidence. …" (pp 353H-356A)

53. The fact-specific nature of the assessment that is to be undertaken when determining the question of abuse is also apparent from other cases. Thus, in **Department of Education and Science v Taylor and others** [1992] IRLR 308 QBD, an appeal was allowed against the ET's striking out of the employer's response in circumstances in which earlier claims had been successful and the employer's appeal in those cases had been abandoned. Holding that the ET had wrongly transplanted the ruling in **Ashmore** to the different circumstances of **Taylor**, Auld J (as he then was) noted that, in **Ashmore**, the initial claimants had been selected as sample claimants with "*everyone's consent*" and so as to overcome the problem of multiplicity in that litigation; that was not the position with the earlier claims with which the **Taylor** proceedings were concerned. More generally, Auld J observed:

> "55 The Court of Appeal's decision in *Ashmore* has not changed the established principles … It is simply a case where the party seeking to avoid relitigation has been able to show in the special circumstances of the case that it would be an abuse of process for the matter to go forward. Those circumstances are not present here. At the end of the day, the question is not so much whether this case is distinguishable from *Ashmore*, but whether the Tribunal directed itself properly in law so as to correctly identify the issues. In my judgment … it misdirected itself in law by disregarding the general principle of entitlement to relitigate an issue where res judicata or issue estoppel does not apply, and thus wrongly imposed upon the Department the obligation of establishing a good reason for litigation. …"

54. In **In re Norris** [2001] UKHL 34, [2001] 1WLR 1388, the approach in **Ashmore** was also distinguished, with the following observations being made as to the particular context of that litigation:

> "The *Ashmore* case is essentially a case of the marshalling of litigation. Where a civil court (or tribunal) is faced with an incident for which a defendant may be liable and which injured a large number of people or some situation where a large number of people similarly placed wish to make a contested claim against another, as was the case with the sex discrimination claim against the British Coal Board being made in the *Ashmore* case, the court, as a necessary part of the administration of justice, has to be prepared to make orders requiring the interested parties to come forward so that appropriate cases can be selected for trial and the parties can address the court upon whether their case raises any different issues from those selected. Each party has an opportunity to persuade the court that its case requires special treatment and should not follow the result of the selected cases. Any aggrieved party may seek to appeal such a procedural order. Where some interested party has been content not to intervene and awaits the outcome of the substantive trial, he must abide by the result, even if adverse, save possibly for seeking belatedly to intervene in order to support an appeal against the substantive decision. Simply to seek to relitigate the whole thing over again is an abuse of process and will not be allowed, as is more fully explained in the judgment of Stuart-Smith LJ in that case, [1990] 2 QB 338, at 345-355." (see per Lord Hobhouse at paragraph 26)

55. More generally, in **Allsop v Banner Jones Ltd** [2021] EWCA Civ 7, [2022] Ch 55, consideration was given to the approach that a court must adopt when determining whether to exercise its jurisdiction to

strike out what is said to be a collateral challenge to a previous judicial decision. Having reviewed the authorities addressing abuse in this context, Marcus Smith J (with whom the other two members of the court agreed) provided the following guidance:

> "44 …
> i) The jurisdiction to strike out proceedings as an abuse of process is one that should not be tightly circumscribed by rules or formal categorisation. It is an exceptional jurisdiction, enabling a court to protect its procedures from misuse. Thus, a court is able to – indeed, has a duty to – control proceedings which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people….
> ii) Any further attempt to define the circumstances in which this power should be exercised is subject to this overriding formulation of the principle, and can only be helpful if seen in this light. Thus, there can be identified a class of abuse which involves the relitigation of issues which have already once been determined by a court of competent jurisdiction in earlier proceedings. There are a number of statements in the cases suggesting that such relitigation may be regarded as abusive ….
> iii) However, the cases make clear that to regard relitigation as even *prima facie* amounting to an abuse of process would be to adopt too rigid an approach and to disregard the importance of individual circumstance and the need to consider each case on its own facts ….
> iv) In terms of the facts and circumstances that render relitigation potentially abusive, the following points are of particular relevance:
>
> a) There is a clear distinction to be drawn between the collateral challenge of an anterior criminal decision when compared to the collateral challenge of an anterior civil … decision. There is a public interest in criminal convictions only being challenged by way of appeal, and for them not otherwise to be called into question. As Lord Hoffmann put it in Hall [Hall (Arthur) JS & Co v Simons [2002] 1 AC 615 HL] …:
>
> > "...it would ordinarily be an abuse of process for a civil court to be asked to decide that a subsisting conviction was wrong. … The resulting conflict of judgments is likely to bring the administration of justice into disrepute.... On the other hand, in civil …. Whether the original decision was right or wrong is usually a matter of concern only to the parties and has no wider implications..."
>
> b) There is a second, important, distinction between collateral challenge to anterior criminal rather than civil decisions. As Lord Diplock emphasised in Hunter [Hunter v Chief Constable of the West Midlands Police [1982] AC 529 HL] (at 540), criminal decisions do not give rise to *res judicata* estoppels in the way that civil decisions do. ...
> c) Thirdly, and relatedly, it is necessary to be very clear what is meant by "relitigation". In my judgment, relitigation means arguing the same issue, that has already been determined in earlier proceedings, all over again in later proceedings. In civil proceedings, generally speaking, for an issue to be the same, it will arise as between the same parties (or their privies) That is why, in such cases, the doctrine of *res judicata* estoppel comes into play. The role of the doctrine of abuse of process is, correspondingly, much more limited. The abuse doctrine will only arise where one of the parties to the earlier litigation sues a stranger to that litigation. In such a case, the claim will typically be permissible and not abusive, and that will generally be because the case is not one of relitigation at all. Rather, the stranger to the earlier litigation will be the subject of the later claim because that person has

> done or failed to do something which (had that person behaved as he or she should) affected the terms or nature of the anterior decision. Why or how that earlier decision was affected will depend on the individual circumstances. It may be that the later claimant's former legal advisers failed properly to prepare the case … or failed, in an appeal, to deploy or consider a potentially winning point …. In all of these cases, what is being focussed on is "the impugned conduct of the lawyer [which is] independent of the...conclusions of the court" in the anterior decision ... None of these cases involves the adduction of new evidence within the meaning of Phosphate Sewage [Phosphate Sewage Co. Ltd v Molleson (1879) 4 App Cas 801] and it is quite clear that these later so-called "collateral" challenges are regarded as permissible even though there was no new evidence which would meet the stringent test in Phosphate Sewage.

v) It follows that, at least where the anterior proceedings are civil, Phosphate Sewage is of no application, and not to be used as a test for the purpose of determining whether the subsequent proceedings are abusive or otherwise. … The fact is that subsequent civil litigation that calls into consideration an anterior civil decision may or may not be abusive depending on facts that may have nothing to do with relitigation in its strict sense or the adduction of "new" evidence within the Phosphate Sewage test. Thus:

> a) In Hall, Lord Hoffmann gave an example of subsequent proceedings which – whilst not involving relitigation – was potentially abusive (at 706-707):
>
> > "...The action for negligence may be an abuse of process on the ground that it is manifestly unfair to someone else...."
>
> b) By contrast, Laing [Laing v Taylor Walton [2007] EWCA Civ 1146) … is a case where the earlier decision of His Honour Judge Thornton was being re-visited in later and distinct proceedings on the basis of no new evidence at all. In those circumstances, it is easy to see how the existence of or potential for divergent judgments of courts of co-ordinate jurisdiction does amount to a potential abuse of the court's processes (as the Court of Appeal found in Laing). In reality (as the Court of Appeal also found in Laing), the subsequent proceedings were no more than an (improper) attempt to appeal the decision of His Honour Judge Thornton.

vi) …, counsel for Banner Jones, sought to deploy the principle of finality of litigation in support of her contention that the Phosphate Sewage test did apply as a test for what was and what was not abusive. I do not accept that contention. Whilst, of course, finality in litigation is important, it is ensured by the doctrine of *res judicata* estoppel …. Where the later litigation is litigation that should, properly seen, have been an appeal of the earlier litigation, then the doctrine of abuse may have a role, as in Laing. But where the later proceedings are simply alleging a breach of duty on the part of the claimant's legal advisor, which breach resulted in a loss that is measured by reference to the probability that the earlier judgment would have been different, questions of finality of process simply do not arise.

45. In short, the doctrine of abuse of process is best framed, at least in the context of a "collateral" attack on a prior civil decision, by reference to the test expounded by Lord Diplock [in Hunter] and Morritt V-C [in Secretary of State for Trade and Industry v Bairstow [2004] Ch 1]: If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if *(a)* it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated or *(b)* to permit such relitigation would bring the administration of justice into disrepute."

56. Although the Court of Appeal in **Allsop** did not refer to **Ashmore** (and that case was not referenced

in argument), that is understandable as **Ashmore** did not strictly involve a collateral challenge to the earlier decision on the sample claims, albeit that it was seen as analogous to such a challenge. In any event, I do not read the decision in **Allsop** as casting any doubt on the guidance provided in **Ashmore**.

57. As for my approach to this appeal, a decision as to whether the continued pursuit of a claim amounts to an abuse of process is not a matter of judicial discretion but involves an evaluative assessment of all the circumstances; as such, an appellate tribunal will be reluctant to interfere with the determination of this question at first instance, save where there has been an error of principle, or where there was a failure to take into account material factors, where regard was had to immaterial factors, or where the first instance tribunal came to an impermissible conclusion (**Aldi Stores Ltd v WSP Group Plc & Ors** [2008] 1 WLR 748 CA, at paragraph 16; **AmTrust Europe Ltd v Trust Risk Group SpA** [2015] EWCA Civ 437, at paragraph 42). Although not a challenge to an exercise of discretion, when reviewing the decision of the first instance tribunal to apply its procedural powers against abusive proceedings (see per Lord Sumption JSC in **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd** [2014] AC 160 at paragraph 17), the appellate tribunal will give considerable weight to the judge below (**Michael Wilson** at paragraph 48(6)). Moreover, where an ET has correctly stated the legal principles to be applied, the EAT should be slow to conclude that it has not applied those principles, and should generally only do so where it is clear from the language used that a different principle has been applied (**DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, at paragraph 58).

The Claimant's Appeal and Submissions in Support

58. The claimants pursue four grounds of appeal, contending that the ET erred in the following respects: (1) applying the wrong test in its assessment of whether the FDA proceedings were abusive; (2) reaching the wrong conclusion in deciding the proceedings were abusive; (3) failing to take material factors into account; (4) taking into account a number of irrelevant factors.

59. Addressing the first ground of appeal, the claimants say that the correct legal test was whether it was "*manifestly unfair to the party in later proceedings that the same issue be re-litigated*" or whether "*to permit such relitigation would bring the administration of justice into disrepute*" (**Allsop**). Having purported to apply that test (ET decision, paragraph 67.4), in finding abuse because (i) it had been open to the FDA claimants to intervene in the sample litigation at any point, and (ii) the content of the fresh evidence (the

Gibson report) was not sufficient to justify re-opening the issues determined in **Newby**, the ET had not explained why those factors made it "*manifestly unfair*" for the respondents that the matters be re-litigated, or brought "*the administration of justice into disrepute*" (per **Hunter**). Although purporting to remind itself that re-litigation was not *prima facie* abuse (ET decision, paragraph 67.3), the ET failed to apply that principle, considering it material that the FDA claims would "*plainly defeat the whole object of setting up the PCMO and litigating sample cases only*" (ET decision, paragraph 72). Further, the ET had wrongly approached **Ashmore** as setting out a "*test*" for abuse (ET decision, paragraph 56), when the question was always fact sensitive (**Ashmore** p 352E); in any event, this case was distinguishable from the circumstances of **Ashmore**, not least as the FDA claimants had not had the opportunity to be sample claimants. As for the relevance of new evidence, the ET erred in applying the **Phosphate Sewage** test; that formed no part of the test for abuse for prior civil proceedings (per **Allsop**). In the event, the ET had gone on to consider both limbs of the **Phosphate Sewage** test in reaching its conclusion that the new evidence (i) "*would, should or could*" entirely change the aspect of the case (ET decision, paragraph 116), and (ii) could have been obtained earlier and raised at the December 2021 hearing (ET decision, paragraph 102). In the alternative, to the extent that this had been the correct test, this was merely "*perhaps a little stronger*" than **Ladd v Marshall** (**Hunter** at p 545C), and (i) the first limb was met, and (ii) there was no basis for applying the second (which was not mentioned by Stuart-Smith LJ in **Ashmore**, see p 345F).

60. In relation to the second ground, it is the claimants' case that there was no *prima facie* case of abuse: the test set a high bar and the fact that they were subject to the PCMO and could have made an application to intervene (notwithstanding the ET's acceptance that it would not have been practicable to prepare for full involvement in the December hearing) was not sufficient to mean that, if pursued, their claims would bring the administration of justice into disrepute. Moreover, in determining whether the proceedings were abusive, the existence, nature, relevance and cogency of the fresh evidence were relevant factors. Gibson showed the evidence of the sole witness for the respondents was methodologically unsound, having made systematic errors in the calculation of benefits and losses, which led Gibson to reach materially different conclusions in respect of sample claimants, and to propose an alternative (less discriminatory) age for the imposition of the cap and taper (on which there had been no evidence before the Doyle ET). The ET's reasoning showed it failed to understand the meaning and significance of Gibson, in part due to misunderstanding what

justification required in the context of direct age discrimination (which could allow for different outcomes relating to the same scheme or policy, see **Pitcher** and **Ewart**).

61. By the third ground of appeal, the claimants say the ET failed to take into account the following material factors: (i) the reasons why no rule 36 order had been made (and was not sought by the respondents); and (ii) the respondents' failure to identify any particular prejudice. As for the fourth ground, the claimants contend the ET took into account irrelevant factors: (i) that the determination of sample cases is intended to achieve finality (and settlement), when that was the purpose of most case management; (ii) the reference in SG's letter of 4 June 2021 to all claims being joined and managed "*as one*" when that related only to the FDA claims; (iii) the attendance by a junior solicitor from SG at the December 2021 hearing (attending without access to witness statements, the hearing bundle, or written submissions); (iv) the assumption that the respondents could never have re-litigated the justification issue; (v) the assumption (absent evidence) that allowing the FDA claims to proceed would "*cause a sense of injustice to those who had already lost*".

The Case for the Respondents

62. For the respondents, it is submitted that the ET's self-direction as to the law was unimpeachable, and the conclusion reached – on the application of well-established tests and considering all relevant facts and circumstances – was plainly permissible (such that it was not open to the EAT to interfere).

63. In relation to the first ground of appeal, the respondents say it is wrong to suggest the ET erred in the application of the relevant test. Specifically, the ET's reasoning fully explained its findings on abuse; it did not treat re-litigation as necessarily abusive but made a fact-specific analysis reflecting the reality that the claimants' approach amounted to obvious abuse - as to which, it was entitled to consider it material that that approach undermined the system of case management the ET had put in place (**Ashmore** p 352E-F). As for the fresh evidence, before the ET, the claimants had accepted that the correct test was whether it would "*entirely change the aspect of the case*", in the sense of entirely changing the way one looks at the case. In **Ashmore** (adopting the stricter wording articulated in **McIlkenny**, approved in **Hunter**), the test was stated to be that the evidence "*must be likely to be decisive"* and *"not available at the trial or could [have been] by reasonable diligence"*. The ET had been entitled to consider these questions in determining whether the

claimants' position amounted to an abuse and reached permissible conclusions: (i) that the proposed fresh evidence did not entirely change the aspect of the case (or even meet the less rigorous **Ladd v Marshall** test ("*probably … an important influence*")), and (ii) could reasonably have been obtained earlier.

64. In relation to the second ground, the respondents contend that the ET reached a conclusion open to it in the circumstances of the case. Specifically, it had made detailed findings of fact as to the FDA claimants' understanding of the effect of the PCMO and the sample litigation, about SG's acceptance of that position, and as to the claimants' ability to intervene before the determination of the preliminary issues in **Newby**. As for the new evidence, this was not a case where a party had belatedly discovered new evidence, rather the FDA claimants had been content (presumably on advice) to have their claims stayed behind the PCS claimants (who took on the burden of the litigation) but were displeased with the outcome; having then trailed an intention to obtain new evidence for some four months, the Gibson report was only produced on 8 November 2022. In any event, the ET carefully considered the Gibson report but permissibly concluded it was not significant: (i) even if it undermined Mr Spain's evidence (not accepted), that was only one of eight matters relied on by the respondents on proportionality, all of which were accepted by the Doyle ET; (ii) the PCS challenges to Mr Spain's evidence were dismissed by the Doyle ET and his evidence had previously been accepted in other litigation (**Coombes v DVSA**); (iii) the Gibson report was capable of reasoned response – it could not be assumed to demonstrate anything; (iv) Gibson did not affect the underlying substance of the Doyle ET's reasoning in **Newby**, namely that a fairer distribution of benefits is achieved by maintaining the operation of the cap and taper provisions.

65. As for the third ground, the respondents say: (i) there was no basis for considering the question of a rule 36 order to be material, but, in any event, the ET had explicitly taken into account the decision not to proceed by way of binding lead cases (ET decision, paragraph 67.7), and (ii) it was wrong to say the respondents had failed to identify any prejudice – they said there would be significant prejudice, including the endless proliferation of litigation. In relation to the fourth ground, it is the respondent's case that: (i) the decision to determine a point of principle by way of sample claims was self-evidently relevant to the question of abuse in relation to an attempt to re-open that point; (ii) the ET did not misread SG's letter of 4 June 2021 but permissibly had regard to the recognition of the commonality of issues under the CSCS and the identity of interest amongst the respondents, and thus of the importance of combined case management;

(iii) there was no evidence before the ET as to the level of experience of the SG observer at the December 2021 hearing (or as to the materials available to them), but, in any event, that would not undermine the need to consider the degree to which the FDA claimants were, or could have been, involved in the proceedings leading up to that hearing; (iv) the ET was entitled to take into account the fact that any attempt by the respondents to re-litigate the justification issue would have been bound to fail; (v) the ET relevantly had regard to the fact that re-litigation could cause a sense of injustice to those who had already lost (**Ashmore** p 345H).

Analysis and Conclusions

66. In determining whether the continued pursuit of the claims of the FDA claimants were abusive, such that they should be struck out as scandalous or vexatious within the meaning of rule 37 **ET Rules**, the principles that the ET was required to apply (as laid down by the case-law) can be stated as follows:

(1) The power to strike out proceedings as an abuse of process is an exceptional jurisdiction, enabling the ET to protect its procedures from abuse (**Allsop** paragraph 44 i)).

(2) The jurisdiction is underpinned by a two-fold public interest: that there should be finality in litigation and that a party should not be twice vexed in the same matter (**Johnson v Gore Wood** p 31A-B; **Michael Wilson** paragraph 48(1); **Allsop** paragraph 44 i)).

(3) As for what may constitute abuse, that will depend on all the circumstances of the case: the categories are not closed and the ET's assessment will be informed by considerations of public policy and the interests of justice (**Ashmore** p 348B-E); re-litigation *may* constitute abuse, but there is no presumption that it will do so (**Taylor** paragraph 55; **Allsop** paragraph 44 ii)-iii)).

(4) In civil proceedings (in contrast to a criminal conviction), there is generally no wider interest in the earlier decision so as to mean re-litigation would bring the administration of justice into disrepute, and the parties themselves may be protected by the principle of *res judicata* (**Allsop** paragraph 44 iv) a)-b)).

(5) Although there is thus no *prima facie* case that re-litigation will be an abuse in civil proceedings, in the case management of large-scale litigation involving sample claims, the particular circumstances may be such that it is possible to show (the burden is on the party seeking to strike out) that it would

be an abuse to permit the re-opening of an issue determined in a sample case (**Ashmore** pp 348H-349D, 352D-F, 353H-356A; **Taylor** paragraph 55; **In re Norris** paragraph 26).

(6) Even in such circumstances, it may not be an abuse to seek to re-litigate a point where there is fresh evidence, which could not have been relied on before, that would entirely change the aspect of the case (**Phosphate Sewage** p 814; **Hunter** p 545; **Ashmore** p 354D-G); in civil proceedings, however, litigation that calls into question an earlier civil decision, may or may not be abusive regardless of the adduction of new evidence (**Allsop** paragraph 44 v)).

(7) Whether proceedings are abusive requires a fact-specific assessment, by which the ET must arrive at a "*broad merits based judgment*" (**Johnson v Gore Wood** p31C-D).

(8) The test is always whether the proceedings in question, while not inconsistent with the literal application of the ET's procedural rules, would nevertheless be manifestly unfair to a party in litigation before it, or would otherwise bring the administration of justice into disrepute (**Hunter** p 536; **Ashmore** p 348B-E; **Allsop** paragraphs 44 i) and 45).

(9) Where there is abuse, the ET has a duty to control the proceedings; it is not a matter of judicial discretion (**Hunter** p 536C-D; **Allsop** paragraph 44 i)).

67. In the present case, it is not suggested that the Pirani ET failed to direct itself in accordance with these principles; it is apparent that it was aware of the test it was bound to apply and had expressly reminded itself of relevant legal principles. For the claimants, however, it is said that the Pirani ET erred in its application of those principles: that it effectively assumed that re-litigation would be abusive, and that the present case was akin to **Ashmore**; and that it failed to demonstrate any engagement with whether re-opening the issues determined in **Newby** would be manifestly unfair to the respondents and/or would bring the administration of justice into disrepute, wrongly applying the **Phosphate Sewage** test.

68. As emphasised in **DPP Law Ltd v Greenberg**, where (as here) an ET has correctly stated the legal principles to be applied, the EAT should, unless the ET's language leads to a different conclusion, be slow to conclude that it has not then applied the correct test. In the present case, having reminded itself of the relevant legal principles, the Pirani ET appropriately reviewed the procedural context of this litigation: the case management (in accordance with the overriding objective) that had led to the PCMO, and the reasoning that had underpinned the decision to proceed with a preliminary hearing on the issue of justification (the

premise being to maximise the possibility that no further substantive hearings would be required); see ET, paragraphs 68-70. It further took into account the safeguards that had been put in place, noting that the PCMO had:

> "74. … expressly provided for liberty to apply and that any party or representative wishing to make representations for the further conduct of any such claims should do so upon application to the respective Regional Employment Judges."

and concluding that, as in **Ashmore**, the ET:

> "73. … had gone to considerable lengths to enable the parties, and their representatives, to advance their best cases so that as many issues of fact and law covering the various permutations of the schemes could be raised and decided after the fullest inquiry and investigation."

69. In having regard to this procedural context, the Pirani ET did not simply assume that re-litigation would be abusive, but legitimately took into account relevant factors that might mean that re-opening the issue of justification in these particular circumstances would be manifestly unfair to the respondents and/or would bring the administration of justice into disrepute. Thus, in considering the unfairness to the respondents, it was relevant that the ET had previously dismissed their concerns about proceeding to determine the issue of justification as a preliminary point (ET, paragraph 71; and see the background at paragraphs 12-15 above) and that the respondents had had to accept that, if they lost on that point, they would not be able to re-run their arguments against subsequent claimants (ET, paragraph 97). The obvious unfairness that would arise for the respondents if then required to re-litigate the question of objective justification was thus closely related to the question whether allowing the re-opening of this issue would bring the administration of justice into disrepute. Expressly acknowledging that the circumstances were not precisely the same as **Ashmore**, the Pirani ET was entitled to have regard to the fact that the FDA claimants were parties to the previous litigation, subject to the PCMO, and would have been able to make any appropriate application prior to the hearing in **Newby**. I return to this point under the second ground of appeal, but it is clear that the Pirani ET gave case-specific consideration to how allowing the FDA claimants to re-open the question of justification in relation to the cap and taper provisions of the CSCS would be entirely counter to the purposeful case management of the proceedings ("*the marshalling of litigation*", *per* **In re Norris**) and would bring the administration of justice into disrepute. On its findings as to the relevant procedural history, the Pirani ET was entitled to conclude that, having apparently determined not to engage in the proceedings (again, see the discussion under the second ground of appeal), it was an abuse for the

FDA claimants (who might also have sought to appeal the **Newby** decision, *per* **Martineau**) to attempt to challenge the determination of the justification issue by means of re-litigation.

70. In considering these questions, it is also clear that the Pirani ET paid careful regard to the particular nature of the claims (giving rise to common issues relating to the operation of the CSCS scheme) and demonstrated a clear understanding of the nature of the justification defence in the context of direct age discrimination, anticipating the possibility of a **Pitcher**, **Ewart** argument, but noting that this was not a case where it was suggested that there were any relevant factual differences between the FDA claimants and the circumstances of one or more of the sample claimants (ET, paragraph 76). Equally, it is wrong to suggest that the Pirani ET made the error (*per* **Allsop**) of eliding the question of abuse with issues of fresh evidence; on the contrary, it was expressly recognised that:

> "101. In accordance with **Allsop**, in cases of civil re-litigation the question of abuse of process depends on the facts and might have nothing to do with re-litigation in its strict sense or the adoption of new evidence within the test as articulated by **Phosphate**."

Thus, the Pirani ET did not use **Phosphate Sewage** as a test for determining whether the re-opening of the question of justification would be abusive: its conclusion on abuse was founded upon the fact that the re-litigation in this case would entirely undermine the ET's case management of the proceedings, giving rise to a manifest unfairness to the respondents and bringing the administration of justice into disrepute. It was, however, the case for the FDA claimants that new evidence (foreshadowed by the Gibson report) meant that the re-litigation would not be abusive. Thus considering that evidence as part of the relevant factual matrix, the Pirani ET was entitled to conclude that this did not alter the position: it remained abusive to seek to re-open litigation on the basis of evidence that (i) could have been obtained and/or flagged up before the **Newby** hearing (and, for completeness, the fact that this point was not referenced in **Ashmore** (in which no reliance was placed on fresh evidence in any event) cannot detract from its obvious relevance), and (ii) was not such as to entirely change the aspect of the case.

71. By the second ground of appeal, the claimants challenge the findings reached by the Pirani ET on the procedural history - the findings that led it to reach the conclusions discussed under the first ground. Accepting the high bar to be applied, I do not consider that this is a sustainable ground of challenge.

72. The relevant chronology of the FDA claims prior to the hearing in **Newby** is set out at paragraphs 16-25 above. It is clear that the FDA claimants (through their advisers, SG) were aware of the PCMO from

the outset and, therefore, that their claims ("*of a similar kind*") would be combined and case managed as part of the larger group of claims that were seeking to challenge the cap and taper provisions of the CSCS on the ground of direct age discrimination, but that representations might be made as to the future conduct of their particular claims. Moreover, the email from the GLD to SG of 12 July 2021 had not only underlined the significance of the PCMO but had drawn attention to the fact that the claims were "*proceeding to a hearing in December 2021 to determine the question of objective justification*", that there were in place "*case management orders to that effect*", and that "*sample cases have been chosen*". Had it been considered that the FDA claimants ought properly to have been included within the sample cases, or that they should be permitted to adduce evidence (including evidence of an expert nature), or make representations at the December hearing (or even that that hearing ought to be adjourned and re-listed to permit the proper participation of the FDA claimants), it was entirely open to SG to then make the appropriate application on behalf of their clients (indeed, to do otherwise would be inconsistent with the overriding objective, which requires that "*parties and their representatives shall assist the Tribunal to further the overriding objective*" rule 2 **ET Rules**). While, as parties to proceedings thus being case managed under the PCMO, it was open to the FDA claimants to effectively sit on their hands pending the determination of the sample claims, it would be entirely counter to the proper administration of justice to do so while also seeking to keep open the possibility of later re-litigation of precisely the same point; whether tactical stratagem or simple failure to engage, it would plainly undermine the ET's very careful case management of the litigation and would represent a clear abuse of the processes of the ET.

73. In argument, it was suggested that the Pirani ET had wrongly assumed (absent evidential foundation) that any application on the part of the FDA claimants (to participate as sample claimants and/or to be permitted to adduce evidence such as the Gibson report) would have been entertained; it is the claimants' submission that, having accepted that they could not have participated effectively in the December hearing, it should have been held that these were very different circumstances to **Ashmore**. This submission fails, however, to demonstrate a proper appreciation of the procedural history in this litigation. As will be apparent from the summary provided (see paragraphs 6-15 above), the ET had been at pains to ensure that all concerned had the opportunity to advance their best cases, and that all relevant issues of fact and law - covering the various permutations of the cap and taper provisions of the CSCS - could be raised and

determined after the fullest judicial inquiry. That had led the ET to revisit its decision on the preliminary hearing on justification on two occasions, and its case management orders always provided for liberty to apply on the part of any party or representative that had not had the opportunity to be heard, or make representations, at any relevant hearing. The only proper inference to be drawn from that history was that any application on behalf of the FDA claimants would have been the subject of careful consideration and that, as the Pirani ET was entitled to conclude, it was inconceivable that their involvement would not have been accommodated (ET, paragraphs 91-92).

74. As for the Gibson report, the Pirani ET carefully considered its content and potential relevance, allowing that it might have been material to the issues raised in **Newby** but permissibly finding it was by no means determinative. Certainly, on any understanding of the matters raised in the Gibson report, this was not evidence that would entirely change the aspect of the case. Although possible to view the report as putting into more persuasive form the points raised by, and on behalf of, the sample claimants in **Newby** (Mr Gibson's arguments regarding the ratio of benefits to potential loss essentially articulated points that had been made by the sample claimants), it did not address the full range of matters relied on by the respondents, and did not undermine the Doyle ET's acceptance of the cap and taper provisions as being part of an overall package, bridging the gap between termination of employment and entitlement to full pension at NPA under the PCSPS, achieving a fairer distribution of benefits. Contrary to the claimants' arguments in this regard, the reasoning of the Pirani ET evinces a clear appreciation of the balancing exercise - taking into account all relevant factors, not merely those addressed in the Gibson report - that the Doyle ET had carried out in **Newby** (*per* **Seldon** and **Hardys and Hansons**).

75. The points raised by the third and fourth grounds of appeal similarly seek to challenge the assessment carried out by the Pirani ET. It is, however, a mischaracterisation of arguments taken below to suggest that there was failure to take into account the absence of an order under rule 36 **ET Rules**, or that it was wrongly assumed that the respondents could not have re-litigated the issue of justification, or that no prejudice had been identified. The absence of any rule 36 order had been the subject of debate in the correspondence leading up to the hearing before the Pirani ET, when it was accepted by the respondents that no such order had been made, albeit that the case management decisions relating to the selection of sample cases for determination of justification as a preliminary issue had made clear that any attempt to re-run the

same arguments would be met by an objection under rule 37 (indeed, in argument, the respondents had noted that this had been part of the ET's reasoning when rejecting their arguments against determining justification as a preliminary issue). As for the question of prejudice, it was the respondents' objection that the continued pursuit of the FDA claims allowed for the endless proliferation of the litigation. The Pirani ET's decision is not be read in a vacuum and cannot be criticised for failing to focus on that which would have been obvious to the parties before it.

76. The claimants further object to the reference in SG's letter of 4 June 2021 to the claims being managed "*as one*", when that related only to the FDA claims and not to all claims before the ET. The Pirani ET's reasoning does not, however, suggest any misunderstanding in this regard: the reference to SG's letter was no more than a passing observation as to that acknowledgement of the commonality of issues and respondents involved in the claims. As for the position of the SG lawyer attending at the December 2021 hearing, again the reasoning of the Pirani ET reveals no error in understanding: the reference to SG's attendance at the **Newby** hearing ("*as observers*") merely stated that which was factually correct; the abuse identified related to the failure to make any procedural intervention prior to that, or by way of application to the Doyle ET (with no suggestion that that ought to have been done by the particular person attending as observer).

77. Finally, the claimants argue that it was irrelevant for the Pirani ET to have regard to the fact that the determination of sample cases was intended to achieve finality, or that permitting the FDA claims to proceed might cause a sense of injustice to those who had already lost. It is hard, however, to understand the first of these objections: the Pirani ET was required to consider the question of abuse in this case in the light of the public interest in the finality of litigation (**Johnson v Gore Wood**); having regard to that point of principle, it was entirely correct that it should look to the purpose of the decision to proceed by way of sample cases and to ask whether the public interest was served by effectively re-opening that decision. As for the reference to the possible impact on those who had already lost, the Pirani ET made no assumption that this would cause a sense of injustice but merely saw it as potentially relevant that it "*could*" do so. As allowed in **Ashmore**, that was a relevant, albeit not determinative, consideration.

78. Having considered each of the objections taken on this appeal, but also standing back and reviewing the decision as a whole, I am satisfied that the Pirani ET did not err in its application of the legal test in this

case, but undertook an evaluative assessment that had regard to all relevant factors, without being tainted by that which was irrelevant. As the first instance tribunal, it was best placed to carry out the fact-specific assessment required, reaching a broad, merits-based judgment as to whether a strike out was required to prevent manifest unfairness to the respondents or the bringing into disrepute the administration of justice in ET proceedings. For all the reasons provided, I therefore dismiss this appeal.