



EMPLOYMENT TRIBUNALS

Claimant David Kinsman

Respondent Honeywell Normalair- Garret Limited

Heard at: Exeter

On: 25 & 26 May 2016

Before: Employment Judge Goraj

Representation

Claimant: Mr R Morfee, Solicitor

Respondent: Mr A Short, Leading Counsel

JUDGMENT ON A PRELIMINARY HEARING

THE JUDGMENT OF THE TRIBUNAL IS THAT:-

1. The tribunal does not have jurisdiction to consider the claimant's complaint of age discrimination contrary to sections 5, 13, 39 and/or 61 of the Equality Act 2010 by reason of its findings in respect of Issues 4, 5, 6 and 7 of the attached List of Issues. The claimant's complaint of age discrimination is therefore dismissed.
2. The tribunal does not have jurisdiction to consider/ the claimant's claim pursuant to section 11 of the Employment Rights Act 1996 in respect (only) of the declarations identified at paragraphs 3 (a) and (b) of the attached List of Issues is, in any event, struck out by reason of its findings in respect of Issues 1 and 3 of the attached List of Issues.

RESERVED JUDGMENT

BACKGROUND

1. By a claim form (A17- A30 of the bundle) which was presented to the tribunals on 6 August 2015, the claimant alleged that he had been unlawfully discriminated against by the respondent because of the protected characteristic of age contrary to the Equality Act 2010 ("the 2010 Act"). The claimant also sought declarations of certain alleged particulars of employment pursuant to the Employment Rights Act 1996 ("the Act"). Further details of the claimant's complaints are contained in particular, in the claimant's amended reply to the respondent's grounds of resistance at A80 -A 92 of the bundle.
2. This matter has been listed for a Preliminary Hearing ("the Hearing") to determine the preliminary issues identified at paragraphs 1-8 of the list of issues ("the List of Issues") attached to the Case Management Preliminary Order dated 29 December 2015 ("the Order") at pages A70-A78 of the bundle. A copy of the List of Issues is also attached to this Judgment. The tribunal is also required to determine an agreed additional preliminary matter in respect of Issue 4 as identified further at paragraph 110 below.

The bundle

3. The tribunal has been provided with a bundle of documents which has been agreed between the parties ("the bundle"). The parties have also provided the tribunal with a bundle of legal authorities and associated legal provisions (" the authorities bundle"), an agreed chronology of main events and detailed written submissions.

Background to the claimant's claims

4. By way of background, the claimant's claims relate to the operation of the respondent's pension arrangements and in particular, the introduction of a new defined contribution pension arrangement in 1998. At that time the respondent entered into a special arrangement with certain employees who met the age or age plus service criteria to supplement their benefits on retirement to a level to which they would have been entitled under the previous pension scheme if the new arrangement failed to match the former benefits (referred to below as "the Special Arrangement"). The claimant did not meet the above-mentioned criteria at the relevant time and was therefore not offered entry into the Special Arrangement.

The claimant's age discrimination claim

5. The claimant clarified the nature of his age discrimination claim at the commencement of the Hearing. The claimant confirmed that he is pursuing a complaint of direct age discrimination contrary to sections 5 and 13 of the 2010 Act. In summary, the claimant confirmed that he contended that

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he had been treated less favourably than others because of his age in respect of his exclusion from the benefits of the Special Arrangement which gave a guarantee to those employees who were entitled to it that they would receive a certain value in the payments which they would receive on retirement. The claimant contended that this was a continuing act of age discrimination which commenced on 1 October 2006 (the date upon which the relevant provisions of the age discrimination legislation came into effect) at which time the respondent should have taken the necessary steps to rectify the unlawful discrimination including in respect of service prior to 2006. The claimant also contended that such unlawful discrimination continued until his retirement on 13 May 2016 as he alleged that such benefits accrued on a daily basis until they became payable on retirement and further, that the claimant was therefore paid less during his employment than those who were admitted to the Special Arrangement.

6. The respondent denied the allegations including on the grounds that there had not been any actionable age discrimination and that any less favourable treatment was, in any event, justified for the purposes of the 2010 Act. The respondent further contended that the tribunal did not have jurisdiction to entertain the claimant's age discrimination claim as the matter fell within the exemptions to the provisions of the 2010 Act and/or that the claimant's claim was, in any event, outside the applicable statutory time limits as it related to a contractual promise (the Special Arrangement) which was made in 1998 and which was a one off act or omission for the purposes of the 2010 Act.

Other matters

7. By letter dated 12 April 2016, the claimant applied (a) for specific disclosure of the respondent's documents relating to the Special Arrangement and (b) to join the trustees of the Honeywell UK Pension Scheme and the principal employer (Honeywell UK Limited) as additional parties to the proceedings.
8. This application was resisted by the respondent.
9. The tribunal directed that any issues relating to the above applications should be addressed at the Hearing.
10. The claimant confirmed at the commencement of the Hearing that he did not wish to pursue his application for specific disclosure at that time as the application had been made before his legal advisers had had an opportunity to interview Mr Colin Rose whom he would be calling as a witness at the Hearing. The claimant also confirmed at the commencement of the Hearing that he did not wish to pursue his application to join the trustees of the Honeywell UK pension scheme or the principal employer as additional parties at that time. The claimant further confirmed that (a) he did not contend that there had been any actionable breach of the age discrimination legislation by the above named trustees/principal employer and (b) that the application to join them in the proceedings had been brought purely for the purpose of procedural correctness in case there was any dispute about the claimant's entitlement

to join the above mentioned pension scheme if his age discrimination claim was successful.

Witnesses

11. The tribunal was provided with a witness statement and heard oral evidence from the following on behalf of the claimant:- (a) the claimant, (b) Mr Colin Rose, former employee, union convener and chairperson of the Westland staff pension scheme negotiating committee at the respondent and subsequently a regional trade union officer in the South West and (c) Mr Rhett Land an employee with the respondent.
12. The tribunal was provided with a witness statement and heard oral evidence from the following on behalf of the respondent :- (a) Mrs Cheryl Lim, Human Resources Director at part of the Honeywell Group and (b) Ms Sara Sturtivant, Human Resources Leader at Honeywell Aerospace Yeovil.

FINDINGS OF FACT

13. The tribunal has made the findings of fact referred to below for the purposes only of determining the Preliminary Issues at paragraphs 1-8 of the List of Issues.

The respondent

14. The respondent originated as a joint venture between AlliedSignal (now Honeywell) and GKN Westland. AlliedSignal Holdings Limited acquired GKN Westland's shares in the respondent's immediate parent company in 1998. Extracts from the sale and purchase agreement dated 7 May 1998 are at B9 -B29 of the bundle. AlliedSignal was acquired by Honeywell in 2000. The respondent was also acquired by Honeywell at that time and changed its name accordingly.

The claimant and the claimant's employment history with the respondent

15. The claimant's date of birth is 7 April 1959.
16. The claimant was employed by the respondent between 7 October 1985 and 13 May 2016 on which latter date the claimant's employment terminated by way of voluntary redundancy. The claimant's gross annual salary at the time of the termination of his employment with the respondent was around £48,000.

The claimant's appointment as a skilled Wireman/Tester

17. Following a successful interview, the respondent wrote to the claimant by letter dated 15 August 1985 offering him employment with the respondent as a skilled Wireman/Tester.

18. This letter of offer, together with a copy of the associated Terms and Conditions of Employment relating to Production Staff Employees is at pages B3-B5 of the bundle. The letter of offer was signed by the respondent's then Personnel Manager, Mr R A Gard, who is no longer in the employment of the respondent.
19. The respondent stated in the letter of offer that:-
- (1) The terms and conditions of employment for the appointment had been collectively agreed for the Production Staff Bargaining Unit.
 - (2) It was a condition of employment that the claimant joined the Westland Works contributory Pension Scheme on the day that he fulfilled the eligibility criteria (the claimant joined such pension scheme during his period of employment as a skilled Wireman/tester).
 - (3) Details of the pension scheme were set out in an explanatory booklet - a copy of which was enclosed.
 - (4) The claimant was requested to confirm in writing his acceptance of the appointment together with a proposed commencement date.
20. The tribunal has not been provided with a copy of any letter from the claimant accepting the respondent's offer of employment. The claimant however confirmed in his oral evidence that he had accepted the respondent's terms of employment.

The claimant's appointment as a Production and Quality supervisor

21. The claimant subsequently made a successful application for the position of Production and Quality Supervisor. The respondent's letter of offer dated 24 October 1988 is at B6-B7 of the bundle. The letter of offer was signed by Mr Gard on behalf of the respondent.
22. The respondent stated in the letter of offer that:-
- (1) The position was an administrative monthly staff appointment.
 - (2) The claimant would remain a member of the Westland Staff Pension Scheme ("the Scheme").
 - (3) That it was enclosing a copy of the terms and conditions of employment for non-procedurally covered employees.
23. The claimant signed a copy of the letter of offer on 25 October 1988 confirming his agreement to the terms and conditions contained therein.
24. The claimant confirmed in his oral evidence that he received a copy of the terms and conditions referred to at the end of the letter of offer dated 24 October 1988 at that time. The claimant also confirmed that he received, at some point, a copy of the Scheme booklet at pages B1-B2 of the

bundle. The tribunal has noted that it states at paragraph 25 of the Scheme booklet that the Trustees and the respondent could together amend the Trust Deeds and Rules of the Scheme but not so as to affect adversely benefits relating to service already completed (page B2 of the bundle).

The claimant's appointment as Superintendent

25. Mr Gard, then Personnel Director of the respondent, wrote to the claimant by letter dated 25 September 1998 confirming the claimant's appointment to the position of Superintendent-E C S with effect from 1 October 1998 on an increased salary. Mr Gard also confirmed that there were no other changes to the claimant's terms and conditions of employment. This letter is at page B57 of the bundle.

The claimant's appointment to the position of Production Manager

26. The respondent wrote to the claimant by letter dated 3 September 2003 confirming an offer of promotion to the position of ECS Production Manager with an increased salary of £35,000 with effect from 1 September 2003. The respondent confirmed in the letter that the position was an administrative monthly staff appointment and that there were no collective agreements applicable to the position. The letter further stated that the remaining terms and conditions of employment were in accordance with the respondent's rules copies of which were available for inspection in the Human Resources Department. The claimant signed a copy of the letter on 8 September 2003 confirming his acceptance of the terms and conditions set out in the letter. This letter is at page 114 the bundle. The claimant further confirmed in his oral evidence that he had accepted the terms offered by the respondent and did not request any alterations.

27. The claimant was subsequently further promoted to the position of Operations Programme Manager in or around 2005. The tribunal has not been provided with a copy of any documentation relating to this staff position.

The Special Arrangement

28. The respondent's employees (including the claimant) ceased to be eligible to participate in the Scheme following the sale and purchase agreement dated 7 May 1998.

29. Following consultations with the respondent's recognised trade union representatives and others, which were led by the respondent's then Managing Director Mr Peter Burrows (who is no longer employed by the respondent), Mr Gard sent a notice dated 30 July 1998 to all employees who were members of the GKN/Westland pension schemes. This notice is at B41- B41A of the bundle.

30. In summary, employees were informed that:-

- (1) They would remain in their existing pension schemes until the end of November 1998.
- (2) They would be offered membership of the AlliedSignal UK Retirement Plan ("the ASRP"), a defined contribution pension scheme, and the AlliedSignal Share Ownership Plan with effect from 1 December 1998 (together "the AlliedSignal arrangements").
- (3) Although the AlliedSignal arrangements were different to the existing pension arrangements they provided substantially equivalent or better benefits.
- (4) Employees would have a choice of maintaining a preserved pension in their current scheme or of taking a transfer value and moving it to the ASRP.

31. There were further consultations with the recognised trade unions and others, including, meetings on 3 August 1998 and 11 August 1998 (B42- B45 of the bundle) at which Mr Rose, then union convener at the respondent, was in attendance. During such discussions concerns were raised with the respondent that the AlliedSignal arrangements would not be as beneficial as the existing pension arrangements. The respondent agreed to provide, if required, guaranteed top up pension benefit arrangements for certain categories of the workforce in response to such concerns (the Special Arrangement).

The notice dated 4 September 1998

32. Mr Burrows wrote to the respondent's employees by notice dated 4 September 1998, which together with the accompanying questions and answers document, is at pages B46-B48 of the bundle.

33. In summary, Mr Burrows advised employees that although the respondent was confident that the performance of the AlliedSignal arrangements would, using conservative assumptions, exceed the performance of the existing pension arrangements, the respondent would provide a "grandfather" arrangement for employees who fell into a category where the concerns or uncertainty might be strongest in recognition of the concerns which had been raised.

34. Mr Burrows further advised that in respect of members of the GKN Westland Pension Schemes with a commencement date prior to 1 December 1998 who had either (a) attained the age of 45 years on that date or (b) had a total of 55 points of combined age and service and (c) who retired at age 60 or later (and subject also to further specified qualifying conditions) the respondent would provide the greater of the benefits provided by the AlliedSignal arrangements or the benefits of the existing GKN Westland Pension Plan (the Special Arrangement). The claimant did not meet the qualifying conditions for the Special Arrangement.

35. In the accompanying questions and answers sheet the respondent stated that the Special Arrangement was not a scheme but a statement of confidence in the AlliedSignal arrangements. The respondent further stated that in the unlikely event that the AlliedSignal arrangements did not meet their performance expectations it would re-examine the structure of such arrangements for all UK employees (B47-B48 of the bundle).

The notice dated October 1998

36. Further details of the Special Arrangement, including the qualifying and eligibility conditions and options on retirement, were issued to staff by a notice dated October 1998. This notice is at B58-B59 of the bundle. The respondent stated in the notice that if the conditions of the Special Arrangement applied, the respondent would take the necessary steps on retirement to make up the shortfall by way of three possible methods including by arranging for the employee to transfer the funds which they had accumulated to another scheme in which the respondent participated.

The respondent's letter dated 16 November 1998

37. Mr Burrows sent to the claimant a standard form of letter dated 16 November 1998 (page B60 of the bundle) confirming that the claimant's application to join the AlliedSignal arrangements had been received and that he had been duly enrolled. Mr Burrows further confirmed that (a) the claimant did not meet the eligibility conditions for the Special Arrangement as he did not meet the age and service requirements and (b) the respondent continued however to be confident that the AlliedSignal arrangements would exceed the performance of the plans which they had replaced and that, in the unlikely event that they underperformed against the projected expectations, the respondent would review the structure of the plan as such an occurrence would affect all the respondent's units in the UK. The claimant ceased to be an active member of the Scheme on 30 November 1998.

Other assurances

38. Mr Rose stated in his oral evidence that he had had a discussion with Mr Burrows in the corridor during the above mentioned consultations about what would happen to the pension benefits of those employees who did not meet the eligibility criteria for the Special Arrangement in the event that the AlliedSignal arrangements did not perform in accordance with the respondent's expectations. Mr Rose contended that Mr Burrows told him that in such circumstances the respondent would increase the contribution rates to make sure that the benefits were roughly equivalent, that he told Mr Burrows that he would require something in writing to confirm the position and that this was addressed in Mr Burrows' subsequent letter dated 16 November 1998 referred to above. Mr Rose further contended that he had had a clear understanding with Mr Burrows that the planned structure review referred to in Mr Burrows letter dated 16 November 1998 would involve making up any significant shortfall between the plans. The respondent denied that any such assurances were given to Mr Rose.

39. The tribunal has not heard any evidence from Mr Burrows who is no longer employed by the respondent. The tribunal is not however satisfied, on the balance of probabilities, that Mr Burrows gave the alleged assurance to Mr Rose. When reaching this conclusion the tribunal has taken into account in particular that there is no reference to any such assurance in Mr Burrows' letter dated 16 November 1998 save that he gave a commitment to review the plan structure in such circumstances as set out in that letter. The tribunal has also taken into account that such contention is inconsistent with the matters subsequently raised by Mr Rose in his letter to the Vice President of Honeywell Aerospace dated 7 December 2004 (B115- B116 of the bundle) in which Mr Rose contended that the management at the relevant time were determined not to protect the pension expectations of those employees who were not covered by the Special Arrangement. The tribunal has also taken into account that the claimant accepted in his oral evidence that he did not recall being told at the time of the letter dated 16 November 1998 that the respondent would make good any shortfall.

The nature of the Special Arrangement

40. The tribunal is satisfied, in the light of the available documentary and oral evidence, that the Special Arrangement is an unfunded contractual promise which was made by the respondent to top up members' benefits to the level that they would have received if they had continued to receive benefits under the Scheme based on the rules of the Scheme as at 4 September 1998 in return for which an eligible employee transferred their accrued benefits to the ASRP and contributed to the AlliedSignal arrangements at the required rates. The transfer of accrued pension benefits to the ASRP by employees who were eligible for the Special Arrangement occurred by in or around March 1999. The Special Arrangement has not been registered by the respondent as an occupational pension scheme. The respondent introduced in 2008 an Internal Dispute Resolution Procedure for use by former members of the Scheme in relation to the operation of the Special Arrangement. This procedure is at B126-127 of the bundle.

The operation of the Special Arrangement

41. The respondent has historically implemented the provisions of the Special Arrangement on retirement by arranging for the transfer of the member's accrued benefits under the respondent's section of the AlliedSignal Restricted Membership Scheme ("the ARMPS") which was established for this purpose. The benefits which the member would have received if they had remained as an active member of the Scheme are then provided by the ARMPS (B313- B321 of the bundle). Extracts from the Deed of Amendment and Adherence relating to the ARMPS are at B76-B85 of the bundle. ARMPS was renamed as the Honeywell Integrated Pension Scheme and was subsequently transferred to a new Honeywell defined benefit scheme, the Honeywell UK Pension Scheme ("HUKPS"), on 9 April 2010. The respondent's section within the HUKPS is now used for the provision of the benefits pursuant to the Special Arrangement.

42. This mechanism for the delivery of the Special Arrangement is preferred by the respondent including on the grounds that the Special Arrangement is treated by the respondent as an unapproved retirement benefit and that if the lump sum element was paid by the payroll the lump sum would therefore be subject to income tax (B49- B54 of the bundle). By paying the Special Arrangement through this mechanism employees are also eligible for protection from the Pension Protection Fund as the benefits are held in trust rather than by the respondent directly.

Employee A

43. The claimant contended that an employee, who is known as Employee A for the purposes of this litigation, had been admitted into the Special Arrangement in 2010 and that the Special Arrangement was therefore not closed to new members as contended by the respondent. The claimant did not contend that anyone other than Employee A had been admitted into the Special Arrangement since 1998.

44. This respondent denied that Employee A had been admitted into the Special Arrangement in 2010. The respondent contended that (a) Employee A had joined the Special Arrangement on its inception (b) Employee A, who was believed by the respondent to have learning difficulties, had subsequently failed to comply with the conditions of the Special Arrangement and that (c) it had relaxed the conditions of eligibility, in the light of the special circumstances of Employee A's case. The claimant did not challenge the factual circumstances relating to Employee A as set out in the witness statement of Ms Sturtivant.

45. Having had regard to the oral evidence of Ms Sturtivant, together with the available documentary evidence, the tribunal is satisfied that Employee A applied for and was admitted to the Special Arrangement in 1998. When reaching this conclusion the tribunal has had regard in particular to the letter from Mr Burrows to Employee A dated 16 November 1998 at B63 of the bundle, confirming that (a) Employee A's application to join the ASRP had been received and that he had been duly enrolled and that (b) Employee A therefore satisfied the eligibility requirements for the Special Arrangement at that time.

46. The tribunal is further satisfied, on the balance of probabilities that (a) Employee A failed to increase his contributions to the ASRP as required when he reached the age of 40 (b) the respondent believed that Employee A had learning difficulties (c) in view of such learning difficulties it was recognised by the respondent that it should have done more to remind Employee A about the requirement to increase his contributions to the ASRP when he reached the age of 40 and that he should therefore be given an opportunity to continue his membership of the ASRP (d) in the light of the above, the respondent allowed Employee A to pay his arrears and to increase his future contributions in return for his continued membership of the Arrangement and (e) Employee A paid the arrears in July 2013 and was therefore reinstated to the AlliedSignal arrangements including the Special Arrangement. When making the above findings the

tribunal has had regard in particular to the documents at pages B175-176, B184-213 and B281-285 of the bundle.

47. The tribunal accepts the claimant's evidence that he was unaware of the events relating to Employee A until he received a copy of the documents which the respondent disclosed to his legal advisers in March 2016 for the purposes of this litigation.

Complaints regarding the performance of the ASRP and the extension of the Special Arrangement

48. The respondent received complaints from in around 2003 onwards concerning the performance of the ASRP. Such complaints included a letter from Mr Rose, then the Amicus Regional Officer, to Mr R Wolfe, Vice President of Honeywell Aerospace dated 7 December 2004 referred to previously above (pages B115-B116 of the bundle). Mr Rose requested a review of the AlliedSignal arrangements and requested that the Special Arrangement should be extended to admit employees who did not meet the eligibility criteria in 1998. The respondent replied to Mr Rose by letter dated 22 March 2006 rejecting his request including on the grounds that the respondent considered that the financial burden and risks involved in the extension of the Special Arrangement would be unsustainable for the respondent in the long term (B117-B118 of the bundle). Employees were notified of the decision by an e-mail dated 6 April 2006 (B119 of the bundle).

49. The claimant raised concerns regarding the performance of the ASRP including that his retirement benefits would be significantly reduced compared to those which he would have received under the Scheme or the Special Arrangement including by an email dated 24 November 2008 in which he requested a meeting with Linda Oxberry, Group Pensions Manager, to discuss his concerns (B128 of the bundle).

The 2010 Review

50. The respondent undertook, in the light of the concerns raised by and on behalf of employees, a review of the structure of the ASRP and the statements made by Mr Burrows in his letter dated 16 November 1998. The outcome of this review was communicated to affected employees, including the claimant, by Ms Oxberry, by letter dated February 2010. This standard letter is at pages B136-B137 of the bundle.

51. In summary, Ms Oxberry informed employees that having reviewed the position the respondent had concluded that (a) the statement made by Mr Burrows in his letter dated 16 November 1998 did not promise a structural change to the ASRP or that the respondent would revert back to a defined benefit plan for former Scheme members if the investment expectations were not realised, (b) that there was no business case to change the structure of the ASRP which, for most of the former Scheme members, was more generous than the money purchase arrangements operated by Honeywell for UK employees and (c) Honeywell provided a competitive package of employee benefits in the UK and that the ASRP was part of such overall package of benefits. Ms Oxberry concluded the letter by

confirming that the decision not to change the structure of the ASRP should be regarded as a final response. Neither Ms Oxberry nor Mr Simpson, who was the site manager at or around this time, remain in the employment of the respondent.

The collective grievance

52. In or around February 2010 approximately 120 employees, including the claimant, submitted a formal collective grievance to the respondent regarding the projected shortfall in pension benefits and the perceived growing disparity between the employees who were covered by the Special Arrangement and those who were excluded from it (B134-B135 of the bundle). Although this grievance is dated January 2010 it was not submitted to the respondent until the middle of February 2010 and therefore coincided with the respondent's review referred to above. Ms Sturtivant of the respondent sent to the claimant a standard letter dated 3 March 2010 confirming that as the issues raised in the collective grievance had already been dealt with by the respondent it would not be arranging a grievance hearing and that the claimant would not have the right to appeal against the respondent's decision. This letter is at B138 of the bundle.

The claimant's complaint to the Pensions Ombudsman

53. In or around May 2010, the claimant made a formal complaint to the Pensions Ombudsman. The claimant was a member of a group of five or six employees who had consulted Mr David Laws, the then local MP, about the matter during this period. Mr Laws advised the claimant to raise a complaint with the Pensions Ombudsman. The claimant considered the possibility of obtaining legal advice at this time but decided instead to proceed with a complaint to the Pensions Ombudsman because of the cost of obtaining legal advice. Four other employees also pursued a complaint to the Pensions Ombudsman at this time.

54. The claimant's application form, together with his draft letter to the Pensions Ombudsman dated May 2010, are at B179-B180 and B177-B178 of the bundle respectively. The tribunal is satisfied that the claimant's accompanying letter to the Pensions Ombudsman was in substantially the same form as the draft letter at B177 of the bundle and has proceeded on such basis. The focus of that letter was on the underperformance of the ASRP and the alleged indication from the respondent that it had no intention of honouring the promises which it had made in respect of such underperformance. The letter made no reference to any complaint of age discrimination.

55. The claimant's completed application form at B180 of the bundle is divided into four sections which included two sections which required the claimant to (a) summarise his complaint and (b) separately, to detail the injustice which he had suffered. The claimant completed these sections as follows :-

Please summarise your complaint

“My complaint is [that] after many years in a DB scheme (GKN- Westland) I was moved into a DC scheme. My employers stated that the new scheme would provide equal or better benefits and that if it did not it would review the scheme and correct it. I was encouraged to transfer my funds to the new scheme. The scheme is significantly underperforming and the company has now stated that it will take no action”

Please detail the injustice you have suffered

“The company gave the majority of existing employees (approximately 52%) a guarantee (the SA) that underwrote any underperformance in the new scheme. The SA was dependent on age or age plus service and I, like many, was not eligible. This discrimination will result in me losing out significantly compared to those who qualified for the SA. Those with the SA continue to receive large top ups to their pension pots upon retirement”.

56. The claimant further stated in his complaint that he had first become aware of the matter in February 2010 (as explained in his accompanying letter) and that he was seeking by way of a remedy that the respondent should honour its assurances and provide benefits that matched the defined benefits scheme. The claimant further stated that current estimates showed that he would receive approximately one third of the benefits to which he would have been entitled under the Scheme.

The letter dated 17 June 2010

57. An Investigator wrote to the claimant by letter dated 17 June 2010 (B181-B183 of the bundle) rejecting the claimant's complaint on the grounds that it had been brought by the claimant outside the relevant time limits and could not therefore be considered. The Investigator informed the claimant that the relevant regulations precluded the Pensions Ombudsman from investigating a complaint if an act or omission had occurred more than three years before the complaint was received. The Investigator also informed the claimant that the regulations further provided that if the applicant contended that he was unaware of the act or omission when it occurred the time limit ran from the earliest date upon which the applicant knew, or ought reasonably to have known, about the matter and that the time limits were subject to a residual discretion to extend time in exceptional circumstances.

58. The Investigator identified the crux of the claimant's claim as being that the respondent had misled the claimant into moving from the Scheme to the ASRP in 1998 and had said that a correction would take place in the event of underperformance. The investigator further stated however that as the act taken place in 1998 the Pensions Ombudsman could not now investigate it because it had occurred more than three years ago.

59. The Investigator also informed the claimant that he had concluded from the information contained in the claimant's covering letter that the three-year period should run from 2003 as the claimant would have been aware/should reasonably have been aware about the concerns relating to the underperformance of the ASRP from that time. The Investigator further

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informed the claimant that he did not consider that there was any reason why a complaint could not have been pursued with the Pensions Ombudsman sooner and that there were therefore no grounds to exercise the Pension Ombudsman's discretion to extend the time limit.

60. The Investigator further stated that his letter had not dealt with the subject matter of the claimant's complaint, namely whether the respondent's actions amounted to maladministration as he had decided that the Pensions Ombudsman was unable to investigate the complaint on the grounds that it had been brought outside the relevant time limit.
61. The Investigator concluded his letter by (a) inviting the claimant to apply for a review of his decision if the claimant considered that he had misunderstood any aspect of his complaint and (b) advising the claimant to consider the possibility of a complaint about the narrower issue of whether the actions of the respondent in 2009/2010 not to alter the pension arrangements amounted to maladministration.

The letter dated 21 September 2010 and associated correspondence

62. A legal adviser and investigator wrote to the claimant or behalf of the Pensions Ombudsman by letter dated 21 September 2010 (B214 – B215 of the bundle) informing the claimant that his file had been passed to her for review and to decide whether the claimant's application could be accepted for investigation.
63. The legal adviser and investigator advised the claimant that having reviewed the available documents the Pensions Ombudsman was prepared to consider the respondent's actions in 2010 to determine whether it had complied with the terms of the respondent's statement dated 16 November 1998.
64. The respondent's legal advisers wrote to the Pensions Ombudsman by letter dated 5 November 2010 (B216- B217 of the bundle) challenging whether the Pensions Ombudsman had jurisdiction to entertain any complaint from the claimant in the light of the applicable time limits and the circumstances of the case.
65. A Gateway Manager at the Pensions Ombudsman wrote to the respondent's legal advisers by letter dated 24 February 2011 confirming that she was satisfied that the Pensions Ombudsman had jurisdiction to consider the complaint which had been accepted for investigation namely, whether the respondent had complied with the promise in accordance with the 1998 statement. The Gateway Manager confirmed that she had reached such decision on the grounds that the members were not advised until February 2010 that no changes would be made to the ASRP and that this was the respondent's final decision in relation to the matter (B228-B229 of the bundle).

The letters of the Pensions Ombudsman dated 3 and 14 March 2011

66. Following a review of the papers, a senior complaints investigator at the Pensions Ombudsman wrote to the claimant by letters dated 3 and 14 March 2011 (B230-231 and B236-327 of the bundle) confirming that (a) as

previously advised the Pensions Ombudsman was unable to consider, on time grounds, any complaint that the claimant had been misled by the respondent by a document issued in 1998 (b) on the basis of the available information there was no evidence to substantiate the complaint which the Pensions Ombudsman did have jurisdiction to entertain namely, that an alleged promise contained in the respondent's letter dated 16 November 1998 had not been complied with as the respondent's letter dated 16 November 1998 contained no promise that future reviews would result in improvements to the benefit structure including that the Special Arrangement would be extended to other members who were not eligible in 1998 and (c) further, the letter dated 16 November 1998 did not state, as claimed in the claimant's application form, that the respondent would , "review the scheme and correct it " .

67. Following further dealings between the claimant and the Pensions Ombudsman, including a letter from the claimant dated 6 May 2011 in which he requested the Pensions Ombudsman to pursue the investigation further, the senior complaints investigator requested the respondent to provide copies of documents relating to the review referred to in the respondent's letter dated February 2010.
68. The tribunal has noted that the claimant stated in his letter to the senior complaints investigator dated 6 May 2011 that he had previously been under the impression that the respondent had made a mistake in its treatment of him and other affected employees however the respondent had made it plain in 2010 that they had no intention of honouring the assurances and promises which they had made earlier (page B238 of the bundle).

The further correspondence between the Pensions Ombudsman and the respondent

69. During the subsequent correspondence between the senior complaints investigator at the Pensions Ombudsman and the respondent's legal advisers :-
- (1) The senior complaints investigator pressed the respondent to provide a copy of the trustee and employer documents relating to the review of the structure of ASRP in 2010 (B 240 and B244 of the bundle).
 - (2) The respondent's legal advisers stated that the review of the ASRP referred to in Ms Oxbridge's letter dated February 2010 took place during a number of meetings and conference calls which were not minuted as the position was clear (B245 of bundle).
 - (3) The senior complaints investigator requested the respondent to provide further details of the grounds upon which it contested the claimant's allegations by way of a better explanation of what had happened when carrying out the 2010 review including dates of meetings/conference calls and the names of the participants involved in such process.

70. The respondent's legal advisers informed the senior complaints Investigator by letter dated 2 March 2012 (B250 – B251 of the bundle) that the respondent had decided to engage a professional firm of benefit consultants to assist the respondent in conducting a review of the structure of the relevant pension plans in respect of the matters identified at paragraph 1-3 of its letter. The respondent's legal advisers concluded the letter on the basis that the review was being conducted as a gesture of good faith to the employees at the Yeovil site and that the respondent reserved its position in respect of the review referred to in Ms Oxbridge's letter dated (10) February 2010. The respondent wrote to the relevant employees, including the claimant, by letter dated 15 March 2012 (B253 of the bundle) advising them of the proposed review.

The letter of the Pensions Ombudsman dated 22 March 2012

71. The Pensions Ombudsman wrote to the claimant by letter dated 22 March 2012 confirming the outcome of the claimant's complaint (B257-258) of the bundle.

72. In summary, the Pensions Ombudsman confirmed that :-

- (1) The claimant had asked him to investigate a complaint regarding the manner in which the respondent had addressed undertakings allegedly given in the respondent's letter dated 16 November 1998 concerning the performance of the ASRP plan.
- (2) The Pensions Ombudsman had been unable to deal with the above complaint because it had been received outside the relevant time limits.
- (3) The Pensions Ombudsman considered that he nevertheless had jurisdiction to determine whether the respondent had complied with its implied duty of trust and confidence when carrying out the 2010 review in the context of the contents of the letter dated 16 November 1998.
- (4) When considering the way forward the Pensions Ombudsman had considered the likely outcome of the investigation into the matter identified at (3) above if he were to proceed, including that he had concluded that the respondent did not promise in 1998 to correct any underperformance only to review the ASRP and consider an appropriate response to the under performance.
- (5) If the investigation was to proceed, it would not be possible for the Pensions Ombudsman to direct the respondent to correct any underperformance only to carry out a fresh review if dissatisfied with the manner in which the 2010 review had been conducted.
- (6) In all the circumstances, the Pensions Ombudsman had decided to make a binding direction requiring the respondent to proceed with the above-mentioned review and to communicate the findings of the third-party consultant to the members.

The 2012 review

73. The respondent appointed Towers Watson to conduct a review of the ASRP arrangements which was completed in July 2012. Following the completion of the review the respondent considered the findings of Towers Watson and decided not to extend the Special Arrangement. The respondent communicated its decision to affected employees at a meeting at the Yeovil site on 5 September 2012. The information contained at B266- B268 of bundle was disseminated at that meeting or very quickly thereafter. Mrs C Lim wrote to the affected employees a standard form of letter dated on or around 6 September 2012 confirming the position, this letter is at B270-B271 of the bundle. The respondent confirmed in the letter that after reviewing the relevant plans in detail they had decided to retain the existing arrangements unchanged. The respondent further stated that the decision was final and consistent with the decision which had been communicated two years previously. The respondent subsequently issued the Questions and Answers sheet at B272-B275 of the bundle to the affected employees.

The events after October 2012

74. The tribunal accepted the claimant's evidence that although he had serious doubts prior to 2012 that the respondent would not take the necessary steps to address any underperformance in the ASRP, including as expressed in his letter dated 6 May 2011(at paragraph 68 above), it did not finally crystallise in his mind that the respondent would not do anything to address the matter until the meeting on 5 September 2012 and the receipt of the subsequent letter confirming the position dated on or around 6 September 2012.

The obtaining of legal advice

75. The claimant's legal adviser, who was then a partner in a local firm of solicitors, was approached by one of the claimant's colleagues for advice concerning the issues arising from the Special Arrangement and associated matters in or around November 2012.

76. The claimant first met with his legal adviser in December 2012. The claimant met with his legal adviser again on or around 13 January 2013 at which time the legal adviser took a statement from the claimant which he used to obtain an opinion from Counsel. The claimant met with his legal adviser on or around 15 March 2013 to discuss the opinion which had been received from Counsel.

77. The claimant and a group of his colleagues met with the legal adviser in around August 2013 to discuss how they could proceed with the matter. The claimant concluded at that time that it would be too expensive to proceed with the matter.

78. The claimant's legal adviser left his firm in July 2014 and the claimant had no further contact with him until September 2014, by which time the adviser had joined another firm of solicitors. The claimant reached an agreement in principle with the legal adviser in October 2014 regarding a conditional fee arrangement. Thereafter, the claimant spent time sorting

out funding and providing the legal adviser with information concerning the case before formally signing a conditional fee agreement in March 2015.

79. The claimant's legal adviser sent a pre-action letter to Mrs Lim of the respondent dated 28 April 2015 which is at A1-A7 of the bundle. The claimant's legal adviser asked the respondent to confirm within four weeks whether the respondent conceded the claimant's claims failing which they would engage with ACAS before commencing proceedings in an employment tribunal. The claimant's claims were refuted by the respondent's legal advisers.
80. The ACAS Early Conciliation Certificate records that ACAS received notification of the claimant's claims on 16 June 2015 and that the Early Conciliation Certificate was issued on 16 July 2015.
81. The claimant's claim form (A17-A30 of the bundle) was presented to the tribunal on 6 August 2015. The respondent's response resisting the claimant's claims is at A31-A47 of the bundle.

The claimant's knowledge of time limits

82. The claimant did not recall any discussions with his legal advisers about any applicable time limits prior to the presentation of his claim form. The claimant accepted however, in his oral evidence that the period of "three months" rang a bell with him but that he would have expected such three months to have begun from the point of his retirement. The claimant has not disclosed to the tribunal the nature of any advice given to him by his legal advisers about the application of any time limits for pursuing a tribunal complaint and has not raised any concerns regarding any such advice. The claimant accepted in his evidence that he had not made any enquiries, such as by way of research on the internet, regarding the application of any time limits relating to the commencement of employment tribunal proceedings.

CLOSING SUBMISSIONS

83. The tribunal has had regard to the written submissions and authorities and associated provisions relied upon by the parties. The tribunal has also had regard to the further authorities referred to in this Judgment including in particular the authorities of **Keeble v the British Coal Corporation** and **Bexley** referred to below concerning the extension of the statutory time limits in discrimination cases. These authorities together with section 33 of the Limitation Act 1980 (referred to in the Keeble decision) were raised with the parties during the course of the Hearing.

THE LAW AND THE CONCLUSIONS OF THE TRIBUNAL

84. The tribunal has considered the matters identified in the List of Issues as amended pursuant to paragraph 110 below.

ISSUES 1-3 (THE PARTICULARS OF EMPLOYMENT CLAIM) OF THE LIST OF ISSUES

85. The tribunal has had regard in particular, to the following statutory and associated provisions and authorities

- (1) Sections 1, 2, 4, 8, 11-12 and 230 of the Act.
- (2) Sections 1 and 2 of the Equal Pay Act 1970
- (3) Rule 37(1)(a) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules of Procedure").
- (4) The authorities of **Young & National Power plc [2001]ICR 328 CA, England v British Telecommunications plc [1990] IRLR 328 EAT and [1992] IRLR 323 EAT, Southern Cross Healthcare Co Limited v Perkins [2011] IRLR 247,CA and Railcare v Cook 1999 UK EAT 98/0303.**

ISSUE 1 OF THE LIST OF ISSUES

86. The tribunal is required to determine whether it has jurisdiction to entertain the claimant's claim for declarations pursuant to section 11 (1) of the Act in respect of the matters identified at Issues 3 (a) and (b) of the List of Issues. Both of these claims relate to the claimant's particulars of employment in respect of periods of service prior to 1 September 2003.

87. In summary, the respondent contended that the tribunal does not have jurisdiction to determine such a claim as the claimant was required, pursuant to section 11 (4) of the Act, to have brought a claim regarding the particulars of the relevant job before the end of three months beginning with the date on which his employment in such job ceased.

88. The respondent further contended that although there was no authority directly on the point, it relied in particular on the language of section 11 of the Act. Further, whilst the respondent's primary position is that the tribunal should apply the more stringent time limitation triggered by a change of job, it also drew the tribunal's attention to the approach taken in equal pay cases including the provisions of section 2 (4) of the former Equal Pay 1970 and the authority of **Young** referred to above in which the Court of Appeal held that an equal pay claim had to be brought within six months of the termination of the relevant contract of employment.

89. The claimant disputed the above interpretation. The claimant contended that the tribunal had jurisdiction to entertain the claimant's complaint pursuant to section 11 of the Act including on the grounds that the claimant remained in the employment of the respondent at the date of the reference, if the legislature had meant to confine the right to a particular contract it would have said so and the word "employment" connoted the concept of continuity from the beginning to the end of the employment relationship.

ISSUE 1 – THE CONCLUSIONS OF THE TRIBUNAL

90. Having given careful consideration to the relevant statutory provisions, authorities and submissions of the parties, the tribunal is satisfied that it does not have jurisdiction to entertain the claimant's claim pursuant to section 11 of the Act in respect of the proposed declarations identified at paragraphs 3 (a) and (b) of the List of Issues because the claimant failed to present such claim within three months of the cessation of the relevant contract of employment namely, the contract of employment accepted by the claimant on 25 October 1988 which terminated by no later than 8 September 2003 (paragraphs 24 and 26 above).

91. When reaching this conclusion the tribunal has taken into account in particular that-

- (1) Section 11 (4) of the Act prohibits the tribunal from considering a reference pursuant to section 11 of the Act where, "the employment to which the reference relates has ceased unless an application requiring the reference to be made was made- (a) before the end of the period of three months beginning with the date on which the employment ceased".
- (2) The wording of the section 11 (4) of the Act therefore appears to envisage that the reference will relate to the terms and conditions in force at the time of the reference or which have ceased within three months of such reference. Further such an interpretation is consistent with the provisions of/ remaining provisions of sections 1, 4, 11 and 12 of the Act.
- (3) The analysis of the similar (but not identical) provisions of the Equal Pay Act 1970 in **Young** referred to above.
- (4) The consideration of the provisions of sections 11 and 12 of the Act in the EAT judgment of **Railcare Limited** referred to above.
- (5) Further, the tribunal considers that the reference to "employment" should be construed as a reference to a contract of employment rather than a job. When reaching this conclusion the tribunal has taken into account in particular, section 230(5) of the Act and the approach adopted by the Court of Appeal in **Young**.

92. In all the circumstances, the tribunal therefore does not have jurisdiction to entertain the claimant's complaint in respect of the declarations identified at paragraphs 3 (a) and (b) of the List of Issues as the claimant's claim form was not presented to the tribunal until 6 August 2015 unless the time limit is extended on the grounds that it was not reasonably practicable for the claimant to have brought the claim within the statutory time period (Issue 2 of the List of Issues).

ISSUE 2 OF THE LIST OF ISSUES

93. The tribunal is therefore required to consider whether time should be extended on the basis it was not reasonably practicable for the claimant to

have brought the claim identified above within the statutory time period (that is by 7 December 2003).

94. The claimant contended that it was not reasonably practicable for such complaint to have been presented within the relevant statutory time limit and that it was presented within a reasonable period thereafter.
95. In summary, the claimant contended that he had not been able to bring his complaint in respect of the declarations identified at paragraphs 3 (a) and (b) pursuant to section 11 of the Act at an earlier date because he did not have the necessary factual or legal knowledge, he had received assurances that he would not be disadvantaged by reason of being excluded from the Special Arrangement and it would have damaged the employer/employee relationship if he had litigated the matter at an earlier time. The claimant also relied on the authority of **O'Brien v Department of Constitutional Affairs 2008 EWCA Civ 1448** in support of this application.
96. The respondent resisted any such application. In summary the respondent contended that time could only be extended if the not reasonably practicable test was satisfied pursuant to section 11 (4) (b) of the Act and there was no basis for such extension of time in this case. The respondent contended in particular, that the claimant knew beyond doubt by 2010 that he was not going to be provided with the benefits that he would have been provided with under the Scheme and further that any residual doubts would have been finally dispelled in 2012 when the workforce was informed of the respondent's final decision not to extend the Special Arrangement (B270 of the bundle).

ISSUE 2 – THE CONCLUSIONS OF THE TRIBUNAL

97. After having given careful consideration to the relevant statutory provisions and authorities referred to above together with the above findings of fact and submissions of the parties the tribunal is satisfied that it was reasonably practicable for the claimant to have presented his complaint pursuant to section 11 (4) of the Act by at the latest within 3 months of the outcome of the respondent's review and notification of its "final decision" at the workforce meeting on 5 September 2012 and its subsequent letter confirming the position of on or around 6 September 2012 (B270-B271 of the bundle) that is by 5 December 2012.
98. When reaching this conclusion the tribunal has taken into account in particular that:-
- (1) The claimant would have been aware, beyond any residual doubt, by the beginning of September 2012 that he was not going to receive the benefits which would have been provided under the Scheme/ the Special Arrangement.
 - (2) The claimant was by the beginning of September 2012 in possession of the necessary information to enable him to bring such a claim (including not only the original documentation from 1998 onwards will also the documentation/information which had

been generated as a result of his complaint to the Pensions Ombudsman).

- (3) For the avoidance of doubt, the tribunal rejects any contention that the claimant was prevented at that time from pursuing a complaint pursuant to section 11 (4) of the Act because of the lack of any relevant information including in respect of Employee A or any eligibility for nomination to any of the respondent's pension schemes. The tribunal is satisfied that any such information which, on the claimant's case was not, in any event, received until March 2016 (which is more than six months after his claim was presented to the tribunals) has no direct relevance to the matters in issue in respect of the claimant's claim pursuant to section 11 (4) of the Act.
- (4) Further, the tribunal is not satisfied that any ignorance by the claimant of the applicable statutory time limits is sufficient reason in this case to extend such period to allow the claimant to pursue his claim in respect of the declarations identified at Issues 3 (a) and (b) of the List of Issues. The claimant is an articulate man who is computer literate and who occupied a managerial position with the respondent from in or around 2003. It was therefore incumbent upon him to take reasonable steps to ascertain the legal position including the nature of any applicable time limits particularly since he had been alerted to such potential requirements by virtue of his complaint to the Pensions Ombudsman. Moreover, although the claimant first met with his legal adviser in December 2012 and was in receipt of an opinion from Counsel in March 2013 he took no steps to pursue a complaint until 2015.
- (5) Still further, the tribunal is not satisfied that it was not reasonably practicable for the claimant to have pursued his claim pursuant to section 11 (4) of the Act at an earlier date by reason of any considerations relating to lack of representation or funding. Employment tribunals are intended to be accessible to, and regularly deal with, litigants who do not have professional advice. Moreover, the claimant was employed by the respondent in a management position from 2003 (on a gross annual salary at that time of £35,000) and it was not suggested in his evidence that he would have been unable to pay any relevant fee (if applicable).
- (6) Finally, the tribunal is not satisfied that the Court of Appeal Judgment in **O'Brien** assists the claimant in this case including on the grounds that it was not necessary for the Court in that case to determine whether it was reasonably practicable for Mr O'Brien to have brought his claim in time but rather in that case whether it was just and equitable to extend the statutory time limit to allow him to do so. This is a different, broader test as explained below in respect of the claimant's age discrimination claim. Further, there was, in any event, no lengthy delay by Mr O'Brien in establishing his rights or in pursuing his claim as was the case with the claimant.

ISSUE 3 OF THE LIST OF ISSUES

99. The tribunal has gone on however, to determine Issue 3 in case the conclusions of the tribunal in respect of Issues 1 and 2 are wrong.
100. When considering the Issue 3 of the List of Issues the tribunal has taken into account in particular that :-
- (1) The provisions of Rule 37(1) (a) of the Rules of Procedure including that when considering whether to strike out a claim on the grounds that it has no reasonable prospect of success this is draconian power which requires a high test. The tribunal is required to consider whether, on a careful consideration of all of the available evidence, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail or whether it is possible that the claim will fail.
 - (2) A tribunal has power under section 11 of the Act to determine what particulars ought to have been included in a written statement of particulars pursuant to sections 1 and 4 of the Act including, in the circumstances of an inaccurate or complete statement. The tribunal does not however have the power pursuant to section 11 of the Act to (a) make an agreement for the parties or (b) construe particulars of employment to decide what they mean.
101. In summary, the respondent contended that in the light of the relevant documentary evidence including the particulars dated 15 August 1985 (B3 of the bundle), 24 October 1988 (B7 of the bundle) and 3 September 2003 (B114 the bundle) together with the oral evidence of the claimant, during which he agreed that he accepted the terms and conditions as offered, there is no proper basis for adding to or construing the terms as contended by the claimant.
102. The respondent further contended that the particulars provided were sufficient to comply with the respondent's obligations pursuant to sections 1 / 4 of the Act.
103. In summary, the claimant contended in his supplementary skeleton argument that no evidence had been served by the respondent to support the contention that the relevant claim had no reasonable prospect of success. Further for the purposes of the striking out application the tribunal should assume that the claimant's evidence as outlined in his reply to the request for further information (at A65 to A67) should be believed. The tribunal should therefore assume that there was an oral agreement that the claimant's employment would include membership of the Scheme. The claimant's entitlement to join/remain in the Scheme was repeated in the offers made to the claimant until September 2003. The claimant did not however contend that his entitlement to join/ or remain in the Scheme survived his promotion from 3 September 2003. Further, the claimant did not rely on the provisions of the sale and purchase agreement dated 7 May 1998 (B9- B29 of the bundle) in support of his section 11 claim. The claimant pursued his claim on the basis that the respondent failed to

terminate his contractual entitlement to the Scheme or reach a consensual variation to the claimant's contract until September 2003.

ISSUE 3 – THE CONCLUSIONS OF THE TRIBUNAL

Paragraph 3 (a) of the List of Issues

104. The tribunal is satisfied having had regard to all of the above, that if the tribunal had jurisdiction to entertain the claimant's claim in respect of the declaration identified at paragraph 3 (a) of the List of Issues it would nevertheless be appropriate, in all the circumstances, to strike out such claim pursuant to Rule 37 (1) (a) of the Rules of Procedure on the grounds that it has no reasonable prospect of success.

105. The tribunal is satisfied that there is no evidence to support the contention that in respect of the claimant's service prior to 3 September 2003 the parties reached an agreement on the terms set out in the proposed declaration at paragraph 3 (a) of the List of Issues.

106. When reaching the above conclusion the tribunal has taken into account in particular the following matters:-

- (1) The findings of fact regarding the claimant's letters of appointment dated 15 August 1985 (paragraphs 17-20 above), 24 October 1988 (paragraphs 21-24 above), and 3 September 2003 (paragraph 26 above) including that the claimant confirmed in his oral evidence that he had accepted such terms and conditions as offered.
- (2) The respondent's letter of offer dated 25 September 1998 confirmed the claimant's appointment to the position of Superintendent with effect from 1 October 1998 on his existing terms and conditions (save for increased salary) (B57 of the bundle) which included the claimant's membership of the Scheme (as confirmed in the earlier letter of offer dated 24 October 1988 at B6-B7 of the bundle). There was no suggestion however in the letter dated 25 September 1998 that the claimant was entitled to the benefits of the Scheme as at 4 September 1998 or that the claimant had any pension entitlement other than pursuant to the rules of the Scheme.
- (3) Mr Burrows wrote to relevant employees (including the claimant) by notices dated 4 September 1998 and October 1998 (paragraphs 32-36 above) confirming the position with regard to the revised pension arrangements including eligibility for inclusion in the Special Arrangement.
- (4) Mr Burrows wrote to the claimant by letter dated 16 November 1998 confirming receipt of the claimant's application to join the ASRP and that he had been duly enrolled. The letter also confirmed that the claimant was not eligible for inclusion in the Special Arrangement (paragraph 37 above).
- (5) The claimant accepted that there was no suggestion in the respondent's letter of offer of promotion to the position of

Production Manager dated 3 September 2003 (in respect of which the tribunal is not requested to consider any declarations for the purpose of this Hearing) that the claimant was entitled to the benefits contended for at paragraphs 3 (a) and (b) of the List of Issues.

Paragraph 3 (b) of the List of Issues

107. The tribunal is further satisfied, having had regard to all of the above, that if the tribunal has jurisdiction to entertain the claimant's claim in respect of the declaration identified at paragraph 3 (b) of the List of Issues it would also have been appropriate, in all the circumstances, to have struck out such claim pursuant to Rule 37 (1) (a) of the Rules of Procedure on the grounds that it also had no reasonable prospect of success.

108. When reaching this conclusion of the tribunal has taken into account in particular the following matters:-

(1) That the claimant was entitled to be a member of the Scheme (subject to the rules of the Scheme) from 24 October 1988 until 30 November 1998 when the claimant ceased to be an active member of the Scheme (following his successful application to join and enrolment in ASRP - paragraph 37 above). Such entitlement prior to 1 December 1998 was reflected in the letters of offer dated 24 October 1988 and 25 September 1998 (paragraphs 21-24 and 25 above).

(2) The claimant ceased to be an active member of the Scheme after 30 November 1998 following the claimant's application to join and enrolment in ARSP as confirmed in the letter from Mr Burrows dated 16 November 1998. The claimant is therefore not entitled to the declaration sought at paragraph 3 (b) of the List of Issues for the period thereafter.

THE CLAIMANT'S AGE DISCRIMINATION CLAIM

ISSUES 4 AND 5 OF THE LIST OF ISSUES

109. The tribunal is required to determine whether (a) the Special Arrangement is an occupational pension scheme for the purposes of regulation 2 of the 2010 Order and (b) whether, if the Special Arrangement is an occupational pension scheme for such purposes, it has been closed for the purposes of paragraph 26 of the 2010 Order at all times since 1 October 2006

110. The tribunal is also required to consider an agreed addition to Issue 4 namely whether, as contended by the claimant, the issue of whether the Special Arrangement is an occupational pension scheme for the purposes of regulation 2 of the 2010 Order has already been determined by the determination of the Deputy Pensions Ombudsman in case number PO-3290 dated 1 August 2014 (pages 383-392 of the authorities bundle ("the Ramsey complaint")) so that the doctrine of res judicata applies. This is denied by the respondent who disputes that this issue was determined in

such case. The tribunal has considered this as a further agreed preliminary matter below.

111. The respondent is one of the parties to the Ramsey complaint. Having considered the Ramsey complaint the tribunal is not satisfied, as a matter of fact, that the issue of whether the Special Arrangement is an occupational pension scheme for the purposes of regulation 2 of the 2010 Order was determined in the Ramsey complaint.
112. When reaching this conclusion the tribunal is satisfied that the matter in issue in that case was whether the respondent, or any other parties in the case, had failed to comply with any relevant legal obligation to inform Mr Ramsey of the personal tax liability arising as a result of the manner in which he took his pension benefits. The tribunal is further satisfied that (a) although the Special Arrangement is not referred to as an occupational pension scheme in the Ramsey complaint (unlike the Honeywell UK pension scheme which is described as such) and (b) it was decided in the Ramsey complaint that the Special Arrangement was not part of such scheme the Ramsey complaint does not consider or determine whether the Special Arrangement was an occupational pension scheme for the purposes of section 1 of the Pension Schemes Act 1993 ("the PSA").
113. The tribunal is therefore satisfied that it has jurisdiction to consider Issue 4 of the List of Issues.

ISSUE 4 – Is the Special Arrangement an occupational pension scheme for the purpose of Regulation 2 of the 2010 Order?

The relevant Law

114. The tribunal has had regard, in particular, to the following statutory and associated provisions and authorities
- (1) Section 1 of the PSA
 - (2) Sections 61 and 212 (1) of the 2010 Act
 - (3) Regulation 2(1) of the 2010 Order
 - (4) The authorities referred to below and in the written submissions of the parties.
115. The tribunal has reminded itself in particular that;-
- (1) Section 212 (1) of the 2010 Act and regulation 2 (1) of the 2010 Order define an occupational pension scheme by reference to section 1 of the PSA.
 - (2) Section 1 of the PSA contains a very broad definition of a, "pension scheme" which means (section 1(5)), "a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people - (a) on retirement, (b) on having

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

- (3) Section 1(1) (a) of the PSA further provides that an "occupational pension scheme" is a pension scheme that was established by an employer for the purposes of providing benefits to, or in respect of, people with service in employment of a particular description.

The submissions of the parties on Issue 4

116. In summary, the respondent contended that :-

- (1) The Special Arrangement is an occupational pension scheme for the purposes of the 2010 Order which defines an occupational pension scheme by reference to section 1 of the PSA (sections 212 (1) of the 2010 Act and regulation 2(1) of the 2010 Order respectively.
- (2) The available guidance indicates that an occupational pension scheme is not confined to a trust based scheme and that it does not require by way of example, trustees, regular contributions, a separate fund of assets or registration with the Pensions Regulator.
- (3) The respondent relies in particular on the Joint Office Memorandum number 78 Preservation of Occupational Pension Rights Voluntary Contributions Revaluations and Transfer Values together with the judgments /determinations referred to in the written submissions including **Parlett v Guppys (Bridport) Limited (No 2) [2000] Pens LR195 CA** and **Pi Consulting v the Pensions Regulator [2013] 100 BPLR (024)**.
- (4) The Special Arrangement, which is evidenced by the offer dated 4 September 1998 (B46 of the bundle) (which offer was accepted when the application was completed and returned), the announcement dated October 1998 (B58) and the letter confirming enrolment dated 16 November 1998 (B61 of the bundle), is plainly capable of providing benefits upon retirement to provide such benefits to or in respect of a particular category of persons who worked for the respondent. The Special Arrangement is therefore an occupational pension scheme for the purposes of the 2010 Order and is subject to the exceptions contained therein.

117. In summary, the claimant contended that the Special Arrangement was not an occupational pension scheme for the purposes of the 2010 Order including on the following grounds:-

- (1) The claimant accepted that, construed literally, the definition of a pension scheme contained in section 1 of the PSA embraces any employment contract which offers pension benefits such as were originally offered to the claimant.
- (2) Neither the union nor the respondent intended the Special Arrangement to be a pension - an intention to create legal relationships is integral to the law of contract and the law of trusts.

Employers and employees must be able to reach contractual agreements without setting up pension schemes as accidental by products otherwise there would be serious difficulties particular with regard to TUPE. The tribunal should construe the PSA as if it contains the words that, "a contract to contribute to a pension scheme is not by itself a pension scheme unless the parties so intend".

- (3) The issue was resolved by ACAS in its guide "Handling TUPE transfers" (at page 51) in which it advises that where an employer has made a contractual promise to an employee to pay a certain percentage of salary each year into a personal pension plan or a group personal pension plan it will not amount to an occupational pension scheme for the purposes of TUPE.
- (4) Viewed as a whole, the Special Arrangement takes effect as a series of contracts with certain employees.
- (5) If the claimant is wrong about (4) above, the true nature of the Special Arrangement is, in any event, that each offer and acceptance created a one-man pension scheme formerly known as an Unapproved Unfunded Pension Scheme and now called an Employer Financed Retirement Benefit Scheme

ISSUE 4 – THE CONCLUSIONS OF THE TRIBUNAL

118. The tribunal is satisfied, having regard in particular, to the statutory and related provisions, authorities and submissions of the parties referred to above, that the Special Arrangement is an occupational pension scheme for the purposes of section 1 of the PSA and further, for the purposes of section 212 (1) of the 2010 Act and regulation 2 (1) of the 2010 Order.
119. When reaching the above conclusions the tribunal has taken into account in particular that (a) sections 212 (1) of the 2010 Act and regulation 2(1) of the 2010 Order both rely upon the definition contained in section 1 of the PSA (b) the definition contained in section 1 of the PSA , as referred to previously above, is very wide as confirmed in the various authorities and guidance to which the tribunal has been referred by the respondent and (c) the findings of fact of the tribunal regarding the nature of the Special Arrangement including in particular the findings at paragraphs 30 – 37 and 40-42 above.
120. For the avoidance of doubt (a) the tribunal is satisfied that the test for deciding whether a scheme is an occupational pension scheme for the purposes of section 1 of the PSA is objective and that it does not matter whether those creating the relevant scheme or arrangements intended it to be an occupational pension scheme (**Pi Consulting v the Pensions Regulator** referred to above) (b) that the findings of fact at paragraphs 40 – 42 above, including with regard to the operation of the Special Arrangement, do not prevent it from being an occupational pension scheme in the light of the wide ambit of section 1 of the PSA and (c) the further matters relied upon by the claimant at 117 above do not prevent

the Special Arrangement from being an occupational scheme in the light of such provisions.

ISSUE 5 – Has the Special Arrangement been closed for the purposes of paragraph 26 of Schedule 1 to the 2010 Order at all times since 1 October 2006.

121. The tribunal has therefore gone on to consider Issue 5 namely whether the Special Arrangement has been closed for the purposes of paragraph 26 of Schedule 1 to the 2010 Order at all times since 1 October 2006. The claimant raised a further issue in his written submissions namely, that the respondent's interpretation of the 2010 Order was incompatible with EU law and could not therefore be relied upon as a defence to the claimant's claim. The tribunal has not considered any contentions relating to this matter as it does not form part of the agreed List of Issues which was confirmed at the commencement of the Hearing.

The relevant law

122. The tribunal has had regard in particular to section 61 of the 2010 Act, regulations 2 (1) and 3 together with paragraphs 26 and 27 of Schedule 1 to the 2010 Order.

123. In summary, regulation 3 the 2010 Order provides that it is not a breach of the non-discrimination rule contained in section 61 of the 2010 Act for the employer (or the others named in that section) to maintain or use in relation to an occupational pension scheme the rules, practices, actions or decisions set out in Schedule 1 of the 2010 Order. Further paragraph 26 of Schedule 1 of the 2010 Order provides that it will not be a breach of the non discrimination rule contained in section 61 of the 2010 Act for an employer to rely on the closing of an occupational pension scheme to new members from a particular date.

The submissions of the parties

124. In summary, the respondent contended as follows :-

- (1) The effect of paragraph 26 of Schedule 1 to the 2010 Order is that an age discrimination claim cannot be pursued on the grounds that an occupational pension scheme is kept open for existing members but was closed to those who had not already joined it. The claimant cannot therefore pursue an age discrimination claim in respect of any period during which the Special Arrangement was closed to new members. In this case no new members have been admitted into the Special Arrangement since it was established in 1998.
- (2) The evidence in relation to Employee A does not alter the position as Employee A had already joined the Special arrangement in 1998. A distinction should be drawn between denying admission to new members and relaxing the conditions of continuing eligibility to existing members. Moreover, even if the tribunal concluded that the relaxation of the conditions of eligibility in respect of Employee A meant that the Special Arrangement was reopened it was closed again following his readmission in 2013 and has remained closed

since that date. In such circumstances the claimant could only, in any event, rely upon the period prior to 2013.

125. In summary, the claimant contended that:-

- (1) Section 61 of the 2010 Act requires an occupational pension scheme to include a non discrimination law. This rule requires the respondent not to discriminate against its employees in the carrying out of any of its functions in relation to the scheme. The 2010 Order was made pursuant to section 61 (8) of the 2010 Act
- (2) All that the 2010 Order can achieve is to establish that section 61 of the 2010 Act does not imply a non-discrimination rule into the Special Arrangement. It does not legitimise discriminatory employment practices outside the Special Arrangement such as with regard to pay.
- (3) The respondent's interpretation of the 2010 Order is incompatible with EU law. The 2010 Act is the U.K.'s implementation of Directive 2000/78/EC. Having regard in particular, to Articles 6(1) and (2) of the Directive and to the Judgement in **HK Danmark v Experian (Case C-476/11)[2014] 1CMR 42**. UK legislation should be interpreted so as to limit age related exemptions in pension schemes to the items specifically listed in Article 6 (2) of the Directive.
- (4) The Special Arrangement is not, in any event, closed. The alleged closure is inconsistent with the respondent's readmission of Employee A and the repeated reviews of the Special Arrangement pursuant to the promises given in 1998 and the review ordered by the Pensions Ombudsman in 2012.

ISSUE 5 - THE CONCLUSIONS OF THE TRIBUNAL

126. Having given careful consideration to all of the above, including in particular the above-mentioned provisions and the findings of fact relating to the Special Arrangement and Employee A at paragraphs 40-47 above, the tribunal is satisfied that the Special Arrangement was, at all relevant times, a closed occupational pension scheme for the purposes of section 61 of the 2010 Act, regulation 3 of the Order by virtue of paragraph 26 of Schedule 1 to the 2010 Order.

127. The claimant confirmed at the commencement of the Hearing that his complaint of direct age discrimination related to alleged less favourable treatment because of his age in respect of his exclusion from the benefits of the Special Arrangement (paragraph 5 above). This is consistent with the way in which the claimant has pursued his complaint both prior to and during the Hearing. The tribunal is therefore satisfied that the claimant is precluded from pursuing such a complaint by virtue of the provisions referred to at paragraph 126 above notwithstanding that he has also described it as a claim for pay pursuant to sections 13 and 39 of the 2010 Act rather than by reference to section 61 of the 2010 Act.

128. When reaching the above conclusions the tribunal has taken into account in particular that :-

- (1) There was no evidence (subject to the consideration of the position relating to Employee A below) to suggest that the Special Arrangement was open to any new members after 1998 (paragraphs 40 and 43 above).
- (2) Employee A joined the Special Arrangement in 1998 (at which time he satisfied the eligibility requirements for entry). Employee A was reinstated to the Special Arrangement in 2013 in the circumstances explained at paragraphs 45-46 above.
- (3) The wording of paragraph 26 of Schedule 1 to the 2010 Order refers to "The closure of a scheme, from a particular date, to workers who have not already joined it". Employee A had already joined the scheme in 1998.

129. The tribunal has gone on however, to consider Issues 6 and 7 of the List of Issues below in case its decision regarding Issue 5 is wrong.

ISSUES 6 AND 7 OF THE LIST OF ISSUES

130. The tribunal is required to determine (a) when the less favourable treatment relied upon by the claimant occurred for the purposes of the 2010 Act and (b) to the extent that such treatment occurred before 1 May 2015 which is the date identified in Issue 7 (albeit that the tribunal recognises that the claim form was not presented to the tribunals until 6 August 2015) whether it is nevertheless just and equitable to extend time to allow the claimant's complaint of age discrimination to, in any event, to proceed.

The relevant law

131. The tribunal has had regard in particular, to the following statutory and associated provisions and authorities:-

- (1) Sections 5, 13, 39, 61 and 123 of the 2010 Act together with section 33 of the Limitation Act 1980.
- (2) The authorities relied upon by the parties/referred to by the tribunal namely, **Kapur v Barclays Bank [1991] 2 AC 355, HL, Cast v Croydon College [1998] ICR 77, CA, British Coal Corporation v Keeble and others [1997] IRLR, 336, EAT, Robertson v Bexley Community Centre [2003] IRLR 434 CA and O'Brien v the Department of Constitutional Affairs [2009] ICR 593, CA.**
- (3) Chapter 15 of the Equality and Human Rights Commission's Code of Practice on Employment 2011 (" the Code").

132. The tribunal has reminded itself in particular of the following :-

- (1) That a complaint of discrimination must normally be presented to the tribunals within three months (subject to any adjustments for the

ACAS Conciliation process) beginning with the date of the act complained of. The time limits contained in section 123 of the 2010 Act apply to claims pursuant to section 13/ 39 of the 2010 Act and to section 61 of the 2010 Act.

- (2) The tribunal is required to identify for the purposes of section 123 of the 2010 Act when the less favourable treatment complained about occurred including in particular (a) whether it was a one-off act or omission in which case the time limit is triggered when the act or omission is completed or (b) whether it was a continuing act in which case time only begins to run when the last act complained about is completed.
- (3) If the alleged unlawful act is a failure to do something the alleged failure occurs when the person does not do it. In the absence of any evidence to the contrary an employer is treated as deciding not to do something when they do an inconsistent act.
- (4) The guidance contained in the judgments of **Kapur** and **Cast**, including that the House of Lords held in **Kapur** that where an employer operates a discriminatory regime, rule, principle or practice it will amount to an act extending over a period. The House of Lords in **Kapur** however also drew a distinction between a continuing act and an act which has continuing consequences including that the latter may have ramifications which extend over a period.
- (5) If a complaint of unlawful discrimination is not brought within the three-month statutory time limit (as extended by any relevant ACAS Conciliation process) a tribunal may nevertheless have jurisdiction to consider the complaint where it considers that it is just and equitable to do so. This is a broader test than that applied in unfair dismissal cases.
- (6) The guidance contained in the Judgments of **Keeble** and **Robertson** including the application of the factors contained in section 33 of the Limitation Act 1980 as set out in **Keeble** which requires the court to consider the prejudice which each party would suffer in all the circumstances of the case having regard to the factors set out in that Judgment.

ISSUE 6 OF THE LIST OF ISSUES

133. In summary, the respondent contended as follows:-

- (1) The essence of the claimant's age discrimination complaint is that
 - (a) the claimant has not been given the contractual promise contained in the Special Arrangement (or an equivalent promise),
 - (b) although the claimant accepted that it was not unlawful for the respondent not to give such a promise in 1998 (because there was no prohibition on age discrimination at that time) it should however have been made when the matter was subsequently reviewed and
 - (c) the fact that some people have the benefit of the promise when the claimant does not does not mean that it is a continuing act.

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- (2) Since the complaint is about the respondent's failure to give the claimant such a promise, time runs from when the decision not to do so was made in accordance with section 123 (3) (b) of the 2010 Act (although the time for any complaints about the subsequent reviews will run from the date of such reviews).
- (3) The Special Arrangement is a single promise which was made (or not made) in the past rather than a traditional pension scheme whereby rights continue to accrue.
- (4) The claimant's claim has been brought outside the time limit contained in section 123(1)(a) of the 2010 Act and it is not just and equitable to extend time to allow the tribunal to determine the claim.
- (5) It is correct that those who were made the promise in 1998 now have the benefit of it when those who were not made the promise (including the claimant) do not have such benefit. This is however, a consequence of the fact that they were not made the promise in 1998 and does not constitute ongoing treatment by the respondent.
- (6) The tribunal is required to focus on the treatment of the claimant by the respondent. The cause of action arises when the claimant was treated less favourably by the respondent namely, when the claimant was not made the promise. This is the act to which the claim relates for the purposes of section 123 (1) of the 2010 Act as confirmed in the pleadings and the correspondence between the parties.
- (7) The claimant's claim relies upon the respondent's failure to make the promise contained in the Special Arrangement whenever the matter was reviewed after 1 October 2006 (the date of the implementation of the relevant provisions of the age discrimination legislation). The claim therefore falls to be determined in accordance with section 123 (3) (b) of the 2010 Act.
- (8) The respondent accepts that the initial decision was subject to review when the respondent decided not to extend the Special Arrangement. The respondent further accepts that time could run from the date of such reviews in accordance with the Judgment in **Cast**. In such circumstances, time ran from no later than 6 September 2012 as this was the last occasion upon which the respondent made it clear that the Special Arrangement was not going to be extended to the claimant and that this was the respondent's final decision.
- (9) The above approach is supported by the analysis of the House of Lords in **Kapur** which drew a distinction between the consequences of a single act and a continuing act. In this case there is no discriminatory rule which is in force throughout the material time but rather several occasions upon which the claimant was not made the promise which, in any event, came to an end in September 2012. Members of the Special Arrangement are not given any additional rights because they carry out more work.

Moreover, the calculation at retirement is made as a consequence of the fact that the promise was made in 1998.

- (10) Further, It would not be just and equitable to extend the statutory time limit in all the circumstances of the case including, in the light in particular of the considerable delay by the claimant in pursuing his claim resulting in the obvious prejudice to the respondent and the cogency of the available evidence. Moreover, the claimant has already pursued a complaint to the Pensions Ombudsman and further, the claimant did not act promptly when notified of the respondent's final decision in September 2012.

134. In summary, the claimant contended as follows:-

- (1) The less favourable treatment complained of by the claimant was the failure to offer terms no less favourable than the Special Arrangement.
- (2) Such less favourable treatment commenced on the 1 December 1998 and was continuous thereafter until the claimant left the employment of the respondent on 13 May 2016 in accordance with the Judgment of **Kapur**.
- (3) The claimant was again treated less favourably than others on his retirement on 13 May 2016 as they were offered the choices available under the Special Arrangement which the claimant was not.
- (4) To the extent that it is necessary to extend time on the grounds that it is just and equitable to do so the claimant relies in particular on the following matters namely (a) the claimant has at all times sought to reach agreement with the respondent, (b) the claimant raised a grievance in 2010, (c) when the grievance was unsuccessful, the claimant made a complaint to the Pensions Ombudsman who ordered a review and (d) following the unsuccessful outcome of such review the claimant sought legal advice in January 2013 but was unable to secure affordable legal representation until March 2015. The claimant also relies for such purposes on the Judgment in **O'Brien**.

ISSUES 6 AND 7 – THE CONCLUSIONS OF THE TRIBUNAL

135. The tribunal has considered first when the less favourable treatment relied upon by the claimant occurred for the purposes of the 2010 Act. The claimant confirmed at the commencement of the Hearing that he was pursuing a complaint of unlawful age discrimination pursuant to sections 5 and 13 of the 2010 Act as set out in paragraph 5 above. For the avoidance of doubt, the tribunal has also considered the claimant's complaint of age discrimination pursuant to section 61 of the 2010 Act for the purposes of the application of the statutory time limits.

136. Having given careful consideration to all of the above, the tribunal is satisfied that the alleged less favourable treatment of the claimant occurred, for the purposes of section 123 of the 2010 Act, when the

respondent declined/failed in or around September 1998, and subsequently on the introduction of the age discrimination legislation in October 2006 and further following the reviews in 2010 and 2012, to extend the benefits of the Special Arrangement (or equivalent benefits) to the claimant.

137. The tribunal is also satisfied that, for the purposes of section 123 of the 2010 Act, such treatment constituted a series of acts or omissions which commenced in around August/September 1998 when the Special Arrangement was agreed (paragraph 31-35 of the findings of fact) and concluded on or around 6 September 2012 when the respondent confirmed in its letter of on or around that date that the Special Arrangement or equivalent benefits would not be extended to the claimant and that this was a "final decision" (paragraph 73 above).

138. The tribunal is further satisfied that although such treatment may have continuing consequences (as an employee who does not have the benefit of the Special Arrangement is very likely to receive lower pension benefits on retirement than someone who has the benefit of the Special Arrangement) it does not constitute a continuing act for the purposes of section 123 of the 2010 Act.

139. When reaching this conclusion the tribunal has taken into account in particular the following matters-

(1) The nature of the Special Arrangement including that it was a contractual promise given in 1998 (which was subsequently reviewed in 2010 and 2012) to top up, if required pension benefit arrangements for certain categories of the workforce upon retirement (paragraphs 31-37 and 40 above).

(2) This case is distinguishable from the situation in **Kapur**. The Special Arrangement is not a traditional scheme under which benefits accrue or contributions are paid on a weekly or monthly basis. The Special Arrangement was a one off promise which conferred contractual rights upon the beneficiaries, subject to the applicable conditions, at the time it was made in 1998 and which was confirmed on review in 2010 and 2012.

(3) Although the value of the benefits of the Special Arrangement is not determinable until retirement the employees to whom the promise was made in 1998 do not accrue any additional rights by virtue of their continued employment with the respondent.

(4) That the tribunal has found that the Special Arrangement constituted an occupational pension scheme for the purposes of the 2010 Order. The tribunal is however satisfied that such finding is not inconsistent with the above conclusion in the light of the very wide definition of the description of an occupational pension scheme for the purposes of section 1 of the PSA and the 2010 Order.

140. The statutory time limit accordingly runs, at the latest, from 6 September 2012 as this was the last occasion when the respondent

notified the claimant (and others) that the benefits of the Special Arrangement/equivalent or other benefits would not be provided (B270-B271 of the bundle and paragraph 73 above)

141. The claimant's age discrimination claim has therefore been presented outside the statutory time limit and the tribunal does not have jurisdiction to determine it unless the tribunal is satisfied that it is just and equitable in all the circumstances to extend time to allow such claim to proceed.

142. The tribunal has therefore gone on to consider whether to exercise its discretion pursuant to section 123 (1) (b) of the 2010 Act to allow the claimant to pursue his complaint of age discrimination on the grounds that it is, in all the circumstances, just and equitable to do so. The tribunal has reminded itself that this is a different and broader test to that which applies in respect of unfair dismissal and section 11 of the Act claims.

143. When determining this issue the tribunal has had regard in particular to the prejudice which each party would suffer as a result of its decision in all the circumstances of the case including the factors contained in section 33 of the Limitation Act 1980 as identified in **Keeble** as follows :-

(1) The length and reasons for the delay –

(a) There was a delay of more than 2 1/2 years between the notification of the respondent's "final decision" regarding the review of the Special Arrangement on 6 September 2012 and the date of 1 May 2015 identified in Issue 7 of the List of Issues (or 6 August 2015 which is the date upon which the claimant's claim was presented to the tribunals).

(b) The reasons for the delay are set out at paragraphs 75- 80 above.

(2) The extent to which the cogency of the evidence is likely to be affected by the delay –

(a) Although the claimant does not rely on any alleged less favourable treatment prior to 1 October 2006 (when the relevant provisions of the age discrimination legislation came into force albeit that he still seeks a remedy from 1998) the matter relates to events which occurred in 1998 (when the Special Arrangement was agreed) onwards including in respect of the justification for such treatment (including in 2006, 2010 and 2012).

(b) The tribunal is satisfied that the cogency of the evidence is likely to be significantly affected by the delay particularly in the light of the following (a) many of the key matters in dispute occurred between 1998 and September 2012 ie between nearly 4 and 18 years ago (b) this is not a case that can be resolved by documentation alone (as indicated by the dispute between the parties regarding the alleged

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assurances given in 1998 (paragraph 38 above) and regarding the 2010 review as reflected in the correspondence relating to the claimant's complaint to the Pensions Ombudsman (paragraphs 67-69 above) (c) a significant number of the people who were involved/ are likely to have been involved in the relevant events including Mr Gard, Mr Burrows, Ms Oxberry and Mr Simpson are no longer employed by the respondent.

- (3) The extent to which the party sued had co-operated with any requests for information - the claimant has alleged that one of the reasons for the delay in pursuing his complaint to the tribunal was that the respondent did not provide him with relevant information including, in respect of Employee A and in respect of the nomination to the respondent's pension scheme. The tribunal is however, satisfied for the reasons previously explained at paragraph 98 above, in respect of the claimant's claim pursuant to section 11 of the Act, that the claimant had all necessary information to enable him to bring a complaint of age discrimination by September 2012.
- (4) The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action - The tribunal is not satisfied having regard to its findings of fact at paragraph 74-82 above, and in the light of its conclusions at paragraph 98 above in respect of the claimant's complaint pursuant to section 11 of the Act, that the claimant acted promptly once he knew of the facts giving rise to the cause of action. The tribunal is satisfied that in the circumstances of this case there was a significant and unreasonable delay by the claimant in pursuing his claims particularly in the light of his previous involvement with the Pensions Ombudsman which should have alerted the claimant to potential issues relating to time limits. Further, for the reasons previously explained in respect of the claimant's complaint pursuant to section 11 of the Act at paragraph 98 above, the tribunal is not satisfied the claimant was prevented from pursuing his complaint to the tribunal by reason of any issues relating to lack of representation or funding.
- (5) The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action –
 - (a) Again, the tribunal is not satisfied, having regard to its findings of fact at paragraph 74-82 above and in the light of its conclusions at paragraph 98 above in respect of the claimant's complaint pursuant to section 11 of the Act, that the claimant acted promptly with regard the obtaining of legal advice (or in respect of the establishment of his rights) following the notification of the outcome of the respondent's review in September 2012.
 - (b) Further the tribunal is not satisfied that the claimant acted promptly in pursuing his complaint of age discrimination following receipt of such legal advice. Although the

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claimant first consulted his legal adviser in December 2012 and was in receipt of an opinion from Counsel in March 2013 (paragraph 76) the claimant's advisers did not send a pre - action to the respondent until April 2015. Further, the claimant did not contend that he had been wrongly advised by his legal advisers in respect of any delay in presenting his complaint to the tribunal.

- (c) The Judgments in **Kapur, Cast and Keeble** are long-standing authorities which contain settled principles of law.
- (d) The tribunal is not satisfied, in the circumstances of this case, that the claimant is assisted by the Court of Appeal's judgment in **O'Brien**. When reaching this conclusion the tribunal has recognised that notwithstanding Mr O'Brien's considerable legal experience he did not present his claim form to the tribunals within the relevant statutory time limit. The tribunal has also taken into account however, that there was no lengthy delay by Mr O'Brien in pursuing his claim and further that it was not contended in that case that any significant prejudice would have been occasioned to the respondent by extending the time limit including that the cogency of the evidence would have been impaired.

144. The tribunal has also weighed the prejudice which each of the parties would suffer in respect of the decision to extend or not extend time in the light of the above factors. When reaching its decision the tribunal has taken into account in particular that if the tribunal declined to exercise its discretion to extend time the claimant would be prevented from pursuing his complaint of age discrimination including that he would therefore be denied a determination of his claim on the merits, the possible value of such claim (which the claimant quantifies as in excess of half a million pounds) and that it is possible that the claimant may not have any further remedy in respect of such alleged losses. The tribunal has however also taken into account that this matter has been on going since 1998 including by way of grievances, reviews and a complaint to the Pensions Ombudsman. The tribunal has further had regard to the prejudice which would be occasioned to the respondent by reason of the fact that it would be required to defend its position in respect of events going back to 1998 including that the cogency of the evidence is likely to be significantly impaired by the passage of time particularly as a number of relevant employees are no longer in its employment. Having weighed all of the above the tribunal has decided that it is not just and equitable to extend the statutory time limit pursuant to section 123 (1) (b) of the 2010 Act to allow the claimant to proceed with his complaint of age discrimination.

ISSUE 8

145. The tribunal has gone on to consider, in case it is wrong with regard to the above conclusions, whether the claimant is, in any event, :-

- (1) Prevented, in the light of the Pension Ombudsman's determination dated 22 March 2012 (B157 of the bundle) ("the Determination"),

from pursuing the issue identified at paragraph 8 (a) of the List of Issues and/or

- (2) Prevented from pursuing his age discrimination claim in its entirety by reason of the doctrine of res judicata and the doctrine of **Henderson v Henderson** (paragraph 8 (b) of the List of Issues.

The relevant law

146. The tribunal has had regard in particular to the following statutory and associated provisions and authorities: --

- (1) Sections 146-151 of the PSA (including in particular, sections 146 (1) and (6) and 151 (1) and (4)).
- (2) The authorities of: **Henderson v Henderson (1843) 3 Hare, Johnson v Gore Wood [2002] 2 AC 1, Dexter v Vieland- Boddy [2003] EWCA civ 14, Arjo Wiggins v Ralph [2010] Pens LR 11, Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 SC**

147. The tribunal has reminded itself in particular, that res judicata is an umbrella term used to cover three different legal principles namely :-

- (1) Cause of action estoppel which is a principle which precludes a party from challenging the same cause of action in subsequent proceedings.
- (2) Issue estoppel which is a principle which applies even if the cause of action is different in the later action. If an issue which is necessarily common to both actions is determined in the earlier proceedings it will be binding on the parties.
- (3) The rule in **Henderson v Henderson** which provides, in summary, that if a party fails to raise a matter in proceedings which they could and should have raised they may be prevented from raising it in future proceedings if to do so would amount to an abuse of process. The purpose of this doctrine is to prevent proceedings which would amount to an abuse of process. A finding that a party should have raised a matter in earlier proceedings is however insufficient to invoke the principle. The crucial question is whether, having had regard to all the circumstances of the case, the party is abusing the process of the court by seeking to raise a matter that should have been raised previously. This requires the tribunal to adopt a broad-based merits approach to the circumstances of the case.

The submissions of the parties

148. In summary, the respondent contended as follows:-

- (1) the Pensions Ombudsman had jurisdiction, pursuant to section 146 (1) of the PSA to determine any dispute of fact or law arising in

connection with a pension scheme between a person responsible for managing the scheme and a beneficiary.

- (2) Section 146 (6) (a) of the PSA prevents the Pensions Ombudsman from investigating a complaint if proceedings had previously been commenced in a court or tribunal in respect of such matter.
- (3) Determinations of the Ombudsman are binding on the parties subject to a right of appeal on a point of law pursuant to section 151 of the PSA.
- (4) The principle of res judicata is that a party should not to have to face a different case on the same subject matter if the first has failed. This principle applies to determinations from the Pensions Ombudsman and the employment tribunal including where the complainant has not been legally represented.
- (5) The tribunal must focus on the substance of what occurred before the Pensions Ombudsman and what is involved in the new proceedings.
- (6) The respondent denies that there has been any failure to disclose any relevant information, including in respect of the Share and Purchase agreement dated May 1998, and contends that such information would not, in any event, have affected the outcome of the investigation by the Pensions Ombudsman
- (7) In respect of issue estoppel (Issue 8 (a) the claimant is bound by the Determination in which the Pensions Ombudsman made a binding decision that the respondent did not make any promise in 1998 to correct any underperformance and that any undertaking to review the pension benefits was not a commitment to take any particular action.
- (8) The claimant was entitled to include a claim for continuing age discrimination in his complaint to the Pensions Ombudsman. If he failed to do so he should have done so and accordingly, he is now barred by the principle in **Henderson**.
- (9) The claimant cannot have a second bite of the cherry by switching jurisdictions, the Ombudsman and the tribunal are alternatives sources of complaint.
- (10) The respondent accepts however, that the claimant is not barred from pursuing his age discrimination claim in respect of the 2012 review but only insofar as it is pursued as an one off act of discrimination.

149. The claimant contended/confirmed in summary that:-
- (1) Issue 8 (a) - the claimant does not contend that the alleged promise that he would not be disadvantaged by the introduction of the ASRP had contractual force. It is the claimant's case that such promise is however relevant to the respondent's duty of good faith and the limitation issues.
 - (2) Issue 8 (b) - res judicata does not apply as the Pensions Ombudsman did not decide the claimant's age discrimination claim.
 - (3) Further, the claimant is not precluded from pursuing his complaint of age discrimination by virtue of **Henderson v Henderson**. Having had regard to the principles set out in **Johnson and Dexter** referred to above it is wrong to hold that because the matter could have been raised in earlier proceedings it should have been and that raising it in later proceedings is therefore an abuse of process. The crucial question is whether, having had regard to the broad merits of the case, the conduct is in normal circumstances an abuse of process. Further the court will rarely find that later proceedings amount to an abuse of process unless it involves unjust harassment or oppression by claimant. The claimant did not harass or oppress the respondent.
 - (4) The Pensions Ombudsman was unable to consider fully the issues put to him by the claimant as the respondent failed to provide him with almost all of the relevant documents. The claimant had no idea that registered pension schemes were involved in the process until he received the respondent's response which must have given a false and misleading picture to the Pensions Ombudsman.

ISSUE 8 (a) – THE CONCLUSIONS OF THE TRIBUNAL

150. The tribunal has considered first whether the claimant is bound by the Determination of the Pensions Ombudsman in respect of the alleged promise identified in paragraph 8 (a) of the List of Issues.
151. This issue is now of limited relevance in view of the following namely (a) the claimant confirmed that he does not contend that the alleged promise that he would not be disadvantaged had contractual force (b) further the claimant, in any event, only relies on any such alleged promise insofar as it relates to any issues relating to good faith and limitation and (c) the findings at paragraphs 37 and 39 above including that the claimant accepted his oral evidence that he did not recall being told at the time of the respondent's letter dated 16 November 1998 that the respondent would make good any shortfall.
152. The tribunal is not however satisfied, having given careful consideration to the Determination, that the Pensions Ombudsman made any binding determination in respect of the issue identified at Issue 8 (a) of the List of Issues. When reaching this conclusion the tribunal has taken into account in particular:-

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- (1) The contents of the first full paragraph of the second page of the Determination (B258 of the bundle) in which the Pensions Ombudsman advised the claimant that he had considered “what the outcome of the investigation might be if it were to proceed”. Further, the tribunal has had regard to the language which the Pensions Ombudsman adopts in respect of his assessment of the nature of any promise made by the respondent to correct any underperformance including that he refers to the earlier “view” of the investigator and expresses “an opinion” which concurs with the view of the investigator. The Pensions Ombudsman did not however make any formal decision regarding such matter.
- (2) In the fourth main paragraph of the second page of the Determination the Pensions Ombudsman stated that, “I have decided to make a binding direction now for the review to be carried out (a reference to the respondent’s 2012 review). The Pensions Ombudsman issued in the Determination a direction requiring the respondent to proceed as outlined previously in a letter dated 15 March 2012 from the respondent’s director of pensions to the claimant and others. Further, the Pensions Ombudsman concluded his letter by saying that, “my decision and direction are final and binding on all parties subject only to an appeal on a point of law...” The tribunal is satisfied, on the wording of the Determination, that the decision and direction of the Pensions Ombudsman relate only to the further review by the respondent. Accordingly, the tribunal is not satisfied that the view of the investigator and/or the opinion of the Pensions Ombudsman regarding the nature of the alleged promise, as referred to above, formed part of the Pension Ombudsman’s formal determination and that it is therefore binding on the claimant.
- (3) The tribunal however trusts, in the light in particular, of the matters referred to at paragraph 151 above, that if this matter is subsequently allowed to proceed for any reason the claimant will reflect on the merits of such contention and its relevance to the claimant’s age discrimination claim as confirmed at the commencement of the Hearing.

ISSUE 8 (b) OF THE LIST OF ISSUES

153. Finally, the tribunal has considered whether the claimant is prevented from bringing his claim for age discrimination by the doctrine of *res judicata* and/or the rule in **Henderson V Henderson**.

Cause of action estoppel

154. The tribunal has considered first, whether the claimant is prevented from bringing his complaint of age discrimination by way of cause of action estoppel.

155. Having given careful consideration to all of the provisions and guidance referred to above, the tribunal is not satisfied that the claimant is

prevented from bringing his complaint of age discrimination by reason of cause of action estoppel.

156. When reaching this conclusion the tribunal has taken into account in particular the following matters:-

- (1) The contents of the claimant's application form dated 26 May 2010 and accompanying letter to the Pension Ombudsman (B180 and B177-B178 of the bundle and paragraphs 53-56 above). There is no reference to any complaint of age discrimination in the section in which the claimant is required to summarise his complaint and/or in the accompanying letter.
- (2) Further, although the claimant has described, in general terms in the subsequent section of the above application form (requiring him to describe the injustice which he has suffered) the application of the age and age and service criteria for entry into the Special Arrangement and stated that, "such discrimination" would result in his losing out significantly compared to those who qualified for the Special Arrangement (B180 of the bundle) the claimant did not state that it formed part of his complaint and further, the claimant did not include the allegations of continuing age discrimination identified at paragraph 5 above.
- (3) It is clear that the Pensions Ombudsman/ his officers understood the claimant's complaint to be about the fact that he had allegedly been misled by the respondent into moving from the Scheme to ASRP in 1998 and that the respondent had said that a correction would take place in the event of underperformance (the letter from the Pension Ombudsman's investigator dated 17 June 2010 at B181-B182 of the bundle). Further, there is no suggestion in the subsequent correspondence emanating from the Pension Ombudsman that the claimant's original complaint (which was rejected on time grounds) or the subsequent limited complaint which related to the respondent's 2010 review (which was subsequently accepted by the Pensions Ombudsman for investigation) that the complaint was regarded in any way as a complaint of age discrimination.

157. The tribunal has therefore gone on to consider whether the claimant is, in any event, prevented from pursuing his complaint of age discrimination by virtue of the rule in **Henderson v Henderson**. When considering this matter the tribunal has taken into account that in order for the claimant to be prevented from pursuing his complaint of age discrimination it has to be satisfied not only that the claimant could have pursued such a complaint with the Pensions Ombudsman but also that it would be an abuse of process for the claimant to be allowed to proceed with it.

158. The tribunal is satisfied, in the light of section 146 (1) (c) of the PSA that the Pensions Ombudsman would have had jurisdiction to entertain the claimant's complaint of age discrimination.

159. The tribunal is not however satisfied on the facts, that if the claimant's complaint of age discrimination had not been dismissed by the tribunal on other grounds, it would have been an abuse of process to have allowed the claimant to pursue his complaint of age discrimination in the employment tribunals. When reaching this conclusion the tribunal has taken into account in particular the following:-

- (1) The tribunal is satisfied that at the time of the presentation of the tribunal proceedings alleging age discrimination, the claimant had genuine and serious unresolved concerns (a) that he had been treated less favourably than others because of his age in respect of his exclusion from the benefits of the Special Arrangement (including in respect of the respondent's failure/ refusal to address any shortfall when the underperformance of the ASRP arrangements became apparent) (b) about the serious adverse effect which his exclusion from the Special Arrangement/ comparable benefits would have on his impending retirement benefits notwithstanding the confident assurances which had been given to him and others in 1998, and subsequently, regarding the expected performance of the ASRP arrangements.
- (2) From the claimant's perspective, his concerns had not been formally addressed on the merits or resolved by the Pensions Ombudsman. The claimant's original complaint of May 2010 had been rejected on the grounds of time and the revised complaint had been brought to a close by the Pensions Ombudsman on the basis that the respondent was directed to undertake a further review without addressing the concerns which had been raised by the claimant including, with regard to the process of review adopted by the respondent in 2010 (paragraphs 53-70 above).
- (3) The tribunal is not satisfied, in the circumstances, that the claimant's attempts to seek redress in the employment tribunal can be regarded as constituting harassment or oppression of the respondent.

Employment Judge Goraj

Date: 27 July 2016

JUDGMENT SENT TO THE PARTIES ON 2 AUGUST 2016

FOR THE OFFICE OF THE TRIBUNALS

