Case Number: 2202235/2015, 1303751/2015, 1401812/2015, 1601172/2015 & 1601173/2015

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
(1) Ms R Sargeant (2) Mr D Bebbington (3) Mr M Bygrave (4) Mr M Dodds (5) Mrs E McEvoy	**AND**	(1) London Fire and Emergency Planning Authority (2) West Midlands Fire and Rescue Authority (3) Cornwall Fire and Rescue Authority (4) South Wales Fire and Rescue Authority (5) Secretary of State for the Home Department (6) The Welsh Ministers

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 9 to 11, 13, 16 to 19 January 2017
In Chambers 20, 23 to 25 January 2017

EMPLOYMENT JUDGE: Miss A M Lewzey (sitting alone)

Representation:

For Claimants: Mr A Short QC of Counsel
Ms L Seymour of Counsel

For First, Second, Third & Fourth Respondents: Mr A Lynch QC of Counsel

For Fifth & Sixth Respondents: Mr J Cavanagh QC of Counsel
Mr R Hill of Counsel
Ms I Proud of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

(i) The treatment of the Claimants by the transitional provisions included in the Firefighters Pension Scheme 2015 is a proportionate means of achieving a legitimate aim and, accordingly, the claims of direct age discrimination fail.

(ii) The claims for equal pay fail.

(iii) The claims of indirect discrimination on the grounds of sex and/or race fail.

(iv) The piggyback claims for equal pay fail.

RESERVED REASONS

Introduction

1. These claims are brought against various Fire and Rescue Authorities ("FRAs") and the relevant Government Departments in relation to the transitional provisions included in the Firefighters Pension Scheme 2015 (the "2015 Scheme"). There are in total over five thousand claims in England and Wales.

2. The lead Claimants in this multiple are members of the Fire Brigades Union ("FBU"), who support their claims. The English lead cases are Sargeant, Bebbington and Bygrave. The Welsh lead cases are Dodds and McEvoy.

3. The First to the Fourth Respondents, represented by Mr Lynch, are the relevant employing Fire and Rescue Authorities (FRAs). The Fifth and Sixth Respondents, represented by Mr Cavanagh, are the relevant Government Departments.

4. The Home Office, the Sixth Respondent, is now responsible for the fire service, although at the relevant time the responsible department was the Department for Communities and Local Government ("DCLG"). The Welsh Ministers are responsible for the pension schemes of firefighters in Wales.

5. The Claimants are employed by the FRAs, but the Home Office and the Welsh Ministers are responsible under the Public Service Pensions Act 2013 for establishing schemes for the payment of pensions and other benefits to fire and rescue workers in England and Wales respectively.

6. The present cases are test cases in England and Wales. In addition, a number of claims have been brought by firefighters in Scotland, where the transitional provisions differ from the transitional provisions in England and Wales. By a letter dated 22 December 2015 the President of the Scottish Employment Tribunal notified the parties in the Scottish cases that those cases had been sisted (stayed) pending determination of the English and Welsh cases.

7. Similar claims have been pursued in relation to the transitional protection provided in relation to the judicial pension scheme. The decision of the Employment Tribunal in **McCloud & Others v Ministry of Justice** was issued on 16 January 2017. That judgment has been referred to in these proceedings, but is not binding on this Tribunal.

8. The parties agree that this case is suitable to be heard by an Employment Judge sitting alone.

9. The parties have referred me to the decision of the Court of Appeal in **Naeem v Secretary of State for Justice [2016] ICR 289** (auth/33)**.** The Supreme Court heard the appeal in that case in November 2016. All parties have specifically reserved the right to make further written submissions should the decision of the Supreme Court be delivered shortly.

The Issues

10 The following is agreed as common ground:

10.1 That all of the Respondents are emanations of the state;

10.2 That the Fifth and Sixth Respondents are each a 'responsible authority' for the purposes of section 2 of the Public Service Pensions Act 2013;

10.3 That the impugned terms of the Firefighters' Pension Scheme (FPS):

10.3.1 Comprise a provision, criteria or practice for the purposes of section 19 of the Equality Act 2010 (EA 2010);

10.3.2 Treat people who were born on or after 2 April 1971 less favourably than people born before that date on the grounds of age;

10.3.3 Treat people who were born between 2 April 1967 and 1 April 1971 less favourably than people born before 2 April 1967 on the grounds of age;

10.3.4 (Common ground as between the Claimants and the Fifth and Sixth Respondents only) Disproportionately adversely affect women; and

10.3.5 (Common ground as between the Claimants and the Fifth Respondent only) Disproportionately adversely affect members of black or minority ethnic (BME) origin;

10.4 That the impugned terms of the New Firefighters' Pension Scheme (NFPS) applicable to special NFPS members:

10.4.1 Treat people who were born on or after 2 April 1971 less favourably than people born before that date on the grounds of age;

10.4.2 Treat people who were born between 2 April 1967 and 1 April 1971 less favourably than people born before 2 April 1967 on the grounds of age;

10.4.3 (Common ground as between the Claimants and the Fifth and Sixth Respondents only) Disproportionately adversely affect women; and

10.4.4 (Common ground as between the Claimants and the Fifth Respondent only) Disproportionately adversely affect members of BME origins.

11 The agreed issues for determination by the Tribunal at this hearing are as follows**:**

11.1 *Objective justification*

The aim relied upon by the Respondents is to protect those closest to pension age and to retirement from the effects of pension reform.

11.1.1 Is that aim:

11.1.1.1 a legitimate aim for the purposes of the relevant legislation; and

11.1.1.2 (to the extent that this is different to paragraph 11.1.1.1) a legitimate social policy aim for the purposes of the age discrimination legislation?

11.1.2. Are the impugned terms a proportionate means of achieving that aim?

11.2 *The age discrimination claims*

11.2.1 Regarding the Claimants' protected characteristic of age, pursuant to section 13(2) of the EA 2010, have the Respondents shown that the less favourable treatment of the Claimants (which consists of some members of the FPS and/or the NFPS being entitled to continued active membership of the FPS, but not the Claimants, and/or the provision of full or tapering protection to some members of the FPS and/or the NFPS, but not for the Claimants), is:

11.2.1.1 in pursuit of the legitimate aim set out in paragraph 11.1 above; and

11.2.1.2 a proportionate means of achieving that aim?

11.2.2 If not, is there a breach of section 39 of the EA 2010 and/or the non-discrimination rule under section 61 of the EA 2010?

11.2.3 Pursuant to Article 6(1) of Directive 2000/78/EC, have the Respondents shown that the difference in treatment on the grounds of age is objectively and reasonably justified by:

11.2.3.1 the legitimate aims set out at paragraph 11.1 above; and

11.2.3.2 that it is an appropriate and necessary means of achieving that aim?

11.2.4 If not, have the Claimants' rights under Directive 2000/78/EC been infringed?

11.3 *The equal pay claims*

11.3.1 Pursuant to section 69(1)(a) of the EA 2010, have the First and Fifth Respondents (and, in relation to Wales, the Fourth and Sixth Respondents) shown that the difference in terms between the FPS and the 2015 Scheme (in particular as regards the continuing membership of the FPS and/or the basis upon which full or tapering protection is made available) as applied to the First Claimant (and, in relation to Wales, the Fifth Claimant) and her male comparator is due to a material factor which does not involve treating that Claimant less favourably because of her sex?

11.3.2 For the purposes of section 69(2) of the EA 2010, does that factor put women at a particular disadvantage when compared with men doing equal work?

11.3.3 If so, is that factor:

11.3.3.1 In pursuit of the legitimate aim set out in section 11.1 above, and

11.3.3.2 a proportionate means of achieving that legitimate aim?

11.3.4 If not, is there a breach of the equality rule under section 67 of the EA 2010?

11.3.5 Pursuant to Article 157 of the Treaty on the Functioning of the European Union, do the impugned terms differentiate between men and women for a reason unrelated to sex?

11.3.6 If the impugned terms do differentiate for a reason that is related to sex, are they:

11.3.6.1 in pursuit of the legitimate aim set out in section 4 above; and

11.3.6.2 a proportionate means of achieving that legitimate aim?

11.3.7 If not, are the First and Fifth Claimants entitled to equal pay pursuant to Article 157?

11.3.8 If the equal pay claim of the First and Fifth Claimants are made out, are the piggy-back claims of the Second, Third and Fourth Claimants well founded?

11.4 *Sex discrimination*

11.4.1 Does the provision, criterion or practice in issue place female firefighters at a particular disadvantage?

11.4.2 To the extent that this remains in dispute, does the provision, criterion or practice in issue place the individual female claimants at that disadvantage?

11.4.3 To the extent that it is necessary to show this, are female firefighters and/or the individual female claimants placed at that disadvantage because of their gender?

11.4.4 For the purposes of section 19 of the EA 2010, is the effect of section 23 that the comparisons above should be between female firefighters and/or the individual claimants and either:

11.4.4.1 male firefighters (or, in the case of the comparison at 11.4.2, a male firefighter) who are/is the same age; or

11.4.4.2 male firefighters (or, in the case of the comparison at 11.4.2, a male firefighter) who are/is in the protected or tapered groups?

11.4.5 Regarding the First (and, in relation to Wales, Fifth) Claimant's protected characteristic of sex, pursuant to section 19(2)(d) of the EA 2010 have the First and Fifth Respondents (and, in relation to Wales, the Fourth and Sixth Respondents) shown that the provisions by which some members of the FPS are entitled to continued active membership of the FPS, but not the First (or Fifth) Claimant, and/or which provide full or tapering protection for some members of the FPS, but not for these Claimants, are:

11.4.5.1 in pursuit of the legitimate aim set out in section 11.1 above; and

11.4.5.2 a proportionate means of achieving that legitimate aim?

11.4.6 If not, is there a breach of section 39 of the EA 2010 and/or the non-discrimination rule under section 61 of the EA 2010?

11.4.7 For the purposes of the meaning of “indirect discrimination” in Directive 2006/54/EC and, in particular, Article 2(1)(b) thereof, and to the extent necessary:

11.4.7.1 does the provision, criterion or practice in issue place the individual female Claimant at a particular disadvantage because of gender, and

11.4.7.2 should the appropriate comparison be between the First (or Fifth) Claimant and a male firefighter who is the same age as the

Claimant, or between these Claimants and a male firefighter who is in the protected or tapered groups?

11.4.8 Pursuant to Article 2(1)(b) of Directive 2006/54/EC, have the First and Fifth (or the Fourth and Sixth) Respondents shown that basis on which continuing active membership of the FPS and/or full or tapering protection is made available to some members of the FPS, but not the First (or Fifth) Claimant, is objectively and reasonably justified by:

11.4.8.1 the legitimate aim set out in section 11.1 above; and

11.4.8.2 an appropriate and necessary means of achieving that aim?

11.4.9 If not, have the First and Fifth Claimants' rights under Directive 2006/54/EC been infringed?

11.5 *Race discrimination*

11.5.1 Does the provision, criterion or practice in issue place BME firefighters at a particular disadvantage?

11.5.2 To the extent that this remains in dispute, does the provision, criterion or practice in issue place the First (and, in the case of Wales, Fourth) Claimants at that disadvantage?

11.5.3 To the extent that it is necessary to show this, are BME firefighters and/or the First (or Fourth) Claimants placed at that disadvantage because of their race?

11.5.4 For the purposes of section 19 of the EA 2010, is the effect of section 23 that the comparisons above should be between BME firefighters and/or the First (or Fourth) Claimants and either:

11.5.4.1 white firefighters (or, in the case of the comparison at 11.5.2, a white firefighter) who are/is the same age; or

11.5.4.2 white firefighters (or, in the case of the comparison at 11.5.2, a white firefighter) who are/is in the protected or tapered groups?

11.5.5 Regarding the First (or Fourth) Claimant's protected characteristic of race, pursuant to section 19(2)(d) of the EA 2010 have the First and Fifth (or, in the case of Wales, Fourth and Sixth) Respondents shown that the provisions by which some members of the FPS are entitled to continued active membership of the FPS, but not the First (or Fourth) Claimant, and/or which provide full or tapering protection for some members of the FPS, but not for these Claimant, are:

11.5.5.1 in pursuit of the legitimate aim set out in section 11.1 above; and

11.5.5.2 a proportionate means of achieving that legitimate aim?

11.5.6 If not, is there a breach of section 39 EA 2010 and/or the non-discrimination rule under section 61 EA 2010?

11.5.7 For the purposes of the meaning of "indirect discrimination" in Directive 2000/43/EC and, in particular, Article 2(1)(b) thereof, and to the extent necessary:

11.5.7.1 does the provision, criterion or practice in issue place the individual BME claimant at a particular disadvantage because of his/her race, and

11.5.7.2 should the appropriate comparison be between these Claimants and a white firefighter who is the same age as the Claimant, or between these Claimants and a white firefighter who is in the protected or tapered groups?

11.5.8 Pursuant to Article 2(1)(b) of Directive 2000/43/EC, have the First and Fifth (or Fourth and Sixth) Respondents shown that the basis on which allowing some members of the FPS to continue active membership of the FPS, but not the First (or Fourth) Claimant, and/or providing full or tapering protection for some members of the FPS, but not for the First (or Fourth) Claimant, objectively and reasonably justified by:

11.5.8.1 the legitimate aim set out in section 11.1 above; and

11.5.8.2 an appropriate and necessary means of achieving that aim?

11.5.9 If not, have the First and Fourth Claimants' rights under Directive 2000/43/EC been infringed?

Evidence

11 The Tribunal heard evidence from the following witnesses called on behalf of the Fifth and Sixth Respondents, each of whom gave evidence by means of a written witness statement:

Mr S D Pomeroy, Head of the Fire Services Branch of the Education and Public Services Group within the Welsh Government.

Mr J Kelly, Director General of Public Spending and Finance at HM Treasury.

Mr I Boonin, Senior Chief Actuary at the Government Actuaries Department.

Mr C Megainey, Deputy Director for Local Government Finance at the Department for Communities and Local Government ("DCLG") (two witness statements).

12 The Tribunal also had a witness statement and appendix from Mr M Malson, Head of Human Resources of the South Wales Fire and Rescue Service which was admitted, although Mr Malson did not attend.

13 The Tribunal heard evidence from the following witness called on behalf of the Claimants, who gave evidence by means of a written witness statement:

> Mr S Starbuck, National Officer of the Fire Brigades Union ("FBU") and member of the Firefighters Pension Committee ("FPC") until it was abolished in 2015 and now a member of the Scheme Advisory Boards for the Firefighters Pension Scheme in England, Wales, Scotland and Northern Ireland (two witness statements).

14 The Tribunal also had witness statements from each of the following Claimants whose evidence was admitted, although they were not called to give evidence:

> Ms R Sargeant, Firefighter employed by the London Fire Brigade.
>
> Mr D Bebbington, Firefighter employed by the West Midlands Fire and Rescue Service.
>
> Mr M Bygrave, Retained Firefighter employed by the Cornwall Fire and Rescue Service.
>
> Mr M Dodds, Firefighter employed by the South Wales Fire and Rescue Service.
>
> Mrs E McEvoy, Firefighter employed by the South Wales Fire and Rescue Service.

15 The Tribunal also has an amended report of Michael Lapham FPFS, M&H Financial Planning dated 8 December 2016 (admin/3/7) together with a revised executive summary dated 23 December 2016 (admin/4/73). This is the expert's report on behalf of the Claimants. In addition, the Tribunal has a report of Mr I Boonin FIA and Mr C Wilson FIA, both of the Government Actuaries Department ("GAD") dated 7 December 2016 (admin/5/76). The parties have produced a schedule of agreed expert evidence (admin/6/12A).

16 The Tribunal also has an administration bundle, nine volumes of documentation and two authorities' bundles. The administration bundle is referred to by use of the prefix "admin", followed by the tab number, followed by the page number. The nine bundles of documents are referred to by the bundle number followed by the page number. The authorities bundle is sometimes referred to by the prefix "auth" followed by the tab number.

The Material Facts

17 This is a case in which there are no significant disputes of fact and a large amount of common ground.

18 In March 2011 the Independent Public Services Pension Commission ("IPSPC") led by Lord Hutton published a review of Public Sector Pensions known as the Hutton Report (6/4553-4764). The Hutton Report recommended wholesale public sector pension reform in order to place them on a more sustainable footing. The Government accepted the recommendations of the Hutton Report and enacted the pension reforms through the Public Service Pensions Act 2013 ("PSPA 2013").

19 The Hutton Report stated (6/4709):

> "7.34 The Commission's expectation is that existing members who are currently in their 50s should, by and large, experience fairly limited change to the benefit which they would otherwise have expected to accrue by the time they reach their current scheme NPA. This would particularly be the case if the final salary link is protected for past service, as the Commission recommends. This limitation of impact will also extend to people below age 50, proportionate to the length of time before they reached their NPA. Therefore, special protections for members over a certain age should not be necessary. Age discrimination legislation also means that it is not possible in practice to provide protection from change for members who are already above a certain age".

20 Around the time of the publication of the final Hutton Report, there was discussion within Government as to how best to take his recommendations forward.

21 The Budget announcement on 23 March 2011, as set out in paragraph 1.132 of the Budget Report (6/4489) read:

> "The Government accept Lord Hutton's recommendations as a basis for consultation of public sector workers, trade unions and others, recognising that the position of the uniformed services will require particularly careful consideration. The Government will set out proposals in the autumn that are affordable, sustainable and fair to both the public sector workforce and the taxpayer."

22 The Government published a green paper, "Public Service Pensions: Good Pensions That Last" on 2 November 2011 (6/4855) with a forward by Danny Alexander, Chief Secretary to the Treasury, which records:

> "I believe it is right that we protect those public service workers who, as of 1 April 2012, have ten years or less to their pension age. It is my objective that these people see no change in when they can retire, nor any decrease in the amount of pension they receive at their Normal Pension Age …"

This is also reflected in Hansard in the Chief Secretary to the Treasury's announcement on 2 November 2011 (3/1286) which records:

> "In addition, I have listened to the argument that those closest to retirement should not have to face any change at all. That is the approach that has been taken over the years in relation to increases to the state pension age, and I think it is fair to apply that here too. I

> can also announce that scheme negotiations will be given the flexibility, outside the costs ceiling, to deliver".

23 There is also a letter from the Chief Secretary to the Treasury, Danny Alexander, to Brendan Barber, the TUC's General Secretary, dated 2 November 2011 (3/1304-1308) which states:

> "9. Second, I have accepted your argument that there should be transitional protection. It is my objective to ensure that those closest to retirement should not have any detriment either to when they can retire nor any decrease in the amount of pension they receive at their current Normal Pension Age. Over and above the costs ceiling, the Government's objective is to provide this protection to those who on 1 April 2012 are within ten years of Normal Pension Age. Schemes and Unions should discuss the fairest way of achieving this objective, and for providing some additional protection for those who are just over ten years from their current Normal Pension Age. I would be willing to consider tapering of transitional protection over a further three to four years. Full account must be taken of equalities impacts and legislation, while ensuring that costs to the taxpayer in each and every year should not exceed the OBR forecast for public service pension costs – i.e. those forecasts made before the further reform set out in this letter.
>
> …
>
> 11 … The Government's offer is conditional on reaching agreement. If agreement has not been reached, we may need to revisit our current proposals".

24 The Firefighters Pension Scheme 1992 ("FPS") is a final salary defined benefit pension, and a registered pension scheme for HMRC purposes. It provided an annual pension of 1/60th of the firefighters final pensionable pay for the first twenty years and 2/60th for the next ten years, multiplied by the aggregate length of service in the qualifying role. It also provided a maximum lump sum of the lower of one quarter of the value of the pension by HMRC or Scheme Rules, or 2.25 times the annual rate of pension payable on retirement, if retiring between ages 50 and 55 without having accrued thirty years' service and is commutable at retirement based on the commutation rates applicable according to the member's age. The Normal Pension Age ("NPA") was 55 with an ability to retire from age 50 with no penalties for early retirement, provided the member had accrued twenty five years of service. It also provided a surviving spouse/civil partner's pension paid at half the rate of the member's pension and a pension for children. Employee contributions to the FPS are made a tiered basis according to the member's rate of pay (paragraph 7 of the report of Michael Lapham (admin/3)).

25 The FPS closed to new members on 1 April 2006. Firefighters who commenced employment on or after that date joined the less favourable New Firefighters Pension Scheme 2006. That scheme was less favourable and more in line with the Hutton recommendations. The Claimants in the present case and their comparators all commenced membership of the FPS prior to 1 April 2006 and remained in membership on 1 April 2012.

26 The Government conducted discussions with TUC representatives from 2011, focused on the four largest public service pension schemes, namely the NHS Pension Scheme, the Local Government Pension Scheme, the Teachers Pension Scheme and the Principal Civil Service Pension Scheme. These schemes relate to England and Wales apart from the Principal Civil Service Pension Scheme which relates to Great Britain. These four schemes made up

82% of the total membership of the Public Service Pension Schemes in Great Britain and Northern Ireland.

27 All of the Claimants are unprotected firefighters who ceased to accrue benefits in the FPS on 1 April 2015 because they were aged 44 or below on that date, and below 41 on 1 April 2012. The Claimants became active members of the 2015 Scheme on 1 April 2015. The comparators are firefighters who were aged 48 or more on 1 April 2015 and 45 or more on 1 April 2012 and so were entitled to full protection and continued to accrue benefits in the FPS. They also included firefighters who were aged 44 or more, but below 48, on 1 April 2015 and so were entitled to tapered protection by which they were able to continue to accrue benefits in the FPS for a limited period.

28 It is common ground that the Claimants have been treated less favourably on the grounds of age as a result of their exclusion from the FPS, whether wholly or in part, and it is accepted that the treatment will comprise unlawful age discrimination unless it is justified.

29 On 13 October 2011, Miranda Worthington of HM Treasury made a submission to the Chief Secretary of the Treasury on "Public Service Pensions – Transition Options" (3/1057). The submission was to assess the options for offering enhanced transitional protection in the move to the new public service schemes. The report states amongst other things:

> "1. … Getting further transitional protection for current members is hugely important to unions who will want to be able to give a message to more concerned groups of active members that these reforms will not affect them."

The submission identifies five types of further transitional protection namely (3/1059 – 1062), wholesale delay at a cost of circa £4 billion per year of delay; staggered introduction with existing members moving into new schemes later than new members; age protection whereby those over a certain age stay in their current schemes; length of service protection whereby those with a certain length of service stay in their current schemes; and fifthly, a minimum notice period for changes to pension age.

30 By a letter dated 7 December 2011 from the Chief Secretary to the Treasury to Eric Pickles MP, the Secretary of State for Communities and Local Government dated 7 November 2011 (3/1487-1490) the cost ceiling (percentage of pay) for the firefighters pension scheme was set at 27% of pensionable pay compared with 22% in the main public sector schemes. The letter states:

> "Your Department should discuss with the unions and the Local Government Association the fairest way of achieving this objective, taking full account of equalities impacts and legislation, while ensuring that costs to the taxpayer in each and every year do not exceed the Office of Budget Responsibility forecast for public service pensions."

31 In the later part of 2011, discussions with the FBU union increased. On 12 November 2011, the FBU put forward its preferred scheme design (3/1551). This proposed that members of the FPS should maintain their current entitlement. They sought protection for all members of the 1992 scheme. The FBU did not take a

direct part in the central negotiations which focussed on the four largest public sector schemes. The FBU wanted the best possible deal for its members. A particular concern of the FBU was that firefighters who had been recruited on the basis that they could take their pension between 50 and 55, might not be able to work to the new pension age of 60. Mr Starbuck explained that as firefighters get older it becomes harder to maintain their cardiovascular fitness. Mr Starbuck said that a person who cannot maintain that fitness, but who does not meet the criteria for an ill health retirement, is left with the choice of leaving the FRA with a deferred pension or drawing their pension early with an actuarial reduction.

32 When the NPA was fixed at 60 by the PSPA 2013, the FBU sought to obtain the best possible deal for its members by seeking additional protection for those who were within ten years of their expected retirement and mitigating the detriment for unprotected firefighters who were in fact obliged to retire early. The FBU attempted to deal with their concerns in their negotiations with the DCLG and the devolved administrations.

33 The DCLG, the Treasury and the GAD sought to produce a new Heads of Agreement document requesting calculations from the GAD on 1 February 2012 providing for 3.5 and 4 year taper periods, on the assumption that anyone aged over 45 on 1 April 2012 was fully protected (3/1913-1914).

34 A Heads of Agreement document was published on 9 February 2012 (6/4913-4925). This stated:

> "2. There will be statutory based transitional protections for certain categories of members as follows:
>
> a. All active scheme members who, as of 1 April 2012, have 10 years or less of their current Normal Pension Age will see no change in when they can retire, nor any decrease in the amount of pension they receive at their current Normal Pension Age. This protection will be achieved by the member remaining in their current scheme until they retire.
>
> b. There will be a further 4 years of tapered protection for scheme members. Members who are up to 14 years from their current Normal Pension Age, as of 1 April 2012, will have limited protection so that on average for every month of age they are beyond 10 years of their Normal Pension Age, they gain about 53 days of protection. The last day of protected service for any member will be 31 March 2022. At the end of the protected period, they will be transferred into the new pension scheme arrangements. Further details on how the tapered protection will apply can be found at Annex A".

35 Following publication of the Heads of Agreement, further discussions took place and further work was undertaken by the GAD and others leading to a "Firefighters Pension Scheme - Proposed Final Agreement" being issued on 25 May 2012 (6/4944-4960). This document amended paragraph 2 as quoted above by the addition of the words: "which could be beyond 31 March 2022" at the end of paragraph 2(a) and by adding the words: "benefiting from the tapered protection" between "The last day of protected service for any member" and "will be 31 March 2022." in paragraph 2(b).

36 The announcements made by the Chief Secretary to the Treasury on 2 November 2011 also applied to Police Officers. The Police Pension Scheme of 1987 does not have a Normal Pension Age, unlike the FPS. In the Police Pension Scheme 1987 all members can take their pension when they have reached thirty years service, although there are other retirement ages in the scheme depending on rank and terms of appointment. The letter from the Chief Secretary to the Treasury to the Home Secretary dated March 2012 (4/2145-2149) states:

> "5 …….In the context of this commitment and the special circumstances of members of the 1987 Police Pension Scheme transitional protection will be extended to officers in that scheme who at April 2012 are aged 45 or over, or are aged over 40 and who are ten years or fewer away from being able to retire on a maximum unreduced pension.
>
> 6 The 2006 New Police Pension Scheme has an explicit Normal Pension Age of 55. Therefore, for this scheme the protection will be applied to members aged 45 or over."

37 By a letter from Brandon Lewis MP, in his role as Fire Minister, to the Chief Secretary to the Treasury dated 4 December 2012 (4/2485-2486) he states:

> "Provision was made as part of the Police Pension Scheme reform package to allow those police officers who were within 10 years of a maximum unreduced pension to receive full transitional protection. Whilst I understand that there are some minor, structural differences between the Police Pension Scheme 1987 and the Firefighters' Pension Scheme 1992, the main benefit structures are very similar. The only argument for treating the two schemes differently is that Firefighters' Pension Scheme 1992 has an explicit Normal Pension Age but the Police Pension Scheme 1987 does not."

38 As part of a commitment included in the Heads of Agreement published on 9 February 2012 (6/4913-4925), review of the NPA for the Firefighters Pension Schemes was carried out by Dr A N Williams, a Consultant Occupational Physician with extensive experience of firefighter fitness and medical matters. He was asked to undertake the review by DCLG and issued review document entitled "Normal Pension Age for Firefighters – a Review for the Firefighter's Pension Committee" dated 12 January 2013 ("the Williams Report") (7/5217-5378). The report includes information concerning cardiorespiratory fitness and the maximum rate of oxygen uptake known as VO2 max. The report states:

> "Physical fitness is known to decline with age. Studies show that without regular physical activity this decline is substantial and progressive from age 20. A model developed from a number of major academic studies estimates that for the general male population around 60% of men meet the standard of 42mL·kg·□¹min·□¹ at age 25, but this drops to 35% at aged 35, 15% at age 45 and less than 1% at age 60. Within these studies it is shown that a small sub group (<25%) that could maintain weight and physical activity levels would maintain a mean fitness of above 42mL·kg·□¹min·□¹to age 70 assuming they start with a VO2 max above 49mL·kg·□¹min·□¹ at 25 years. The drop in fitness seen in the general population is mostly due to unhealthy lifestyle choices, weight gain and lack of physical activity.
>
> A number of recent studies have suggested that firefighters are no fitter than the general population. They are as overweight as the general population, but have fewer individuals in their high category of obesity than the general population. Our modelling of research papers combined with our limited data from the FRSs shows that UK firefighters are physically fitter than the general population, with an estimated mean of VO2 max of around ~50mL·kg·□¹min·□¹ being maintained until 35 years of age.

> The models estimate the number of firefighters who will be unable to meet the minimum aerobic fitness standard as they age. In the worst case scenario, where firefighters followed the normal population changes in physical activity levels and body mass index with aging, 85% would be unfit for duty at 55 years increasing to 92% at 60 years. In the best case scenario, where firefighters maintain their physical activity levels and body mass index as they age, 15% would be unfit at 55 years, increasing to 23% at 60 years. Those who fall below the standard at ages 55 and 60 are likely to have been close to 42mL·kg·□¹min·□¹ when joining the FRS. It is up to the individual FRSs to decide how to manage individuals who fall below their selected minimum standard. Current practice in many FRSs is to allow them to continue on duty at risk while undertaking remedial training, and the great majority are able to increase their fitness levels to the appropriate standard within a few months.
> ……
>
> Fitness in women is significantly lower than for men at all ages; however the decline in fitness follows a similar rate when activity levels and body mass index changes are similar. The same model can therefore be used for both sexes for the decline in aerobic fitness. There will however be fewer woman with a substantially higher starting fitness than the minimum standard required, so more woman are likely to drop below the required aerobic fitness standard as they age.
> … …
> There will be a significant number of firefighters who expect to retire at aged 55 and will have difficulty maintaining fitness beyond this age. Among those who have joined on the 2006 pension scheme there will also be some who will have difficulty maintaining fitness, and there are likely to be around 2.5% who are medically unfit above age 55 but who do not meet the criteria for IHR. There is likely to be a substantially larger proportion of women firefighters who are physically and/or medically unfit over age 55. Allowing firefighters to leave after age 55 on a pension that is actuarially reduced from age 60 without any additional pension penalty could be considered a reasonable way to manage expectations, and to manage any potential discriminatory issues."

The report recommends 2.5 hours a week of fitness training being incorporated into the daily routine of whole time firefighters.

39 Following the Williams Report, Brandon Lewis MP, the Fire Minister, wrote again to the Chief Secretary of the Treasury on 18 January 2013 (4/2500 – 2505) as follows:

> "… Broadly, Dr Williams report supports our argument that, if fitness levels are maintained, firefighters are able to continue undertaking firefighter roles until age 60. However, the report does suggest that one in four serving firefighters may not be able to undertake firefighting, at ideal fitness levels, until age 60. I would like to be able to respond positively to the report and there appear to be two potential options to help address the issues that arise from the research.
>
> i) Actuarially neutral pension for retirees from age 55
>
> … Dr Williams believes that extending the flexibility down to age 55 is likely to be a more efficient way for members to exit the service on a fair pension and, without it there is a risk of increased ill health retirement applications.
>
> The associated costs of this option would be cost neutral to the scheme in the short term, and potentially present a medium to long term saving as it would be paid for by reductions in member benefits to remain within the original costs ceiling.
> …
> I am confident that such an additional flexibility would not undermine our wish for public servants to work longer, as the scheme Normal Pension Age would remain 60.

> However, it would ensure that firefighters who were no longer fit for firefighting were able to retire from age 55, on an actuarially fair reduced pension.
>
> ii) Extending transitional provisions …
>
> In light of Dr Williams' report, and with your agreement, I would like to revisit the approach to transitional protections for members of the Firefighters' Pension Scheme 1992 that are within 10 years of being able to retire in 30 years service. GAD estimate to extend the transitional protections in this way would give rise to an additional capital cost in 2015 of around £30 million, some of which would be paid for by scheme members through higher employee contributions …"

40 The Chief Secretary to the Treasury responded on 29 January 2013 (4/2510 – 2513) setting out that he was pleased the report supported the Government position that firefighters should be able to continue to work until age 60, but he did not intend to re-open the transitional protections. There is evidence of further communications between Mr Lewis MP, Mr Eric Pickles MP and the Chief Secretary to the Treasury. During this period, further negotiations were ongoing with the FBU.

41 On 19 June 2013, the Government made a final offer to the FBU (4/2771 – 2772). Amongst other things that letter states:

> "… My proposal is to adopt Dr Williams' recommendation on early leavers, the outcome of which is that the actuarial reduction rate to be applied would be 21.8% at age 55 and 17.9% at age 56, using today's assumptions. The revised accrual rate would be 1/59.7th. This is an improvement on the terms set out in the Proposed Financial Agreement and also the early retirement terms in the Firefighters Pension Scheme 2006 where the reduction at age 55 is around 40% and at age 56 is around 37%."

42 The Scottish Government provided protection for those who were within ten years of the date they intended to retire. The FBU has maintained their trade dispute in Scotland and advanced age discrimination claims there which are currently sisted (stayed).

43 It is not in dispute between the parties that the FBU did not at any stage agree the transitional protection provisions. This led to a trade dispute and industrial action.

44 In cross-examination, Mr Pomeroy on behalf of the Welsh Ministers and Mr Megainey on behalf of the DCLG accepted that little independent analysis was carried out at the transitional provisions beyond consideration of whether protection should be extended to those who were ten years from the date they could retire voluntarily on unreduced benefits.

Submissions

45 Each of Mr Short, Mr Cavanagh and Mr Lynch produced a written closing skeleton argument. Each party supplemented the written skeleton orally. The submissions are complex and I deal with them as appropriate in my conclusions. However, it is helpful to summarise the position of each party.

46 Mr Short argues that the Respondents have not proved that the less favourable treatment is justified for the purposes of the age discrimination claim, have not established that the effect of the provisions excluding younger firefighters from protection is justified for the purposes of the equal pay claims, and have not established that the provision excluding younger firefighters from protection is justified for the purposes of the sex and race discrimination claims.

47 Mr Cavanagh, for the Home Office and the Welsh Government, and argues that the Tribunal is only concerned with the transitional provisions and not the wider consequences of the pension changes, but the transitional provisions embodied social policy aims that were approved and implemented by Government and Parliament as a result of which there should be less intrusive review by the Tribunal, that the standard of scrutiny is lower in age discrimination than for other protected characteristics, that aims similar to the ones in the present case have been regarded as legitimate in UK Courts and the Court of Justice of the European Union, and that the social policy considerations that a member state can take into account include budgetary considerations. As a result, Mr Cavanagh argues that the aims are legitimate and the means adopted are proportionate. He argues that the claims should be dismissed in their entirety.

48 Mr Lynch, for the FRA's, adopts the submissions of Mr Cavanagh, argues that it was right for those nearest to their NPA to be protected, and that the claims should fail.

Direct Age Discrimination

The Law

49 Section 13 Equality Act 2010 provides:

> **"13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

50 Article 2 of the Equality Directive 2000/78 provides:

> "1 For the purposes of this Directive, 'the principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1".
>
> …..
>
> 2 For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.
(b) ….."

The grounds in Article 1 include age. Article 6 provides:

"1. Notwithstanding article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."

51 Section 10 Public Service Pensions Act 2013 provides:

"(1) The normal pension age of a person under a scheme under section 1 must be—

(a) the same as the person's state pension age, or
(b) 65, if that is higher.

(2) Subsection (1) does not apply in relation to—

(a) fire and rescue workers who are firefighters,
(b) members of a police force, and
(c) members of the armed forces.

The normal pension age of such persons under a scheme under section 1 must be 60."

Section 18 allows for protective measures to be put in place for some members of pre-existing schemes and provides:

"(1) No benefits are to be provided under an existing scheme to or in respect of a person in relation to the person's service after the closing date.

(2) In this Act "existing scheme" means a scheme listed in Schedule 5 (whether made before or after this section comes into force).

(3) Subsection (1) does not apply—
(a) in relation to an existing scheme which is a defined contributions scheme;
(b) to benefits excepted by Schedule 5.

(4) The closing date is—

(a) 31 March 2014 for an existing scheme which is a relevant local government scheme, and
(b) 31 March 2015 in any other case.
This is subject to subsection (7).

(5) Scheme regulations may provide for exceptions to subsection (1) in the case of—

(a) persons who were members of an existing scheme, or who were eligible to be members of such a scheme, immediately before 1 April 2012, and
(b) such other persons as the regulations may specify, being persons who before that date had ceased to be members of an existing scheme or to be eligible for membership of such a scheme.

[(5A) Scheme regulations may also provide for exceptions to subsection (1) in the case of—

(a) persons who were members of a public body pension scheme specified in the regulations, or who were eligible to be members of such a scheme, immediately before 1 April 2012, and
(b) such other persons as the regulations may specify, being persons who before that date had ceased to be members of a scheme referred to in paragraph (a) or to be eligible for membership of such a scheme.]

(6) Exceptions under subsection (5) [or (5A)] may, in particular, be framed by reference to the satisfaction of a specified condition (for example, the attainment of normal pension age under the existing scheme or another specified age) before a specified date.

(7) Where an exception to subsection (1) is framed by reference to the satisfaction of a specified condition before a specified date, scheme regulations may also provide for a different closing date for persons in whose case the condition—

(a) is not satisfied before the specified date, but
(b) is satisfied no more than 4 years after that date.

(8) Provision made under subsection (5) [or (5A)] or (7) may in particular be made by amending the relevant existing scheme. ……"

Conclusions

52 It is common ground that the Claimants are being paid less than their comparators for work done even if they started work on the same day as the comparator.

53 These proceedings are solely about the transitional protection. There is no challenge that the terms of the 2015 scheme itself are discriminatory. The Claimants and the FBU do not challenge the pension reforms themselves, although Mr Kelly and Mr Megainey said in evidence, and Mr Starbuck confirmed, that the FBU would have preferred it if the pension reforms had not happened. The firefighters are worse off under the 2015 scheme than the FPS.

54 The Hutton recommendations included a recommendation that the cost burden on the public purse of public sector pensions would reduce in order to ensure sustainability and affordability. The Hutton report stated: (6/4562):

> "And taxpayers must be able to feel confident that risks and costs are shared fairly: in particular that the cost of increasing longevity is being managed and that there are safety valves in place to control future cost".

Indeed, the Hutton Report recommended that there should be no transitional provisions. These proceedings concern the transitional protection given to older firefighters, but denied to the Claimants on the grounds of their age. The older firefighters received the transitional protection and the question is whether the denial of that protection to the Claimants was justified. Firefighters undertake dangerous and physically demanding work entering into and fighting compartment fires wearing breathing apparatus. Mr Short states that retirement age is a particular importance for firefighters when compared with public sector workers more generally.

55 There is an issue of fact as to why the transitional protection was adopted. The Claimants say it was adopted to secure a deal with the 'big four' trade unions, namely the NHS, Civil Service, Local Government and Teachers Unions. The Respondents say that the transitional protections were adopted because the Chief Secretary to the Treasury was persuaded that those nearest to retirement needed protection. The evidence on this issue of fact is documentary. Although Mr Kelly expressed his views, as did Mr Pomeroy, Mr Megainey and Mr Boonin, the process of reasoning is set out in the contemporaneous documentary evidence.

56 The judgment in **McCloud & Others v The Lord Chancellor and The Ministry of Justice,** concerning the judicial pension scheme was handed down on 16 January 2017, during the course of this hearing. I am not bound by the **McCloud** judgment. I must decide these proceedings on the basis of the evidence and submissions that I have heard. In **McCloud**, Employment Judge Williams found that the respondents in that case had failed to show their treatment of the claimants in that case to be a proportionate means of achieving a legitimate aim. Mr Short relies on the analysis in **McCloud**. Mr Cavanagh and Mr Lynch argue that **McCloud** is not relevant. Mr Cavanagh distinguishes the **McCloud** case, in which EJ Williams stated clearly at paragraph 93 that he refrained from forming any view about the merits of the transitional protections incorporated in other schemes. His decision related solely to the judicial pension scheme. Mr Cavanagh distinguishes the judicial pension scheme on a number of bases, not least of which is that the difference in treatment between the judges in the protected group and the judges in the unprotected group was more acute that for other public sector workers because of the impact of the tax changes to pension schemes. Mr Cavanagh also draws my attention to matters that he says are errors of law. It is not within my purview to consider the **McCloud** decision. I must decide the present case on the basis of the evidence and submissions heard by me, and in those circumstances I have disregarded the **McCloud** decision in reaching my conclusions in this case.

Legitimate Aim

57 The first issue is for me is to identify a legitimate aim.

58 Mr Short argues that it is wrong to say that Section 13(2) of the Equality Act implements or transposes article 6(1) of the Equality Directive. Section 13(2) is an exercise of article 6(1). The UK was given power to introduce direct discrimination by article 6(1) and at the heart of this dispute is the degree of scrutiny to be applied to the question of justification. Mr Short takes as his starting point, the decision in **Hardys & Hansons plc v Lax [2005] ICR 1565 CA** in which Pill LJ held:

> "32 Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (*Barry v Midland Bank plc* [1999] ICR 859) and I accept that the word "necessary" used in *Bilka-Kaufaus* [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."

Thomas LJ held:

> "54. … As it is the tribunal which must decide on justification without according any margin of appreciation to the employer, the tribunal must therefore set out a critical and thorough evaluation following the test set out in *Bilka-Kaufhaus GmbH v Weber Von Hartz …"*

Gauge LJ stated:-

> "59. In my judgment, to hold that an employment tribunal must adopt a test of a margin of appreciation would be to add a gloss to the test of reasonably necessary …"

59 Mr Cavanagh submits that the Claimants have overlooked that this is a challenge to a measure that was a social policy choice by a Member State which means that they do not make allowance for the wide discretion of Government in matters such as this. Mr Cavanagh submits that **Hardys & Hansons plc v Lax** is about whether a particular job was suitable for a part time worker and that it was a case that concerned an employer treating the decision as concerning operational needs rather than a social policy choice. Mr Cavanagh submits that I must not ignore 20 years of European Court of Justice and Supreme Court and House of Lords case law.

60 Mr Short points to the fact that the burden of establishing justification is entirely upon the Respondents. This was held by Elias J in **MacCulloch v Imperial Chemical Industries plc [2008] ICR 1334.** Mr Short argues that in a direct discrimination case it is the difference in treatment under Article 6(1) or the less favourable treatment of the Claimants under Section 13(2) of the Equality Act that must be justified. He relies on **Hardys & Hansons plc v Lax** that the more serious the adverse impact, the more cogent must be the justification for it. He

also argues that provisions derogating from the individual right not to be discriminated against must be strictly construed.

61 The aims have been identified in a number of ways. In the list of issues set out at paragraph 11.1 the aim is expressed to be:

> "….to protect those closest to pension age and to retirement from the effects of pension reform."

In his closing submission, Mr Cavanagh identifies the aims as:

> (1) "To protect those closest to pension age from the effects of pension reform, since they would have least time to rearrange their affairs before retirement, by making lifestyle changes or alternative financial provision (or by finding alternative employment);
>
> (2) To take account of the greater legitimate expectation that those closer to retirement would have that their pension entitlements would not change significantly when they were close to retirement;
>
> (3) To have a tapering arrangement so as to prevent a cliff edge between Fully Protected and Unprotected Groups.
>
> (4) In achieving these substantive aims behind the transitional provisions, the UK Government sought to ensure that a clear and simple message could be communicated, and that there was consistency across the public sector."

Mr Lynch, for the FRAs identifies the legitimate aim in their ET3 at paragraph 9 (1/34) as:

> "The transitional provisions recognise that the nearer in time a firefighter was to reaching his or her Normal Pension Age, the more difficult it was likely to be to adjust to the move to the 2015 scheme. That is because the firefighters who were near a Normal Pension Age had less time to make the necessary changes to lifestyle and less time to put in place appropriate financial adjustments to accommodate the transfer to different pension provisions than was the case for firefighters whose Normal Pension Age was temporarily more distant".

On 26 October 2016, the FRAs filed voluntary further and better particulars adopting the aims in the agreed list of issues (admin/7/124) as the aim.

62 Mr Short puts forward five propositions. The first is that the aim relied upon must have a social policy objective, rather than an objective such as cost reduction. He relies on **R (Incorporated Trustees of the National Counsel on Ageing ("Age Concern England") v Secretary of State for Business, Enterprise and Regulatory Reform [2009] ICR 1080 ECJ** and also on the decision in **Seldon v Clarkson Wright & Jakes [2012] ICR 716**. The second proposition is that saving cost cannot comprise a legitimate aim for the Respondents, whether as a Member State, scheme manager or employer, and that it is for the national court to determine whether cost was the aim of the measure in question referring to **Ministry of Justice v O'Brien [2013] ICR 499 SC.** His third proposition is that the social policy objective must correspond to a real social need relying on **Homer v Chief Constable of West Yorkshire Police [2012] ICR 704 SC** and **R v Elias (The Secretary of State for Defence) [2006] I**

WLR 3213 CA. His fourth proposition is that although Member States have a broad discretion in deciding what aims to adopt, article 6(1) imposes on Member States the burden of establishing the legitimacy of the aim to a high standard of proof. The fifth proposition is that legitimacy of the aim cannot be established by generalisations. Mr Short also makes clear that the Claimants do not accept that the test for justification is less onerous in cases of age discrimination, nor that **Seldon** provides authority for such a proposition.

63 The aims of the pension reforms were set out in the Hutton Report. Paragraph Ex7 of the executive summary (6/4562) to the Hutton Report reads:

> "The package of reforms recommended by the Commission is a balanced deal that will deliver fair outcomes for public service workers and for taxpayers and build trust and confidence in the system. Public service workers should receive a good pension in retirement and their accrued rights must be protected. They must also be involved in the process of change and may have the right to expect schemes to be well run with greater transparency. And taxpayers must be able to feel confident that risks and costs are shared fairly: in particular that the cost of increasing longevity is being managed and that there are safety valves in place to control future cost. There also needs to be independent assurance on the sustainability of public service pensions. The deal set out by the Commission is designed to meet these objectives.

Recommendation 5 reads (6/4563):

> "As soon as practical, **members of the current defined benefit public service pension schemes should be moved to the new schemes for future service**, but the Government should continue to provide a form of **defined benefit pension** as the core design".

Paragraph Ex12 of the Executive Summary states:-

> "But the taxpayer should also have confidence that public service pension costs are under control and are sustainable. That requires mechanisms in the scheme design to share cost and risk fairly and a fixed cost ceiling to assure cost control".

Finally, paragraph 7.34 of the Report (6/4709) reads:

> "The Commission's expectation is that existing members who are currently in their 50s should, by and large, experience fairly limited change to the benefit which they would otherwise have expected to accrue by the time they reached their current scheme NPA. This would particularly be the case if the final salary link is protected for past service, as the Commission recommends. This limitation of impact will also extend to people below age 50, proportionate to the length of time before they reach their NPA. Therefore special protections for members over a certain age should not be necessary. Age discrimination legislation also means that it is not possible in practice to provide protection from change for members who are already above a certain age."

64 The Hutton Report did not recommend transitional protections. The evidence is that the transitional protections were set out in the letter from the Chief Secretary to the Treasury to Brendan Barber, TUC General Secretary dated 2 November 2011 (3/1306).

65 Mr Short argues that the concerns to protect those closest to pension age and retirement were not mentioned or analysed before the policy was adopted.

He argues that temporal proximity to Normal Pension Age is itself determined by age, but Mr Cavanagh argues that Mr Short had sought to recast justification in the way that suits him.

66 I have considered whether there were real aims. The Hutton Report sets out the aims, but did not recommend transitional protections. The Chief Secretary to the Treasury articulated the transitional protections, in his letter to Brendan Barber, TUC General Secretary dated 2 November 2011 (3/1306) that those closest to retirement should not suffer any detriment, either as to when they can retire, or any decrease in the amount of pension they receive at NPA. The protection was provided to those who were within ten years of NPA on 1 April 2012 and there was also scope for tapering for three to four more years. The cost of the transitional protections was outside the costs ceiling and therefore did not need to be offset by reductions elsewhere in the pension schemes.

67 It was the Chief Secretary to the Treasury who took the decision to provide protection across the public sector for those within ten years of NPA, with a taper for three to four more years. The policy originates from concessions within the Treasury concerning changes to the State Pension Age, in respect of which a ten year notice period was applied after extensive consultation. Mr Kelly gave evidence about the Treasury decision making process at paragraphs 44 to 56 of his witness statement. The Command Paper entitled "Public Service Pensions: Good Pensions That Last" (6/4851 - 4879) explained the rationale. In the Forward the Chief Secretary records:

> "I believe it is right that we protect those public service workers who as of 1 April 2012 have ten years or less to their pension age. It is my objective that these people see no change in when they can retire, nor any decrease in the amount of pension they receive at their current Normal Pension Age."

On presentation of the Command Paper to the House of Commons on 2 November 2011 further detail was provided. The extract from Hansard sets out the matter in more detail as set out at paragraph 23 above.

68 The Welsh situation is slightly different. Mr Pomeroy explained this. The PSPA 2013 constrained the Welsh Government. The Welsh firefighters had more advantageous early retirement factors but a worse accrual rate. The decision was taken to adopt the same transitional protections as were adopted in England.

69 Mr Short argues that the legitimate aim must explain why the older group is being protected. He relies on **Mangold v Helm (Case C-144/04) [2005] ECR 1-9981 ECJ.** He also relies on **Ingenioriforeningen I Danmark v Region Syddanmark (Case C499/08)** [**2011] 1 CMLR 35**, **Kucukdeveci v Swedex GmbH and Co KG (Case C-555/07)** [**2011] 2 CMLR 27 ECJ, Hennigs v Eisenbahn-Bundesamt, Land Berlin v Mai (Joined cases C297/10 and C298/10) [2012] 1 CMLR18 and Odar v Baxter (C152/11) [2013] 1 CMLR 13 ECJ)** and **Lockwood v DWP [2014] ICR 1257 CA.** He argues that in each case the courts have examined why a particular age group was being favoured over another. He said that this would not have been necessary had it been enough simply to identify an intention to favour one group over another. Preferential

treatment on the grounds of age was found to be in pursuit of a legitimate aim where those of a particular age were considered to be at a particular disadvantage or to have a particular need that was related to age. Mr Short goes on to submit that the Respondents cannot establish a legitimate aim corresponding to a real social need to a high standard of proof, unless they can also show that those nearer retirement and Normal Pension Age were in greater need of protection. His argument is that it is insufficient to say that those nearest to retirement have less time to adjust. The amount of time that a person has to adjust is the period of time until Normal Pension Age and the older the person is, the closer they are to that date. It is also common ground that the closer someone was to retirement, the less change he or she would face, and less adjustment would be required. He argues that Respondents must explain with precision the nature of the lifestyle changes and alternative financial provision and establish why the more limited amount of time to make those changes gives rise to a real social need.

70 The Claimants' assertion is that the protected group was treated more favourably simply because its members were older. I do not agree. The protected group were treated more favourably because of proximity to retirement. Whilst retirement is age related, and proximity to retirement is connected with age, there may be good reasons for treating different age groups differently. Mr Cavanagh relies on **Seldon,** where the measure complained about was a compulsory retirement age. Those below that retirement age were treated more favourably than others because of their age, but the objective justification defence succeeded.

71 In the case of firefighters, the decision maker was the Chief Secretary to the Treasury who decided to make a more generous provision to public sector workers than had been recommended by Hutton. By the PSPA 2013, all existing final salary schemes had to close by a fixed date and the rules of the new scheme were to be set out in statutory instruments drafted by the relevant Minister. The old schemes were kept open pursuant to section 5 PSPA 2013 for workers who satisfied a particular condition before the specified date. Mr Cavanagh draws attention to Section 18(6) of the PSPA 2013, which gave as the only example of a particular condition "the attainment of normal pension age under the existing pension scheme or another specified age". It is clear to me that the transitional provisions that were envisaged by primary legislation were age related transitional provisions which protected those closest to Normal Pension Age. The evidence is that the decisions were taken with great care and after negotiations with the representatives of the Unions. There were detailed negotiations with the TUC and, in relation to the firefighters pensions' scheme, the FBU was involved in negotiations with the DCLG and the Welsh Government. The evidence is that the DCLG and Welsh Government took seriously the representations made by the FBU.

72 Mr Short argues that the reforms have less impact upon older firefighters than younger firefighters and that the suggestion that younger firefighters can make good the effect of the pension reforms by applying some of their salary towards retirement is in fact saying that the younger firefighters can choose when they experience the disadvantage of being paid less than the older firefighters. He argues that in any event it is wholly unrealistic given the sums in question. The

suggestion that older firefighters would be less able than younger firefighters to make changes in their expenditure leading up to retirement is unsupported by evidence. His argument is that the closer the scheme members are to retirement, the less they would be affected by the reforms.

73 I have considered the case law. Broadly, this emphasises that it is for Member States and their authorities to find the right balance provided that they do not go beyond what it is appropriate and necessary to achieve the legitimate aim.

74 In **Mangold v Helm (Case C-144/04) [2005] ECR 1-9981 ECJ**, the CJEU held at paragraph 63:

> "The Member States unarguably enjoy broad discretion in the choice of the measures capable of obtaining their objectives in the field of social and employment policy."

In **HK Danmark v Experion A/S (Case C-476/11) [2014] ICR 27** the Advocate General said at paragraph 61:

> "In light of the wide discretion enjoyed by the Member States in regard to the choice of measures for attaining their aims in the field of employment and social policy, the role of the Court is limited to ensuring that measures taken do not appear unreasonable, or put it another way, that the measures taken are not clearly inappropriate for obtaining the aim pursued."

The CJEU in **Rosenbladt v Oellerking GmbH (Case C-45/09) [2011] 1 CMLR 1011** states:

> "68…..a balance between diverging but legitimate interests, against a complex background of employment relationships, closely linked to political choices in the area of retirement and employment.
>
> 69 Accordingly, in the light of wide discretion granted to the social partners at national level in choosing not only to pursue a given aim in the area of social policy, but also in defining measures to implement it, it does not appear unreasonable for the social partners to take the view that a measure such as …….. may be appropriate for achieving the aims set out above."

75 On the basis of these authorities, the decisions which are under examination in the present case are decisions for the elected Government. They are social policy choices which may well have a political element.

76 I also take into account the decision in **Palacios De La Villa v Cortefiel Servicios SA (Case C-411/05) [2009] ICR 111** as follows:

> "68 It should be recalled in this context that, as Community law stands at present, the member states and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it: see, to that effect, **Mangold v Helm (Case C-144/04)** [2005] ECR I-9981, para 63.
>
> 69 As is already clear from the wording, "specific provisions which may vary in accordance with the situation in member states", in recital 25 in the preamble to Directive 2000/78 , such is the case as regards the choice which the national authorities concerned may be led to make on the basis of political, economic, social, demographic and/or budgetary

considerations and having regard to the actual situation in the labour market in a particular member state, to prolong people's working life or, conversely, to provide for early retirement.

….

71 It is, therefore, for the competent authorities of the member states to find the right balance between the different interests involved. However, it is important to ensure that the national measures laid down in that context do not go beyond what is appropriate and necessary to achieve the aim pursued by the member state concerned."

I also take into account paragraph 74 of the Advocate General's opinion in that case:

"Indeed, as a rule, it cannot be for the Court of Justice to substitute its own assessment of such complex issues for that of the national legislature or the other political and societal forces involved in the definition of the social and employment policy of a particular Member State (such as the social partners in the present case). At most, only a manifestly disproportionate national measure should be censured at this level."

On these authorities, it for the Member State to balance the different interests and I must be careful not to substitute my own view for that of the Government.

77 Moreover, in **Rosenbladt** at paragraph 44 and 45, the CJEU held:

"It must be observed that the automatic termination of the employment contracts of employees who meet the conditions as regards age and contributions paid for liquidation of their pension rights has, for a long time, been a feature of employment law in many member states and is widely used in employment relationships. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging peoples working lives or, conversely providing for early retirement …

Therefore, aims such as those described by the German Government must, in principle, be regarded as 'objectively and reasonably justifying' within 'the context of national law' as provided for article 6(1) of the directive 2000/78, a difference in treatment on the grounds of age ….."

78 It is clear from these authorities that Member States enjoy a broad discretion in the choice of both aims and means. Importantly, Lord Nicholls said in **R v Employment Secretary ex parte Seymour Smith (No 2) [2001] WLR 435:**

"The burden placed on the government in this type of case was not as heavy as previously thought. Governments must be able to govern. They adopt general policies, and implement measures to carry out their policies. Governments must be able to take into account a wide range of social, economic and political factors. The Court of Justice has recognised these practical considerations. If their aim is legitimate, governments have a discretion when choosing the method to achieve their aim. National courts, acting with hindsight, are not to impose an impracticable burden on governments which are proceeding in good faith. Generalised assumptions, lacking any factual foundation, are not good enough. But governments are to be afforded a broad measure of discretion. The onus is on the member state to show (1) that the allegedly discriminatory rule reflects a legitimate aim of its social policy, (2) that this aim is unrelated to any discrimination based on sex, and (3) that the member state could reasonably consider that the means chosen were suitable for achieving that aim."

79 I have also taken into account the decision of Baroness Hale in the Supreme Court in **Seldon** as follows:

> "28. The second reason is that article 6 contemplates that the justifications for direct age discrimination should be broad, social and economic policy objectives of the state (or, elsewhere in Europe, the social partners) and not the individual business needs of the particular employers and partnerships …
> …….
> 33 ……..The means employed had still to be both appropriate and necessary, although member states … enjoyed a broad discretion in the choice both of the aims and of the means to pursue them.
> ……..
> 50 What messages, then, can we take from the European case law?
>
> …..
>
> (2) If it is sought to justify direct age discrimination under article 6(1), the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness" (*Age Concern* [2009] ICR 1080 and *Fuchs* [2012] ICR 93).
>
> ……
>
> (7) The scope of the tests for justifying indirect discrimination under article 2(2)(b) and for justifying any age discrimination under article 6(1) is not identical. It is for the member states, rather than the individual employer, to establish the legitimacy of the aim pursued (*Age Concern*).
>
> 53. But what exactly does this mean in practical terms? On the one hand, Luxembourg tells us that the choice of social policy aims is for the member states to make. It is easy to see why this should be so, given that the possible aims may be contradictory, in particular between promoting youth employment and prolonging the working life of older people. On the other hand, however, Luxembourg has sanctioned a generally worded provision such as regulation 3, which spells out neither the aims nor the means which may be justified. It is also easy to see why this should be so, given that the priority which might be attached to particular aims is likely to change with the economic, social and demographic conditions in the country concerned.
>
> **55** It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it."

80 The Claimants accept that the case law of the European Court of Justice in relation to article 6(1) is directly relevant. They also say that in **Hardys & Hansons plc v Lax** the Court of Appeal expressly rejected a submission that the margin of appreciation was to be imported into the domestic test for justification and that the Tribunal must decide whether or not justification is established. Mr Cavanagh argues that that reliance on **Hardys & Hansons plc v Lax** is misconceived because that case was not a social policy measure adopted by a Member State, but an operational decision taken by a private sector employer as to whether a particular post was suitable for a part time worker. I agree. That case, in my view is clearly distinguishable from the present case.

81 Mr Short has argued that the present claims are private law claims made under domestic law. In **Hardys & Hansons plc v Lax** the Court of Appeal does not cite the CJEU cases. In addition, since **Hardys & Hansons plc v Lax** the Supreme Court has applied the CJEU's approach to objective justification. **Seldon** has made clear that the approach of the CJEU to objective justification in social policy cases applies in the United Kingdom. Justifying direct age discrimination under article 6(1) requires the aims to be social policy objectives, which are public interest objectives.

82 The stricter test which relates to operational and business choices of a private sector employer is set out in **Land Registry v Benson [2012] ICR 627**. That case was authority that the measures in question must correspond to a real need on the part of the undertaking, be appropriate with a view to achieving the objectives pursued, and be necessary to the end. Mr Cavanagh argues that even if the stricter test applicable to the private sector employer applies, the transitional provisions would be objectively justified.

83 Having reviewed the authorities, I am satisfied that the correct test to be applied is the test set out in **Seldon** in social policy cases following the CJEU's approach. This is not a case like **Land Registry v Benson** or **Hardys & Hansons plc v Lax** where an employer was taking the decision for operational purposes. The FRAs in the present case are the employer, but the Home Office took the decision on behalf of the Government. This is a situation where a Member State was introducing a measure as a result of having made a social policy decision to protect those within 10 years of retirement. The Government has a wide discretion in social policy matters. The standard of scrutiny involves granting a wide margin of discretion to the Member State. I am satisfied that that is the correct standard in the present case and the stricter test which applies to operational matters of a private sector employer is not the correct test.

84 Mr Short argues that the Government could have achieved its aim by granting transitional provisions to all firefighters in post on 1 April 2012. They recognise that this would have been at an additional cost, but argue that that would not have provided a satisfactory justification for denying protection on grounds of age. Mr Boonin estimated in his Supplement to Experts' Report (admin/5/120A) that the additional cost in England would have been about £928 million. Mr Boonin explains that if the extra cost had been absorbed by increasing employee contributions, that would have cost a typical firefighter almost £3,000 per annum and the burden would fall on the younger firefighters to a greater degree. Further, Mr Boonin explains that if the proposal to take 14 years back from the earliest date on which a firefighter could have obtained a full unreduced pension under the FPS was adopted, then the estimated additional cost in England for firefighters would have been an excess of £30 million and in Wales a further £6 million.

85 Mr Short argues that saving costs cannot comprise a legitimate aim and that it is for the national court to determine whether the cost was the aim of the measure in question. He relies on the judgment in the Supreme Court in **Ministry of Justice v O'Brien [2013] ICR 499 SC** which held:

> "[67] If this is the ministry's best case on budgetary considerations, it can be said, then it does not take them very far. Sound management of the public finances may be a legitimate aim, but that is very different from deliberately discriminating against part-time workers in order to save money. …….
>
> ……..
>
> [69] Hence the European cases clearly establish that a member state may decide for itself how much it will spend upon its benefits system, or presumably upon its justice system, or indeed upon any other area of social policy. But within that system, the choices it makes must be consistent with the principles of equal treatment and non-discrimination. A discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost. No doubt it was because the Court of Justice foresaw that the ministry would seek to rely upon considerations of cost when the case returned to the national courts that it took care to reiterate that 'budgetary considerations cannot justify discrimination'."

86 Mr Cavanagh draws a distinction between cases where discriminatory treatment is solely and purely explained by a desire to save costs, as in **O'Brien**, and treatment which has aims that include, but are not limited to budgetary considerations. He relies on the CJEU authorities including **Palacios** and **Rosenbladt** and also to Baroness Hale at paragraph 46 of **Seldon** where she said:

> "Budgetary considerations might underpin the chosen social policy, but they could not in themselves constitute a legitimate aim under article 6(1) of the Equality Directive."

87 **Land Registry v Benson [2012] ICR 627** was a case in which a redundancy exercise took place at the Land Registry in order to make savings and come within budget. Underhill J, as he then was, stated:

> "33 The next step must be to identify the aim for the pursuit of which the cheapness criterion constituted the means. Plainly the criterion was a means of selecting between applicants, but it is necessary to identify what aim selection was intended to achieve. This is rather less straightforward. The immediate aim of selection was to bring the number of applicants down to a level the cost of which came within the £12m budgeted for the exercise. But it could be argued that it is necessary to include within the definition of the aim the carrying out of the redundancy/early retirement exercise itself, and perhaps also to ask what the aim of the exercise was. In that case the answer would be that the aim of the exercise was to reduce headcount, which in turn was a means of ensuring that the employer's costs did not exceed its revenue. The truth is that the distinction between means and aim is not always easy to draw.
>
> 34 The next question is whether the relevant aim or aims were "legitimate". The uncertainty about how to characterise them discussed in the preceding paragraph does not, fortunately, matter since in our view all the various potential elements are plainly legitimate. It is (to put it no higher) legitimate for a body such as the Land Registry, like any business, to seek to break even year-on-year and to make redundancies in order to help it do so where necessary. It is likewise legitimate to offer voluntary redundancy/early retirement schemes of the kind with which we are here concerned: the tribunal found in terms that the employer had a "real need" to implement the Merging Offices Scheme in 2008/9 …….. And, most pertinently, it was in our view legitimate for the employer to have a fixed budget for the amount to be spent on such schemes in 2008/9, even if that might mean that selection had to be made between applicants. Like any business, it was entitled to make decisions about the allocation of its resources. ….."

In essence the EAT held that selection on the basis of those whose compensation would cost least, was objectively justified in a case where the claimants brought age discrimination claims on the basis that their age meant they were not selected since they would have been expensive to pay off. **Land Registry v Benson** held that the use of a cheapness criteria was a proportionate means of achieving a legitimate aim.

88 The decision of the Supreme Court in **R (Lumsdon and Others) v Legal Services Board [2016] AC 697** made clear that there is a balancing exercise between private interests adversely affected, and public interests which the measures are intended to promote. I must take care not to substitute my view of the social policy issues for a view of the Member State.

89 The Claimants put forward two alternative courses of action which they suggest the Government should have taken. There was no suggestion that the Government should have followed the Hutton Report and provided no transitional provisions. The first proposal was that the transitional provisions should have been extended to cover everyone in post and in the FPS on 1 April 2012. The second proposal was that the transitional provisions should have been extended to cover everyone within 14 years of the earliest age at which he or she could have taken a full unreduced pension. Had the first option been adopted, that would have granted transitional protection to everyone in post irrespective of how close they were to retirement and delayed the pension reforms by as many years as there were to the retirement date of the youngest firefighter. The aim would have been different. It would have been an aim to protect all of those in post on 1 April 2012. The second proposed alternative that the transitional protections should cover everyone within fourteen years of the earliest date on which he or she could have taken a full unreduced pension asks for the line to be drawn at a different date. It accepts that it is lawful and legitimate to protect those closest to retirement and therefore does not assist the Claimants' case. Much of the negotiation by the FBU was spent in trying to adopt the Scottish model which counted back ten years from the age between 50 and 55 that some firefighters could have taken full unreduced pension. Those proposals were accepted in Scotland, but the Claimants, through the FBU, are making a claim in Scotland which is currently stayed. Against that evidence, I accept Mr Cavanagh's submission that the FBU did not think the transitional provisions were discriminatory, or they would not have been arguing for the Scottish position.

90 Mr Cavanagh argues that those closest to retirement have a greater legitimate expectation that things would not change in a significant way when they are only a few years away from retirement as compared with those who are earlier in their career. His submission is that a person in the early part of his or her career is not focused on, or concerned about their pension because retirement is a long way off and there may be changes to their careers or personal circumstances. He suggests that someone closer to Normal Pension Age is focused on their pension entitlement and has a legitimate expectation that their pension will stay as it is with no sudden changes in the last years before retirement.

91 I have been referred to **R (Unison) v First Secretary of State [2006] IRLR 926.** Mr Short says that this case is not authority for the proposition that the aim of protecting those closest to retirement is a legitimate aim for the purposes of the legislation. The case concerned an application for judicial review of changes to the Local Government Pension Scheme brought by Unison. Mr Short argues that the administrative court was not called upon to determine whether the aim relied upon was in fact a legitimate aim. He relies on paragraphs 33 and 34 of the judgment of Deputy Judge Andrew Nicol QC which stated:

> "33 There was an important difference here between the parties as to the approach which I should adopt to this issue. Mr Goudie argued that it was for the Court to rule on the merits. In other words, he submitted, it was for me to say 'yea' or 'nay' whether the 85 year rule was justified under Article 6(1) . Mr Eadie, on the other hand, submitted that this was wrong. In any subsequent litigation between a claimant and the government, it would be for the government, if it thought right, to seek to persuade the court or tribunal that the 85 year rule pursued a legitimate aim and was necessary and appropriate. The Defendant had come to the conclusion that he could not do that. That was a judgment which he had made. This Court could only interfere if that judgment was one which no reasonable minister could reach.
>
> 34 In my judgment, Mr Eadie is right. This Court is not an employment tribunal or Court hearing a private claim between an employee contending that the Rule of 85 is discriminatory and a respondent or defendant seeking to defend a practice which it believes is justified. Rather it has to apply conventional public law principles to judgments and assessments which the decision maker has made in the course of adopting the regulations. … I have to decide whether the implicit judgment that the government could not successfully defend the 85 year rule as justified was one which was legally open to it. That does not mean deciding whether the judgment was correct. Rather it means considering whether a reasonable decision maker could have come to that conclusion or whether the conclusion was irrational."

92 Mr Cavanagh argues that the facts and issues in the **Unison** case are remarkably similar to the present case because in that case there was a change to the transitional provisions that were adopted as part of the reform of a public sector pension scheme, which made the scheme less generous. He relies on paragraphs 10 and 11 of the judgment concerning the Rule of 85 that the total of the members age when employment ends, total years in the scheme and the period between the end of employment and the date of election earlier than age 65 totals 85 years or more. The changes resulted from the unsustainability of the costs of the existing scheme, but rights already accrued were protected. In addition, transitional protections were offered. The Government's justification in that case was listed at paragraph 38 of the judgment and at paragraph 39, Nicol J, as he now is, stated:

> "In my judgment these are all rational bases on which the defendant could have made choices as to transitional protection which he did. The fact that other arrangements could also have been lawfully adopted as the scheme which the government might have wished to defend as justified under Article 6(1) is nothing to the point. Mr Goudie's alternative challenges to the transitional arrangements are not made out."

Mr Cavanagh argues that the issue in the present case has already been determined by the High Court that held that transitional provisions are within the margin of discretion open to the Member State. Mr Short argues this does not

assist because the finding was only that the Respondents' reliance on protecting those closest to retirement was not irrational. However, in my judgment the cases cover much of the same ground and there has been no suggestion that the **Unison** case was wrongly decided. It is therefore of assistance to me in determining these issues.

93 Both parties have also referred me to the decision in **Lockwood v Department of Work and Pensions [2014] ICR 1257 CA**, a decision made after the decision in **Seldon.** This case concerned a policy of paying higher voluntary redundancy payments to those aged over 35 than to those aged under 35, because it was assumed that the younger staff would have fewer commitments and be able to react more easily to the loss of their job. Rimer LJ held:

> "The ET's conclusion was that the aim of the CSCS was to produce a proportionate financial cushion until alternative employment was found, or as a bridge to retirement and the receipt of a pension; and the means of doing so by way of staged payments and a banding process was a legitimate aim. Everyone benefited from it, with the older employees simply benefiting more than the younger ones. The ET was satisfied that the respondents adopted proportionate means to achieve the aim. The methods of implementation were reasonably necessary, and were sufficiently robust to counter any argument that might be raised on the question of substantial disparity of treatment."

94 A further authority to which I have been referred is **Commission v Hungary C-286/12**. In that case the Government of Hungary had introduced a compulsory retirement age of 62 for judges, replacing a previous retirement age of 70, with very limited notice. The aims relied upon were set out as the standardisation of the age limit for compulsory retirement in the context of professions in the public sector, whilst ensuring the viability of the pension scheme, a high level of employment and the improvement of the quality and efficiency of the activities involved in the administration of justice together with a more balanced age structure facilitating access to the relevant professions for young lawyers and guaranteeing them an accelerated career. Those aims were held to be legitimate. The Court held at paragraph 66:

> "Those provisions must be viewed against their legislative background and account must be taken both the hardship they may cause to the persons concerned and of the benefits derived from them as society in general and the individuals who make up society."

The ECJ suggested that transitional measures should have been adopted, aimed at reducing the effect on the disadvantaged group. There should have been a staggered introduction. The case demonstrates that EU law recognises those nearest to retirement who face a sudden change require transitional provisions to provide time to adjust.

95 Mr Short argues that the Government social policy choice was not based on precise or concrete factors. He argued that all members of the FPS had three or three and a half years notice of the impending changes and that the Respondents had failed to identify longer term plans that would have been made by older members but not by younger members which would have been disrupted by the changes. He argued that because the transitional provisions were tied to Normal Pension Age, rather than the expected date of retirement, the policy gave little weight to the expectations in any event. Mr Kelly's evidence was that in the

consultation concerning the State Pension Age, the evidence was that people would finalise their plans the closer they got to retirement.

96 This matter is taken up in **R (Lumsdon and Others) v Legal Services Board [2016] AC 697** where Lords Reed and Toulson said at paragraph 56:

> "The justification for the restriction tends to be examined in detail, although much may depend upon the nature of the justification, and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification, on the other hand, may well be expected to be supported by evidence. ……"

Mr Cavanagh also refers me to **Palacios De La Villa v Cortefiel Servicios SA (Case C-411/05)** and to **Fuchs v Land Hesson C159/10 and C160/10.** in which the ECJ stated:-

> "That choice may, therefore, be based on economic, social, demographic and/or budgetary considerations, which include existing and verifiable data but also forecasts which, by their nature, may prove to be inaccurate and are thus to some extent inherently uncertain. The measure in question may, moreover, be based on political considerations, which will often involve a compromise between a number of possible solutions and, again, cannot with certainty lead to the expected result."

97 The authorities suggest that need for precise and concrete factors depends on the nature of the justification. The government relies on the fact that those in the protected group were closer to retirement. Political considerations may have played a part in the Government's decision. For those reasons I reject the criticism that the Government's decision was not based on precise or concrete factors. The fact that the Scottish Government adopted a different measure, that is drew the line in a different place, shows that these are social policy matters for which there is no right or wrong answer and the choice is that of the Government.

98 The Claimants contend that the Government should have provided all firefighters in post as at 1 April 2012 with the transitional protection. That was not the decision taken. The decision was to protect those closest to retirement. It is that decision that must be justified. What is required is for me to evaluate the aims and means that were actually adopted, and not to evaluate the means by reference to different aims. This has made clear in **Land Registry v Benson**.

99 I have also been referred to the decision of Langstaff J in **Chief Constable of West Midlands Police v Harrod [2015] IRLR 790** in which he stated:-

> "41 ……. When considering justification, a tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by a decision maker to consider discrimination at all, or to think

> about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted. But the fact that there may be such an impact does not convert a tribunal's task from determining if the measure in fact taken can be justified before it,
>
> objectively, into one of deciding whether the alleged discriminator was unconsidering or irrational in its approach. ….."

100 The protection of those within ten years of Normal Pension Age has been adopted across the public sector. There is a statutory Normal Pension Age. Mr Kelly's evidence was that there was no taper in Local Government. Agreement was reached with the four large Public Sector Unions covering Local Government, the NHS, the Civil Service and the Teachers. The challenges have been made by certain of the members of the Judicial Pension Scheme, the Police and the Firefighters. These three schemes were generous, and each had some characteristics peculiar to the particular scheme. Mr Starbuck's evidence was that the FBU was seeking the best deal for its members.

101 There is a final matter to be considered in relation to the legitimacy of the aims and that relates to the fitness issue. Mr Lynch has made a number of submissions concerning fitness and the report of Dr Williams. He argues that a central reason for refocusing protection on the older firefighters is that they have the least ability to change their lifestyles and circumstances to accommodate the changes to the Normal Pension Age. This involves a consideration that it is the older firefighters who face the greatest difficulties in maintaining their fitness and weight. Mr Lynch argues that the new fitness regime is something that should be taken into account because the protection arrangements focusing on older firefighters allow for the new fitness structures to come into effect before the change is made to the firefighters NPA. Retaining health and fitness is more difficult for older firefighters who will soon be 55 and otherwise facing being obliged to work until 60. The evidence for this is contained within the fitness report of Dr Williams (7/5218). The FBU was extremely concerned about issues concerning fitness and the possible disadvantage to a firefighter who became unfit and thus no longer able to work and needed to take early retirement.

102 The Williams Report (7/5218) used a standard of fitness based on cardiorespiratory figures and V02 42 max. The Williams Report noted that there were limitations to this standard. The report noted that a number of FRAs used a lower standard of V02 35 max and expressed the view (7/5368) that 100% of firefighters would be able to work until 60 years of age with such a standard. Whilst the report also says that if the V02 42 max standard was used there would be some firefighters who could not meet it, although the majority would be able to regain their fitness with appropriate training. Mr Lynch submits that the protective arrangements mean that those who might be in difficulty in terms of benefiting from new policies and structures because the new structures are not in place and will need to be effective are protected from the need to work beyond 55.

103 I have also been referred to the ECJ decision in **R (Incorporated Trustees of National Council on Aging) ("Age Concern England") v Secretary of State for Business Enterprise and Regulatory Reform [2009] ICR 1080.** Paragraph 2 of the ruling of the Court reads:-

> "Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which does not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age……. However, Article 6(1)
>
> offers the option to derogate from that principle only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training. It is for the national court to ascertain whether the national legislation allowing employers to dismiss workers who have reached retirement age is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States' discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim."

104 Having undertaken the analysis set out above, I am satisfied that the correct test for me to apply in determining the legitimate aims is to be determined by the approach to scrutiny laid down by the ECJ and the Supreme Court in **Seldon**. There is a wide margin of discretion for the Member State. On the evidence before me I am satisfied that the Respondents have demonstrated that the aims were to protect those closest to pension age from the effects of pension reform; to take account of the greater legitimate expectation that those closer to retirement would have that their pension entitlements would not change significantly when they were close to retirement; to have a tapering arrangement so as to prevent a cliff edge between fully protected and unprotected groups; and that there was consistency across the public sector.

105 It is my decision that the Respondents have demonstrated these aims.

Proportionality

106 The next issue is proportionality, or the 'means'.

107 Mr Short refers to the three stage test adopted by the Privy Council in **de Freitus v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1AC 69**, in which the three-fold analysis was expressed to be:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Mr Short has also drawn my attention to the authorities that assist with each of the three limbs. The first stage of the test involves balancing the need to achieve the aim against the impact of the means used to achieve it. In **Seldon** Baroness Hale described the matter at paragraph 50(6) as follows:

> "The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen (*Fuchs*)".

108 In relation to the second limb of the test requiring that the measure is rationally connected to the objective, Mr Short refers to a number of authorities including **Age Concern** at paragraph 51 in which the ECJ stated:

> "In that connection, it must be observed that in choosing the means capable of achieving their social policy objectives, the Member States enjoy broad discretion (see to that effect *Mangold* paragraph 63). However, that discretion cannot have the effect of frustrating the implementation of the principle of non discrimination on grounds of age. Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim."

As Mr Cavanagh points out, AG Mazar in the **Age Concern** case goes on at paragraph 86 and 87 of his opinion to say-

> "Furthermore, the Court mentioned the various and complex considerations, the national authorities concerned may take into account as regards retirement rules and concluded that it is for the competent authorities of the Member States to find the right balance between the different interests involved, provided the requirements of proportionality are respected.
>
> That appears to suggest that Member States are left a relatively wide discretion in identifying the means to be used to achieve the legitimate aim relating to the social and employment policies pursued, which is possibly also reflected by the wording of the answer given by the Court in that case, according to which such rules are not precluded if it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose."

109 In relation to the third aspect of the test concerning reasonable necessity Mr Short draws attention and the fact that this part has been formulated in various different ways. He refers to **Dansk Jurist C546/11 [2014] 1 CMLR 41**, which formulated the test as the question of whether the aim could be achieved by less restrictive, but equally appropriate measures. He also refers to **European Commission v Hungary** in which it was held that evidence is required to establish that more lenient provisions would not have made it possible to achieve the objective. Finally, he refers to the **Rosenbladt** case as authority that the provisions at issue must not go beyond what is necessary for achieving that objective and unduly prejudice the interests of the persons concerned.

110 It is common ground that the transitional provisions were not agreed. The FBU sought to extend provision to all members of the FPS. Mr Short argues that there was no real analysis of the need or impact of the transitional protections and no attempt to balance the need for such protection against the impact on the disadvantaged class when the provisions were adopted or brought into force.

111 In considering the three stages of the proportionality test, the first stage is the balancing aspect. In this case the question is whether the need to protect those aged 48 or more on 1 April 2015 from the financial consequences of

pension reform is sufficiently important to justify their receiving pension benefits that are very much more valuable than those received by younger firefighters for the same work. I have found that it was a legitimate aim to protect those closest to retirement. It follows that the place where the line was drawn was a matter of social policy choice. Mr Pomeroy in cross-examination by Mr Short said:

> "We considered at length where to draw the line but not that it should be drawn prior to retirement age."

Mr Pomeroy went to explain that the aim was always to protect those closest to retirement and the further from retirement an individual was, the greater the change to their entitlement. The line was drawn ten years from Normal Pension Age with a four year taper. This was consistent with the rest of the public sector. The FBU would have preferred the line to be drawn elsewhere so that all members of the FPS were protected. That is a preference. The Government made a social policy choice which it applied across the public sector that those within ten years of NPA had protection to which was added a four year taper.

112 Mr Short argues that the impact on the unprotected group is catastrophic and unfair. It is common ground that the unprotected group receive worse pension rights than the older firefighters doing the same job at the same time. The Normal Pension Age for the younger firefighters is 60 rather than between 50 and 55. The deferred pension age is 65 rather than 60. There is a lower accrual rate, less generous age related commutation factors for calculating the lump sum entitlement, and a career average rather than a final salary scheme. These go to the pension reforms themselves. The reforms are not what is at issue in this case, the issue relates solely to the transitional provisions.

113 I take note of the decision of Baroness Hale in **Seldon**:

> "64 The answer given in the Employment Appeal Tribunal … with which the Court of Appeal agreed … was:
>
> > "Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, which is itself an important virtue."
>
> Thus the Appeal Tribunal would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare.
>
> 65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. In the particular context of intergenerational fairness, it must be relevant that, at an earlier stage in his life, a partner or employee may well have benefited from a rule which obliged his seniors to retire at a particular age …"

114 Mr Short points out that impact is at the higher end of the scale in terms of the Hutton Report. He demonstrates this by reference to Mr Bebbington who under the FPS would have been able to retire on a full pension at age 50, but since April 2015 his options are more limited. At age 50 he could take his benefits

amounting to eleven years' accrual under the FPS, but only if he leaves service. If he leaves he could take his FPS benefits but would only be entitled to his 2015 scheme benefits at age 55 subject to an early retirement factor. At age 55, Mr Bebbington could still only take his FPS benefits if he left service. There would be no late retirement factor increase, but the commutation factor would be less generous. There would also be an early retirement factor applied to his 2015 scheme benefits. At age 60, Mr Bebbington could take his benefits under the FPS which would not be increased by a late retirement factor, even though taken ten years late but the commutation factor would be less generous. Mr Bebbington could also take his 2015 benefits without an early retirement factor reduction.

115 It is clear to me on the case law that there has to be a line drawn at some point. That is a social policy choice and inevitably some individuals will be disadvantaged. The FBU put forward the arguments in negotiation that the starting point for the transitional provisions should have been when a firefighter would have qualified for a full unreduced pension. Had this been agreed, the transitional provisions would still have protected those closest to retirement with a different cut-off date. Indeed, the Scottish Government took account of the length of service in their transitional provisions, but, nonetheless the FBU is pursuing claims for discrimination in Scotland. Mr Starbuck's evidence was that the FBU had noted that the Police had obtained an improved position and, thus, sought to obtain improvements for the firefighters.

116 It was reasonably necessary for the Government to draw the line at some point. I am satisfied that the Respondents have demonstrated a legitimate aim and having considered the three stage test, I am also satisfied that that aim was proportionate.

117 In these circumstances it is my judgment that the treatment of the Claimants by the transitional provisions included in the Firefighters Pension Scheme 2015 are a proportionate means of achieving a legitimate aim and the claims of direct age discrimination fail.

The Claims of Equal Pay and of Indirect Sex and Race Discrimination

118 The Claimants bring claims for equal pay and in some cases for sex and/or race discrimination. These claims are subsidiary claims to the main age discrimination claim. The parties have dealt with them briefly in their submissions and for the sake of convenience I deal with them together. It has been accepted by the Claimants that there can be no claim for sex discrimination if, and to the extent that the sex equality rule under Section 67 of the Equality Act 2010 operates or would operate, but for a material factor defence being made out under Section 69.

119 It is admitted by the Fifth and Sixth Respondents that the limitation of transitional protection on the grounds of age has a disparate impact as between men and women and as between white and BME firefighters. The FRAs have made no formal concession on the point.

The Law

120 Section 67 Equality Act 2010 provides:

"(1) If an occupational pension scheme does not include a sex equality rule, it is to be treated as including one.

(2) A sex equality rule is a provision that has the following effect—

(a) if a relevant term is less favourable to A than it is to B, the term is modified so as not to be less favourable; …..

(3) A term is relevant if it is—

(a) a term on which persons become members of the scheme, or

(b) a term on which members of the scheme are treated.

…….

(5) The reference in subsection (3)(b) to a term on which members of a scheme are treated includes a reference to the term as it has effect for the benefit of dependants of members.

……."

Section 69 sets out the material factor defence and provides:

"(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

…….

(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex."

121 In relation to indirect discrimination, section 19 Equality Act 2010 provides:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

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

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

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

Conclusions

122 Mr Lynch refers me to **Essop v Home Office [2015] ICR 1063** which was a test case in which the claimants, who were black and minority ethnic civil servants over the age of 35, sought to achieve promotion in the Civil Service. The Court of Appeal held that the Employment Judge had been correct to hold that the claimants had to prove the nature of the group disadvantage and that each claimant also had to prove that he had suffered the same disadvantage. Many BME and older candidates did pass the CSA examination. At paragraph 32 Rimer LJ held:

> "Since, however, not all BME candidates fail, a BME claimant has first to prove the "particular disadvantage" that the CSA poses for BME candidates as compared with white candidates: section 19(2)(b); and each BME claimant must then also prove that he too is put at *"that disadvantage"*, namely the *same* disadvantage: section 19(2)(c)."

Mr Lynch says that the reason why Essop is so important is that it demonstrates that indirect discrimination is not a mechanistic statistical analysis. The Court of Appeal held it was crucial to establish why general groups suffered the disadvantage.

123 All parties have taken me to the decision of Underhill LJ in **Naeem v Secretary of State for Justice [2016] ICR 289 CA**. The Supreme Court heard the appeal in **Naeem** in November 2016 and the parties reserve the right to make further written submissions should the decision of the Supreme Court be forthcoming soon. **Naeem** was a claim of indirect discrimination on the grounds of religion and belief by a Muslim chaplain employed in the prison service who contended that the emphasis given to progression based on length of service meant that he was disadvantaged as a Muslim chaplain, since longer serving Christian chaplains were more likely to be higher up the pay scale having been able to join the service prior to 2002. In his judgment, Underhill LJ stated:

> "22. …The concept of "putting" persons at a disadvantage is causal, and, as in any legal analysis of causation, it is necessary to distinguish the legally relevant cause or causes from other factors in the situation. In my view the only material cause of the disparity in remuneration relied on by the claimant is the (on average) more recent start dates of the Muslim chaplains, but that does not reflect any characteristic peculiar to them as Muslims: rather, it reflects the fact that there was no need for their services (as employees) at any earlier date.
>
> ……
>
> 24. … Accordingly the use of the criterion had to be justified. If the employer had been able to establish that the only reason for the disparity in average lengths of service had been that the proportion of women being recruited had increased in recent years – say, as

> a result of a change in social attitudes, so that women were more willing to contemplate working in an industrial environment – the analysis would have been different."

This refers to footnote 7 which reads:

> "Indeed it were otherwise an employer who made positive efforts to increase the diversity of his workforce – say by advertising vacancies in the media with a greater appeal for women or members of an ethnic minority – would be making a rod for his own back, at least if length of service were a criterion in his pay system."

Underhill LJ also states at paragraph 28:

> "28 The point established by the *Armstrong* line of cases – that is that an employer can rebut a claim of indirect discrimination by showing that an apparent disparate impact is the result of non discriminatory factors – is in line with my own reasoning at paragraph 22 above. As Smith LJ makes clear in *Gibson*, there can no difference between the approach in an equal pay case and in a claim under the 2010 Act."

124 The claims of sex discrimination are in fact claims for equal pay. There is no dispute that pension payments are deferred pay. The claim is a claim for breach of the sex equality rule contrary to Section 67 of the Equality Act. The issue is whether there is good material factor defence. The Government has admitted a disparate impact in its response form (1/56 paragraphs 11 and 12). There was a greater percentage of male firefighters in the protected group and a very small percentage of females in the protected group.

125 It is apparent from the nature of the transitional protection that it is age related. I have considered **Gibson v Sheffield City Council [2010] ICR 708** in which Smith LJ stated at paragraph 63:

> "……The position in a non-pay case for alleged indirect discrimination is that the claimant must prove that the provision puts women at a particular disadvantage. While putting the burden of proof squarely on the claimant, the provision leaves open to the respondent the opportunity to demonstrate that what might appear to be a disadvantage to woman arises from factors wholly unrelated to gender. So even though the 1975 Act does not provide an express defence comparable to that under section 1(3) of the 1970 Act, there is an implied one because it is always open to a party who does not bear the burden of proof to shoulder an evidential burden and disprove his opponent's case. There must be such an implied possibility because the purpose of the legislation is to prevent sex discrimination, including unjustifiable indirect discrimination. A respondent is not to be held to have discriminated – and to put the justification of his practice – merely because it has given rise to a statistical imbalance."

This authority shows that there is no need to justify if the factors are wholly unrelated to gender.

126 I have also been referred to **Rutherford v Secretary of State for Trade and Industry (No 2) [2006] ICR 785**, in which Lord Scott stated:

> "16. … The conclusion I would draw is that a difference in treatment of individuals that is based purely on age cannot be transformed by statistics from age discrimination which it certainly is to sex discrimination.
> ……

> 19. ….The composition of the respective groups would not depend upon the individual's ability or inability to satisfy some particular condition. It would depend of course on the individual's decision whether or not to continue in employment after the age of 65 and, also, on whether or not he or she survived to that age. The latter condition is essentially non discriminatory otherwise than on the ground of age. Age discrimination cannot be turned by statistics into sex discrimination."

127 Mr Short relies on **Middlesbrough Borough Council v Surtees [2007] ICR 1644**. Mr Lynch also relies on this authority, which concerned age criteria protection being lost at 65. He submitted that the issue in **Rutherford** was thoroughly germane to the present claim because the FRAs submit that an attempt is being made by the Claimants to attach sex discrimination and race discrimination claims to a claim for age discrimination which is entirely artificial. I agree with this submission.

128 There is one further authority brought before me by Mr Cavanagh upon which he places reliance. This is **Tyne & Wear Passenger Transport Executive (T/A Nexus) v Best [2007] ICR 523.** This case was a claim brought by operators of the Newcastle Metro. The longer serving members of staff attracted better terms and conditions. The majority of this group were men and there were more women in the younger group who had less generous terms and conditions. As the women only formed a small minority of the protected and the unprotected group, no inference of prima facie sex discrimination could be made.

129 On the evidence before me in this case, the material factor is age and not sex. Therefore, no material factor defence is necessary. In addition, the women, and indeed the BME individuals, form only a small minority of the protected and unprotected group.

130 In these circumstances, it is my decision that the claim of equal pay fails.

131 In relation to the claims of indirect sex and race discrimination, the issue for the Tribunal is one of objective justification, if I am wrong that the material factor is not sex or race, but age. The test of objective justification in claims of indirect discrimination is set out in **Chief Constable of West Yorkshire Police v Homer [2012] ICR 704** in the Supreme Court. I am satisfied that, in the light of my decision in relation to age discrimination, the Respondents have demonstrated objective justification in the claims of sex and race discrimination.

132 The final issue concerns the piggyback claims. These arise out of the right of the male firefighters to bring contingent or piggyback claims in the event that their female colleagues succeed in the equal pay claim as established in **Hartlepool Borough Council v Llewellyn [2009] ICR 1426.**

133 The female Claimants have not succeeded, and accordingly the piggyback claims made by the younger male staff cannot succeed.

134 It is the decision of the Tribunal that the piggyback claims fail.

RESERVED JUDGMENT AND REASONS

Employment Judge Lewzey
14 February 2017