Neutral Citation Number: [2020] EWCA Civ 1487

Case No: A2/2019/2140

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HH JUDGE BARKLEM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2020

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of the Appeal (Civil Division))
LORD JUSTICE McCOMBE
and
LADY JUSTICE MACUR

- -

Between :

CRAIG HESKETT	**Appellant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Respondent**

- -
- -

Mr Gordon Menzies (instructed by **Baileyfields**) for the **Appellant**
Ms Claire Darwin and **Mr Nathan Roberts** (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 6th May 2020
Written submissions: 13th and 15th May 2020

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Claimant, Mr Craig Heskett, who is the Appellant before us, has been employed since 2006 as a probation officer in Kent. The probation service in England and Wales was at the time material to his claim operated by the National Offender Management Service ("NOMS"), which was an executive agency under what is described as the "sponsorship" of the Ministry of Justice. It has no separate legal personality. For practical purposes I can refer to the Claimant as being employed by NOMS, but as a civil servant he is formally an employee of the Crown, and the Secretary of State is the appropriate respondent to these proceedings on behalf of the Crown. NOMS was replaced in April 2017, following the start of the proceedings, by Her Majesty's Prison and Probation Service ("HMPPS").

2. In February 2016, when he was aged 38, the Claimant brought proceedings against the Respondent in the Employment Tribunal complaining of (indirect) age discrimination. I give details of his complaint below, but his essential point is that the rate of pay progression for his job has drastically reduced as a result of the policy of austerity in public sector pay which was in force since 2010, and that this disadvantaged younger employees such as himself since they were inherently less likely than older colleagues to have reached the top of the applicable pay range when the policy came into force.

3. The Claimant's complaint was heard over two days in July 2017 before an Employment Tribunal at London South comprising Employment Judge Crosfill, Mrs R Serpis and Mr D Clay. The complaint was dismissed by a Judgment and Reasons sent to the parties on 12 October 2017.

4. The Claimant appealed to the Employment Appeal Tribunal. His appeal was heard by HH Judge Barklem on 6 December 2018. His decision dismissing the appeal was not handed down until 25 June 2019, but that is not something about which I feel able to be critical since there has been a substantial delay in this Court also, for which I express my regret.

5. The Claimant appeals to this Court with the permission of Lewison LJ. He has been represented by Mr Gordon Menzies. The Respondent has been represented by Ms Claire Darwin and Mr Nathan Roberts. Both Mr Menzies and Ms Darwin appeared in both the ET and the EAT.

THE FACTS

6. The primary facts were not in any substantial respect in issue in the ET. They are set out clearly and succinctly at paras. 5-18 of the Tribunal's Reasons which I annex to this judgment. The essential points for our purposes, adding in one or two matters which appear elsewhere in the Reasons or are common ground, can be summarised as follows.

7. The annual budget of NOMS was set by the Ministry of Justice. Within the parameters of that budget it was the responsibility of NOMS to determine pay for its employees, subject to any constraints imposed by the Cabinet Office Department or the Treasury and "in alignment with" the Ministry's pay strategy.

8. Prior to the introduction of the policy of austerity in 2010 NOMS operated a pay progression system of the kind then almost universal in the public sector, in which particular jobs were placed in a "pay band", which comprised a scale of "spinal points" corresponding to particular salary figures. An employee was entitled to progress up the scale by three spinal points each year until they reached the top. In addition, there was an expectation that the salary figures which each spinal point represented would be adjusted annually, so as (broadly) to keep pace with increases in the cost of living, so that progress up the scale would constitute increases in salary in real as well as nominal terms.

9. The Claimant was promoted to band 4 in 2008 and started at the bottom of the band. There were 25 spinal points in the band. If the rate of annual progression had remained the same he could have expected to reach the top in eight or nine years.

10. In June 2010, in response to the financial crisis, the Coalition Government announced what was described as a "pay freeze"[1] in the public sector under which pay increases would be limited to 1% of overall pay costs. That led to negotiations between NOMS and the recognised trade unions in the National Negotiating Council for the Probation Service ("the NNC") and to an eventual agreement in February 2012 (with retrospective effect to the start of the 2011 pay year).

11. The principal effect of the NNC agreement, so far as we are concerned, is that the rate of annual progression in bands 3-6 was reduced from three spinal points to one (save in the first year, when it was reduced to two); and there was to be no cost-of-living increase in the salary figures attached to the bands. Other aspects of the agreement, including some designed to mitigate the impact on lower-paid workers, are referred to at para. 14 of the ET's Reasons. Some minor adjustments were made in the following years, explained at para. 15.

12. The agreement as regards the rate of progression remained in effect up to the date that the Claimant brought his claim in 2016. If it remained in place indefinitely he would not be able to reach the top of the band until he had been in it for a further sixteen years (23 in total).

13. It is common ground that the slowing of the rate of progression as a result of the NNC agreement had a disproportionate effect on younger employees because a higher proportion of older employees would, in the nature of things, either have reached the top of the pay band or in any event have progressed further up it than younger employees.

THE BACKGROUND LAW

14. Section 39 (2) (d) of the Equality Act 2010 provides that an employer must not discriminate against an employee by subjecting him or her to any detriment.

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1 The term "freeze" is arguably not quite accurate given that a small increase in pay budgets over the relevant period was allowed; but the label is well understood.

15. In the present case we are concerned with indirect discrimination. That is defined in section 19. Subsections (10 and (2) read:

> "(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."

The relevant protected characteristics are listed in subsection (3) and include "age".

16. A couple of points about terminology. I will adopt the usual shorthands of "PCP" for the phrase "provision, criterion or practice" in subsection (2) and "justification" (sometimes referred to in the case-law as "objective justification") for the requirement that a PCP must be a proportionate means of achieving a legitimate aim. It is not uncommon to refer to a PCP as discriminatory if elements (a)-(c) under subsection (2) are satisfied. That is strictly inaccurate, since the requirement at (d) that the PCP has not been shown to be justified is part of the definition of "discriminatory" in the subsection. Normally what is meant is clear from the context, but I will where necessary use the phrase "*prima facie* discrimination".

17. It will be seen that section 19 (2) (d) requires the putative discriminator to show two things – (a) that the purpose of the PCP was to achieve a legitimate aim; and (b) that it represented a proportionate means of achieving that aim. The distinction between the two is in principle important since the aim, so long as "legitimate", must be a matter for the choice of the employer whereas the proportionality of the means chosen must be assessed by the tribunal. A recent example of that distinction being applied was the decision of this Court in *Harrod v Chief Constable of West Midlands Police* [2017] EWCA Civ 191, [2017] ICR 869 (per Bean LJ at para. 30, myself at para. 41 and Elias LJ at para. 48); but see also *Blackburn v West Midlands Police* [2008] EWCA Civ 1208, [2009] IRLR 135. Having said that, it has to be recognised that the case-law sometimes slurs over the distinction between aim and means, perhaps because it is not always easy, or necessary, to draw it: as to this see paras. 32-33 of my judgment in *HM Land Registry v Benson* [2011] UKEAT 0197/11, [2012] ICR 627.

THE CLAIM AND THE ISSUES

18. The essence of his claim was pleaded by the Claimant (then unrepresented) in his ET1 as follows:

> "From 1 April 2011 pay progression was changed as a result of Union negotiation … such that pay progression was limited to 1 pay point each year.
>
> If the rate of pay progression had not changed I could have advanced to the top of my pay point (102 at a salary of £36,084) in 9 years ... However, as I am currently at pay point 85 (a salary of £30,503) it will currently take me until 2032 (17 years) before I am able to reach the top of my pay point. …
>
> My pay is significantly less than colleagues who undertake the same role. The only reason for this is that my older work colleagues were able to progress up the pay point scale prior to 2011 at a much quicker rate, with several work colleagues being at the top of the pay scale for Band 4. This means that I undertake the same role, with the same level of competence and experience as my colleagues, yet I am paid a salary which is £5,588 per annum less."

19. The Claimant was required to give further and better particulars of his case. As regards the PCP he put his case two ways – described as "ground 1" and "ground 2". Ground 1 was pleaded as "the change in the Respondent's pay policy in April 2011, which reduced the annual pay increase from 3 points to 1 point". Ground 2 was pleaded as "pay is primarily based on length of service and/or experience and/or loyalty".

20. For present purposes I need only quote the part of the Respondent's ET3 in which he pleads his case on justification. This reads:

> "Even if, which is denied, the Claimant was to prove that the Respondent has indirectly discriminated against him on the grounds of his age, then the respondent contends that this was a proportionate means of achieving a legitimate aim: i.e. the need to balance the ability to continue to award probation officers with an annual incremental annual pay rise in recognition of the difficult and valid role they undertake, and thereby to retain these vital employees in employment, versus the significant reduction in public money available to run this vital service and remunerate its employees in light of the significant downturn in the economic climate from 2010 onwards."

21. Prior to the hearing in the ET the parties agreed a statement of their respective cases and the issues to which they gave rise. This reads:

> "2. The Claimant contends that the Respondent's pay progression policy is indirectly discriminatory within the meaning of section of 19 of the Equality Act 2010. The protected characteristic on which the claimant relies is his age, specifically being aged under 50 years old.

3. Are the following provisions, criteria or practices ("PCPs") within the meaning of section 19 of the Equality Act 2010 and which the Respondent applied to the Claimant:

3.1 the change to the Respondent's pay progression policy in April 2011, which reduced the annual pay band increase applicable to employees in pay bands 3 to 6 from three points to 1 point; and/or

3.2 pay is based solely on length of service?

4. If so, did the Respondent apply any such PCP to employees aged 50 or over who are employed by [the Respondent] and based within his current location, or in Canterbury, Swale, Medway or Maidstone ("the comparator group")?

5. If so, did any such PCP put employees aged under 50 who are employed by the [Respondent] and who are based within his current location or in Canterbury, Swale, Medway or Maidstone at a particular disadvantage when compared to the comparator group? The particular disadvantages on which the Claimant relies are:

5.1 employees aged 50 or over are more likely to reach the top of the pay scale prior to April 2011 and therefore less likely to be affected by the change in policy; and

5.2 employees aged 50 or over will reach the top of the pay scale in a shorter period of time; and

5.3 employees aged 50 or over will be paid on a higher pay scale for the same work/job title/duties; and/or

5.4 the consequential impact of any or all of the above on pension entitlement in addition to salary.

6. Is the comparison a proper comparison for the purpose of section 23 of the Equality Act 2010?

7. If so, did any such PCP place the claimant at that particular disadvantage(s)?

8. If so, was the PCP a proportionate means of achieving a legitimate aim(s)? The Respondent contends [his] legitimate aim is to reward staff in terms of pay on the basis of experience and/or service, to ensure that public sector pay is efficient and cost-effective for the taxpayer, to promote staff retention, and/or to ensure that the pool of workers has the proper skill set."

THE DECISION OF THE EMPLOYMENT TRIBUNAL

22. The Tribunal's consideration of the issues starts at para. 22 of the Reasons. Paras. 24-46 address issues 2-7 in the agreed statement. Those issues are not live before us and I need say nothing about them (save that I shall have to make some observations about the definition of the PCP). The only issue before us is issue 8, justification.

23. At para. 51 the Tribunal identified a number of matters which it said that it considered important to the resolution of the justification issue, noting that these included some expansion of its primary findings of fact. Those matters are:

> "51.1 In 2010 a political decision was taken that until further notice the overall cost of public sector pay should not increase beyond 1% per annum.
>
> 51.2 In the present case the new pay scheme was introduced after negotiations with the recognised trade union. The product of those negotiations was that three different groups are treated differently.
>
> 51.2.1 Whilst those employees in the Claimant's position were provided with modest pay progression which for them meant that it would take many years for them to reach the top of the pay scale and their pay might slip behind rises in the cost of living.[2]
>
> 51.2.2 The worst paid employees were initially treated more generously. They progressed at 2 points per annum.
>
> 51.2.3 The employees at the top of the scale initially received no pay rise at all. This remained the case until the changes effective from 1 April 2015 when a 1% award was made. Given that there has been a regular year on year cost of living increases[3] this group's real income is decreasing at the fastest rate. Given that in general people will tend to get used a standard of living this group are disadvantaged despite the fact that they are the highest paid.
>
> 51.3. Subsequent negotiations have resulted in changes to the scheme. Amongst these changes are the shortening of the pay scale by elevating the entry point. Those changes have shortened the scale and mitigate any discriminatory effect.
>
> 51.4. The Respondent wishes to, and is taking, slow but active steps to address the deficiencies in the present pay scheme. Mr Paskin told us, and we accept, that this is a matter which he is authorised to, and is committed to, address as soon as possible. We have regard to the fact

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2 Something has gone wrong with the English here. I think the Tribunal must have meant something like "Whilst those employees in the Claimant's position were provided with modest pay progression, *that rate of progression* for them meant …".

3 This is possibly ambiguous. It is clear from the Tribunal's main findings of fact that NOMS did not, contrary to its pre-austerity practice, make annual "cost-of-living increases" to the value of the spinal points in the band. Evidently what the Tribunal meant was that the cost of living continued to rise each year.

> that introducing an element of performance related pay is something that has been the subject of negotiations through all of the documents we have looked at. We are alive to the fact that not all employees welcome such changes and the introduction of changes will not necessary be speedy no matter how committed the employer."

24. Paras. 52-58 are headed "Was the introduction of the present pay policy a means of achieving a legitimate aim?". At para. 52 the Tribunal makes the point to which I have drawn attention at para. 17 above, saying that it was common ground that "the question is not whether the legitimate aim … is justified but whether the means to achieve it can be", referring to *Harrod* (and also *Benson*). At para. 53 it summarises what it understands to be the Respondent's case on that question, as follows:

> "We note the manner in which the respondent has described the aims it sought to fulfil by making the changes to its pay policy. Essentially it is said that, within the straitjacket of the imposition of an overall pay cap, the respondent has endeavoured to retain some incentive, reward loyalty and experience, avoid redundancies and preserve accrued rights. Put somewhat differently they have attempted to agree fair pay policy in straitened circumstances."

25. The Tribunal then proceeds to consider that justification. I need not quote its reasoning in full. step. For our purposes it can be sufficiently summarised as follows.

26. The necessary starting-point, as in all cases of this kind, is to identify the PCP which requires justification. As to that, the further and better particulars (see para. 19 above) identified two possible PCPs, and that is reflected in para. 3 of the agreed statement. "Ground 2" is in effect a challenge to the whole system of pay progression because it is (unjustifiably) based on length of service. "Ground 1" is a narrower challenge, based only on the reduction in the rate of progression introduced in 2011.

27. At para. 32 of its Reasons, read with para. 33, the Tribunal says:

> "We … conclude that there was a PCP broadly as defined by the Claimant in his further better particulars but perhaps better expressed as being the implementation of the pay policy as operated by the Respondent from 2011. That policy included pay progression based on length of service. Indeed, that was the primary measure within any given pay band."

28. There is no challenge in the grounds of appeal to that characterisation of the PCP, but it needs a little unpacking. Although the Tribunal says that it "broadly" accepts the Claimant's pleaded case about the PCP, the reformulation which it then advances – "the implementation of the pay policy *as operated* by the Respondent *from 2011*" – seems to me to correspond only to the PCP challenged in ground 1 and not to that challenged in ground 2. Although the Tribunal does say that the system "included pay progression based on length of service", that appears to be doing no more than acknowledging that the adverse effect of the way that the system was operated from 2011 consisted of a reduction in the rate of pay progression.

29. That reading of the decision is consistent with the way in which, as we will see, the Tribunal goes on to address the justification issue, where it focuses on the changes made in 2011. It is also consistent with what seems to me the common sense of the matter. The Claimant's original ET1 (at para. 20) had only complained of the reduction in the rate of progression from 2011; and although the broader ground was subsequently added its consequences do not seem to have been thought through since the "particular disadvantage" identified at para. 5 of the agreed statement consists entirely of the effects of the 2011 changes.

30. However, even if I have misunderstood the Tribunal's decision on this point, we are still only on this appeal concerned with the narrower formulation of the PCP because at para. 64 of the Reasons it made a finding that (in effect) the pre-2011 system was justified. That finding is not challenged in this appeal and the only live challenge can be to the changes introduced in 2011.[4]

31. In short, therefore, the PCP which the Respondent was required to justify was, and was only, the reduction of the rate of pay progression from three spinal points per year to one (or two in the first year).

32. If the PCP is defined as discussed above, much of the Respondent's case on justification, as summarised both in the ET3 and in the statement of issues, is beside (what is now) the point. At paras. 61-64 the Tribunal makes the point that none of the conventional justifications for a pay progression system could operate in circumstances where progress was reduced to a rate of one spinal point per year, with the result that it would take 23 years for a new entrant to reach the top of the band and where the evidence was that an officer would be fully experienced after eight years at most. As it put it, "the link between skill and pay has been broken by the introduction of the new pay progression policy". Thus the only element in the Respondent's pleaded justification which is capable of justifying the actual PCP, namely the reduction in the rate of pay progression, is "the significant reduction in public money available … in light of the significant downturn in the economic climate from 2010".

33. As to that, the Tribunal followed the correct sequence identified at para. 17 above and first addressed whether the reduction in the rate of pay progression had a legitimate aim. At para. 50 of the Reasons it records that Mr Menzies argued that "the principal driver for the changes introduced in 2011 was cost" and that the saving of costs could not in law by itself amount to a legitimate aim, relying on *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330, [2012] ICR 1126. It rejected that submission at para. 57 of the Reasons, which reads:

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[4] I should perhaps say that the Tribunal's finding about the system pre-2011 seems to me unexceptionable. The effect of the case-law about the justifiability of pay systems providing for progression on the basis of length of service in the context of sex discrimination (see, for example, *Wilson v Health and Safety Executive* [2009] EWCA Civ 1074, [2010] ICR 302) is that they can in principle be justified on the basis that length of service is a fair proxy for experience and loyalty; but the longer the pay scale the less cogent the justification. The Tribunal's reasoning reflects that approach.

> "It seems to us that the aims of the Respondent cannot simply be described as cost-cutting. That might have been the aim of central government in issuing a pay cap, but on a department level the aim was far more nuanced than that. The Respondent, like any private sector business, needed to live within its means. The measures it adopted were its means of doing so and not its objectives. As such we do not think that the Respondent is relying on cost to justify its discriminatory conduct. It was an absence of means which forced the Respondent to take the decisions it did but that is not the same thing."

Its conclusion, at para. 58, is that "the implementation of the new pay policy was for the legitimate aims identified by the Respondent".

34. The issue then was whether the reduction in the rate of progression was a proportionate means of achieving that aim, notwithstanding the detrimental impact which it had clearly described at paras. 61-64. It held that it was. It started with a finding, at para. 65, that:

> "The new pay policy was detrimental to all in the sense that all employees were receiving increases in pay that would mean that their real income was falling once inflation is taken into account. The new pay policy was crafted to distribute that pain in as fair and equitable a way as possible given the constraints the Respondent was subject to. The employees at the top of the pay bands were given no increase in pay whatsoever until the 2015 pay settlement. As we say above this would have been a significant hardship. For a number of years more favourable pay progression was used to boost the pay of the lowest paid workers in bands 1 and 2. It seems to us that was a fair approach given those with least the greatest pay increases. The remaining employees did receive pay progression but at a reduced rate."

35. Para. 66 makes a finding that any attempt to reform the pay structure to introduce a performance-related element was likely to be resisted by the trade unions and would be difficult and take time. Para. 67 finds that NOMS had taken some steps – essentially by shortening the scale – to ensure that the reduction in the rate of pay progression bore more heavily on the better-paid and less heavily on the lower-paid. Para. 70 (which I mention out of order) finds that it was not in practice open to the Respondent to reduce payroll costs by making redundancies, and that accordingly "the options available for the Respondent were limited to sharing the resources available as fairly as possible". None of those findings are challenged.

36. The Tribunal's essential reasoning appears at paras. 68-69, which read as follows:

> "68. We have accepted that the Respondent is alive to the fact that progression through its pay scales is now so painfully slow that most of the correlation between pay progression and skills and experience has been lost. We accept that the Respondent is doing what it can to change the system in as short a time scale as possible. It has already shortened the pay scale by five spinal points and we were told by Mr Paskin that he intends to review the scheme as soon as he is able. We have set out above our conclusion that if the present scheme ran for 23 years the

> level of indirect discrimination requiring justification would inexorably rise. We accept that the Respondent recognises this and intends to take steps to reduce the discriminatory effect of the present scheme. We note that in [*Naeem v Secretary of State for Justice*] the Supreme Court found no fault with the decision of the employment tribunal who had held that 'managing an orderly and structured transition' amounted to a serious objective (see paragraph 43). We consider that the fact that an employer is alive to, and is taking steps to change, a potentially discriminatory PCP is a matter that we can properly take into account in assessing justification.
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> 69. We infer from the evidence that we heard that the Respondent has reacted to the pay freeze on the assumption that it would be a temporary measure. It was not unreasonable to take that view as it could reasonably be thought that years of below inflation pay settlements are politically unsustainable. In our view, whilst the situation has persisted for over 6 years, it could still be thought to be temporary or transient in nature and that provides justification for not immediately radically changing the pay policy. Put differently it has never been viewed as anything other than a stop gap measure."

37. In short, the Tribunal found that, while the reduction in the rate of progression produced inequities which could not be justified in the long term, it was nevertheless a proportionate short-term response to the extreme financial stringency caused by the "pay freeze" imposed by the Treasury; but that that was only the case on the basis that NOMS would as soon as possible implement further changes to remove those inequities. The importance which it attached to that qualification appears in the final paragraph of the Reasons, para. 72, which reads:

> "It should be apparent from what we say above that it is our view that it is principally because the Respondent is actively considering changing the present pay policy to eliminate the lengthy pay progression policy that means that the present policy is justified. If no active steps are taken in the near future the outcome of a further complaint might be very different and we would urge Mr Paskin to see through the task that he has been set to review the present policy as soon as possible."

THE DECISION OF THE EMPLOYMENT APPEAL TRIBUNAL

38. The Claimant appealed to the EAT on three grounds. In summary (and confining myself to the aspects that remain live before us) they were:

(1) that the distinction which the ET drew at the end of para. 57 of its Reasons between "cost" and "absence of means" was wrong in law;

(2) that the ET had been wrong to place weight in its assessment of justification on the fact that the Respondent was actively considering changing its pay policy so as to reduce the disadvantage complained of, as it made clear that it did at several points but most explicitly in para. 72; and

(3) that there was no evidential basis for the ET's conclusion at para. 69 that the Respondent only intended the changes made in 2011 as "a stopgap measure".

39. Judge Barklem rejected all three grounds. Without disrespect to him, since essentially the same grounds are advanced before us, I do not think it will be useful to summarise his reasoning in full. It is enough to note briefly his key conclusions on each of the grounds.

40. As to ground (1), he said, at para. 25 of his judgment:

> "… [T]here is indeed a distinction to be made between an absence of means and a Respondent seeking impermissibly to placing reliance solely on cost. Through no fault of its own, the Respondent was compelled to find a way of squaring a circle brought about by central government policy. It is clear from [*HM Land Registry v Benson*] and [*Edie v HCL Insurance BPO Services Ltd*] that it is legitimate for an organisation to seek to break even year on year and to make decisions about the allocation of its resources. It is for a Tribunal to weigh the relevant factors in the balance to decide the key question, as identified by the present Tribunal which, at para 52 of the Reasons, cited *Benson* in support of a proposition which, it noted, was not disputed as being a proper statement of the applicable law."

I will come back in due course to the two authorities which Judge Barklem cites.

41. As to ground (2), at para. 30 of his judgment Judge Barklem said:

> "The fact that the discriminatory effect of the policy had been noted, and also that steps were being taken to address it within a short period were, in my judgment, legitimate considerations for the Tribunal in that regard. The 'shot across the bows' in the final paragraph of the Reasons, which suggested that, unless further changes were made within the near future, the outcome of a further complaint might be different does not, in my judgment, amount to an error of law or support the argument that the wrong test was being applied."

42. Ground (3) was addressed at para. 31 of the judgment. In the course of that paragraph Judge Barklem said that he did not accept that the finding that the policy was intended to be of a stopgap nature vitiated the Tribunal's conclusions, but he does not explicitly address the argument that there was no evidential basis for that finding.

THE GROUNDS OF APPEAL

43. The grounds of appeal to this Court are, as I have said, in substance the same as were advanced in the EAT, but I should set them out.

> "(1) That the EAT erred in holding at paragraph 25 of its judgment that when deciding whether the cost was a legitimate aim for the purposes of justifying age discrimination there was a valid distinction between costs (as defined in *Woodcock v Cumbria PCT* [2012] EWCA Civ 330

> and *Cross v British Airways plc* [2005] IRLR 423 as including saving of costs) and an absence of means.
>
> (2) That the EAT erred at paragraphs 28-30 of its judgment in holding that when considering the issue of 'proportionate means' for the purpose of justifying age discrimination it was open to the ET to hold that because there was 'active consideration' of changing an unacceptable pay policy that policy was a proportionate means of achieving a legitimate aim.
>
> (3) That when considering whether the ET had acted correctly in concluding that the pay policy was a 'stop gap' measure the EAT erred at paragraph 31 of its judgment in failing to apply the principle in *Chapman v Simon* [1994] IRLR 124 that the basis for any inferences drawn should be properly identified in the judgment or otherwise erred in failing to identify there was no legitimate basis for such consideration by the ET."

44. I take those grounds in turn. It is fair to say that Mr Menzies in his submissions focused mainly on ground 1, which he treated as the principal ground of appeal.

GROUND 1: DISTINCTION BETWEEN "COST" AND "MEANS"

INTRODUCTION

45. This ground is founded on the proposition that, as Mr Menzies put it in his skeleton argument, "cost alone cannot justify indirectly discriminatory treatment" and that the financial burden of acting in a manner which does not discriminate can only be relied on as an element in a justification which involves other factors. This is referred to in employment lawyers' jargon, not in my view very aptly, as the "cost plus" principle. The Tribunal, as we have seen, recognised that there was such a principle but held – Mr Menzies says wrongly – that it did not apply in the present case. By his Respondent's Notice the Secretary of State puts the existence of the principle in issue. His "additional ground 2" reads:

> "The saving or avoidance of costs can, without more, amount to the achieving of a legitimate aim under EU and/or UK law. There is no 'bright line' preventing reliance upon cost-based justification in the absence of a 'plus factor'."

46. It is accordingly necessary that I consider whether there is indeed a "cost plus" principle and if so what it means. This will, I fear, mean a rather lengthy excursion through the authorities.

THE "COST PLUS" PRINCIPLE

The EU Authorities

47. The early cases are all decisions of the ECJ or the CJEU. Most of them are concerned with the disadvantageous treatment of part-time workers. I should therefore note by way of preliminary that it has long been established in EU law that since part-time

workers are disproportionately female such treatment will be regarded as indirect sex discrimination and will be unlawful unless objectively justified.

48. The relevant case-law starts with *De Weerd v Bestuur van de Bedrifsvereniging voor de Gezondheid* (case no C-343/92, [1994] ECR 1571. (The claimant's unmarried name was Roks, and the case is sometimes referred to by that name.) This was not a decision in the employment field but it is referred to in the authorities which follow. It concerned a Dutch social security measure which had a disproportionate impact on women. One of the questions referred to the ECJ was whether the measure in question could be justified "on budgetary grounds". As to that the Court said:

> "35. [A]lthough budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes.
>
> 36. Moreover, to concede that budgetary considerations may justify a difference in treatment as between men and women which would otherwise constitute indirect discrimination on grounds of sex, which is prohibited by Article 4(1) of Directive 79/7, would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.
>
> 37. Finally, as the Court has stated in connection with the second question, Community law does not prevent Member States from taking budgetary constraints into account when making the continuance of entitlement to a social security benefit dependent on conditions the effect of which is to withdraw the benefit thereof from certain categories of persons, provided that when they do so they do not infringe the rule of equal treatment as between men and women laid down in Article 4(1) of Directive 79/7."

49. The first case which addresses the issue of the admissibility of "cost" as a justification in an employment context is *Hill and Stapleton v Revenue Commissioners and Department of Finance* (Case no C-243/95) [1999] ICR 48. The claimants were Irish female civil servants who worked for the Revenue Commissioners. Pay for civil servants was determined partly by reference to length of service. Both claimants had been working on a job-sharing basis, under which they worked one week on and one week off; but later moved to full-time employment. For the purpose of computing their full-time pay they were treated as only having had half their actual service in respect of the period for which they were job-sharing. They complained that this constituted indirect sex discrimination: almost all job-sharers were women. One aspect of the justification advanced by the employer was that the practice of pro-rating years of service worked "ensures that the incremental cost of job-sharing staff is the same as that of full-time staff" (see n. 20 in the Opinion of the Advocate General). As to that the Court said, at para. 40 of its judgment:

> "So far as the justification based on economic grounds is concerned, it should be noted that an employer cannot justify discrimination arising

> from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs."

50. That statement in *Hill and Stapleton* is the first appearance of the phrase "*solely* on the ground that avoidance of such discrimination would involve increased costs" – for short, "solely to avoid increased costs". The Court refers generally to whether the employer can "justify" discrimination: it does not employ the dichotomy of "aim" and "means". As noted at para. 17 above, the distinction between the two is not always clear-cut. I think, however, that the Court must be understood to have been referring to the legitimacy of the employer's aim rather than to the proportionality of its means; and that is how Rimer LJ understood it in his judgment in *Woodcock* to which I refer below.

51. In *Jørgensen v Foreiningen af Speciallaeger and Sygesikringens Forhandlingsudvalg* (Case no C-226/98)[2000] IRLR 726 the issue was (in very summary form) whether the Danish health service could pay lower fees to a female doctor on the basis that she had previously worked part-time. The referring court asked whether considerations relating to budgetary stringency, savings or medical practice planning might be regarded as objective considerations justifying a measure which adversely affected a larger number of women than men. In answering the question, the Court repeated paras. 35 and 36 of its judgment in *De Weerd* but agreed with the Commission that "reasons relating to the need to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care are legitimate" (see para. 40). Its answer to the referred question (para. 42) was that

> "… budgetary considerations cannot in themselves justify discrimination on grounds of sex. However, measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care may be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end".

52. In *Kutz-Bauer v Freie und Hansestadt Hamburg* (Case no C-187/00) [2003] IRLR 368, the claimant was a female employee of the City of Hamburg. A scheme was provided for under a German legislation by which employees approaching pensionable age were encouraged to take part-time employment at an enhanced rate of remuneration, with the difference being reimbursed to the employer by the German government; but the benefit ceased to be funded if they worked beyond pensionable age. Since pensionable age was 60 for women and 65 for men the scheme had an indirectly discriminatory effect. The city ceased to pay the claimant at the enhanced rate after she reached 60. She brought proceedings against both the government and the city, no doubt on the basis that both were in different ways responsible for the detriment of which she complained. One of the justifications advanced by the government was that it would be expensive to fund the benefit for women aged over 60. As to that the Court said, at paras. 59-61 of its judgment:

> "59. As regards the German Government's argument concerning the additional burden associated with allowing female workers to take advantage of the scheme at issue in the main proceedings even where they have acquired entitlement to a retirement pension at the full rate, the Court observes that although budgetary considerations may underlie

> a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes (Case C-343/92 *De Weerd and Others* [1994] ECR I-571, paragraph 35).
>
> 60. Moreover, to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States (*De Weerd and Others*, cited above, paragraph 36, and *Jørgensen*, cited above, paragraph 39).
>
> 61. Nor can the City of Hamburg, whether as a public authority or as an employer, justify discrimination arising from a scheme of part-time work for older employees solely because avoidance of such discrimination would involve increased costs (see, to that effect, *Hill and Stapleton*, paragraph 40)."

53. It will be noted that in those paragraphs the Court referred separately to the authorities relating to the entitlement of the government to rely on "budgetary considerations", i.e. *De Weerd* and *Jørgensen* (paras. 59-60), and to *Hill and Stapleton* as regards the entitlement of an employer to rely on the "increased costs" of avoiding discrimination (para. 61). The distinction is evidently deliberate and reflects the fact that both the government and the city were responsible for the discrimination.

54. In *Steinicke v Bundesanstalt für Arbeit* (Case no C-77/02) [2003] IRLR 892 German legislation imposed pre-conditions on the rights of civil servants to continue to work part-time after age 55 which discriminated against employees who had previously worked part-time. The claimant, who worked for the Federal Labour Office, complained of its application of those conditions in her case. The Federal Labour Office sought to justify them by reference, among other things, to "considerations of cost-neutrality". At paras. 66-68 of its judgment the Court repeated in (*mutatis mutandis*) identical terms paras. 59-61 of its judgment in *Kutz-Bauer*.

55. In *Schönheit v Stadt Frankfurt-am-Main* (Case no C-4/02) and *Becker v Land Hessen* (Case no C-5/02) [2004] IRLR 983 the claimants were female civil servants employed by, respectively, the city of Frankfurt and the state government of Hesse. The terms of German legislation relating to civil service pensions were disadvantageous to part-time employees. The German government sought to justify the terms in question on the basis of seeking to limit public expenditure. The Court said:

> "84. It must be observed at the outset that the aim of restricting public expenditure, which, according to the national court, was invoked by the State when the pension abatement first became part of national law, cannot be relied upon for the purpose of justifying a difference in treatment on grounds of sex.

> 85. The Court has already held that budgetary considerations cannot justify discrimination against one of the sexes. To concede that such considerations may justify a difference in treatment between men and women which would otherwise constitute indirect direct discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States (*Roks*, paragraphs 35 and 36 … and *Kutz-Bauer* paragraphs 59 and 60)."

It will be noted that the Court does not refer to para. 61 of *Kutz-Bauer* or, therefore, to *Hill and Stapleton*. That presumably reflects the fact that the discrimination in question derived wholly from a government measure.

56. Ms Darwin also referred to two decisions of the CJEU about the compatibility of legislation imposing mandatory retirement ages with Directive 2000/78 – *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* (Case no C-388/07) [2009] ICR 1080, and *Fuchs v Land Hessen* (Case no C-159/10) [2012] ICR 93 – but the issues were not the same as those before us, and I do not think that considering them here adds anything useful.

The Domestic Case-Law

Cross

57. The CJEU case-law was first considered by a domestic tribunal in *Cross v British Airways plc* [2005] UKEAT 0572/04, [2005] IRLR 423. In that case members of BA's female cabin crew were complaining of the effect on their pension rights of the differential retirement age which applied as between male and female employees. The ET found that the indirectly discriminatory effect of that differential was justifiable. So far as relevant, it directed itself that "economic (which includes cost) grounds can properly be a factor justifying indirect discrimination, if combined with other reasons"; and it held that in the particular circumstances of the case it should take into account, albeit not as the only factor, the cost to the employer of altering its retirement age, which would have been very substantial.

58. The EAT upheld that decision. The judgment of Burton P is very fully reasoned, but the essential points can be summarised as follow.

59. First, at para. 62 he referred to a number of decisions in which "economic considerations, either the same as or analogous to costs, have been permitted or envisaged as justification", and in particular to four cases – *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ICR 592; *Bilka-Kaufhaus v Weber von Hartz* [1987] ICR 110; *Rainey v Greater Glasgow Health Board* [1987] AC 224; and *Allonby v Accrington & Rossendale College* [2001] EWCA Civ 529, [2001] ICR 1189. He continued, at para. 63:

> "It seems to us, as a matter of obvious common sense (and in accordance with the principle of the concept of proportionality), … that, albeit that, in the weighing exercise, costs justifications may often be valued less, particularly if the discrimination is substantial, obvious and

> even deliberate, economic justification such as the saving, or the non-expenditure, of costs (which must, for example, include the avoidance of loss) must be considered. It would, in our judgment, need clear reasoning and binding authority to prevent that occurring."

60. He then conducted a thorough analysis of the CJEU authorities, noting among other things the distinction to which I have referred at para. 53 above. He concluded, at para. 72:

> "We conclude that the European Court has laid down a perfectly comprehensible structure. A national state cannot rely on budgetary considerations to justify a discriminatory social policy. An employer seeking to justify a discriminatory PCP cannot rely *solely* on considerations of cost. He can however put cost into the balance, together with other justifications if there are any."

61. The decision in *Cross* – and specifically the last two sentences of para. 72 – is the origin of the "cost plus" approach in the domestic case-law, although, to be fair to him, Burton P did not use that phrase.

Bainbridge

62. In *Redcar & Cleveland Borough Council v Bainbridge* [2006] UKEAT 0135/06, [2008] ICR 249, the council had terminated a pay structure under which its employees in predominantly male jobs received bonus payments which were not available to employees in predominantly female jobs of equal value, and a new structure common to both kinds of job was substituted under which no such bonuses were available. In order to cushion the blow to employees in the predominantly male jobs, the council for a limited period made "pay protection" payments. The female employees in the latter group contended that it was discriminatory not to make equivalent payments to them. The ET held that the difference in treatment was justified. One of the matters on which it relied was that the employer was "impecunious".

63. The EAT upheld the finding of justification on other grounds, but it did address the "impecuniosity" aspect on an *obiter* basis. Elias P at para. 90 of his judgment characterised the argument of counsel for the employees as being that "the only proper construction of [the] decisions of the European Court is that costs can never be taken into consideration when considering the question of objective justification". He pointed out that that argument had been rejected in *Cross* and that it would be wrong to depart from that decision unless it was plainly wrong. He continued:

> "… We do not think that such a broad statement is consistent with the case law. We accept that the cases show that it is not legitimate to discriminate where the aim or purpose is to save costs; see *De Weerd, nee Roks v Bestuur van de Bedrifsvereniging voor de Gezondheid* ('*Roks*') [1994] ECR 1571 where the ECJ held that a state cannot rely upon budgetary considerations to justify a discriminatory social policy. But we do not think that the case law supports the conclusion that the question of cost should always be irrelevant."

He continued:

> "91. We would add this. It is not in our view helpful simply to talk about costs in an abstract way. Almost every decision taken by an employer is going to have regard to costs. Given an unlimited purse there need be no losers at all. We wholly accept that where a benefit is introduced and where costs determine the scope and size of that benefit, as they inevitably will, then it would be unlawful to allocate the benefit on a discriminatory basis. In that sense it would not be open for an employer to say that the restriction on cost prevented him from conferring the benefit on the disadvantaged group.
>
> 92. If there are cost constraints, they must be allocated in a way which limits any discriminatory impact as much as possible: see for a recent example [*Secretary of State for Defence v Elias* [2006] EWCA Civ 1293, [2006] 1 WLR 3213]. This in our view is the explanation of the *Schönheit* case. Usually, however, the issue of costs may become material when an employer is being asked to put right some alleged continuing discrimination. *Cross* suggests that an employer cannot defeat the right to equality by pointing to financial burdens alone, but he can pray the financial burdens in aid as some support for a decision which is objectively justified on other grounds. Pay protection arrangements provide a good example. Transitional arrangements of such a kind will sometimes be appropriate (and often unavoidable in practice) to cushion the pay of those moving to lower pay. It would theoretically be possible to confer the benefit of the higher pay on everyone, but the cost may reinforce the justification limiting the benefit.
>
> 93. In our view, that is the position here. The council has identified a significant material factor defence which explains the difference in pay. The cost of bringing about equality is in that context merely a supportive reason, but it was never relied upon as the principal basis for the objective justification."

Woodcock

64. In *Woodcock*, to which I have already referred, the claimant was a senior employee in an NHS Trust. He was liable to be dismissed for redundancy but there was a long delay, essentially for his benefit, in giving him the twelve months' notice of dismissal that was required: the latter part of the delay was as a result of a proposed consultation meeting having to be postponed. Notice was finally given, at a time when formal consultation procedures had not been completed, in order that the notice should expire before his fiftieth birthday, at which point he would have become entitled to early retirement and enhanced pension rights, at very considerable cost to the employer. He claimed (direct) age discrimination. It was common ground that the decision to make the claimant redundant had nothing to do with his age: the challenge was to the timing of its implementation. As to that, the ET found that in the particular circumstances of the case the enhanced benefits that would have accrued if the claimant had remained employed when he reached fifty would have constituted a windfall, in the sense that that he had no legitimate entitlement to expect them. It applied the "cost plus" approach

derived from *Cross* and held that the timing of the dismissal was justifiable notwithstanding that in one sense its only aim was to save costs.

65. The EAT – [2010] UKEAT 489/09, [2011] ICR 143 – upheld the ET's decision on the basis of the "cost plus" approach. I need not summarise that aspect of the reasoning. However, I did at para. 32 of my judgment express our reservations about whether the distinction between "cost alone" and "cost plus" correctly reflected the applicable principles. I need not quote the whole passage, but the following passage may be material:

> "The 'cost plus' approach propounded in *Cross* represents the current orthodoxy. … But [counsel for the employer] submitted, as one alternative basis of his case, that the cost plus approach was wrong, and we have to say that we do not find it convincing. For reasons which will appear, we need not reach a concluded view, but we will briefly indicate our thinking in case the matter falls for decision elsewhere. We respectfully agree with Burton P's observation … that, as a matter both of principle and of common sense, considerations of cost must be admissible in considering whether a provision criterion or practice which has a discriminatory impact may nevertheless be justified ... . But we find it hard to see the principled basis for a rule that such considerations can never by themselves constitute sufficient justification or why they need the admixture of some other element in order to be legitimised. The adoption of such a rule, it seems to us, tends to involve parties and tribunals in artificial game-playing – 'find the other factor' – of a kind which is likely to produce arbitrary and complicated reasoning: deciding where 'cost' stops and other factors start is not straightforward (cf. the observations of Elias P. in *Bainbridge*, at para. 91 …) ..."

I went on to say that if the matter were free from authority it would be our view that an employer should be entitled to seek to justify a PCP producing a discriminatory impact on the basis that the cost of avoiding that impact, or rectifying it, would be disproportionately high.

66. This Court likewise upheld the decision of the ET. The only substantial judgment was given by Rimer LJ, with whom Arden LJ and Ryder J agreed. At paras. 55-63 of his judgment he carried out a full review of the authorities, mainly through the prism of *Cross*. At para. 65 he summarised the submission of counsel for the employee as being that:

> "… the saving or avoidance of costs alone cannot be a legitimate aim. It can only be so if it is linked to a non-cost factor. Thus a consideration that, by itself, is inadmissible as justification becomes admissible if so linked; and, in such a case, it can play a part in the proportionality assessment."

He continued:

> "66. There is, it seems to me, some degree of artificiality about such an approach to the question of justification. As Elias J observed in

> the *Redcar & Cleveland* case, [2007] IRLR 91, at paragraph 91, 'Almost every decision taken by an employer is going to have regard to costs.' [The relevant provision of the regulations then governing age discrimination], however, says nothing of the extent to which considerations of cost may feature in the justification exercise. It provides merely that what would otherwise be discriminatory treatment may be justified if it was 'a proportionate means of achieving a legitimate aim'. The relevant question must therefore be whether the treatment complained of was such a means. Accepting, as I make clear I do, that the guidance of the Court of Justice is that an employer cannot justify discriminatory treatment 'solely' because the elimination of such treatment would involve increased costs, that guidance cannot mean more than that the saving or avoidance of costs will not, without more, amount to the achieving of a 'legitimate aim'. That is entirely unsurprising. To adopt a simple example given by [counsel for the employer], it is hardly open to an employer to claim to be entitled to justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B. Such treatment of A could not, without more, be a 'legitimate aim'.
>
> 67. If the Trust's treatment of Mr Woodcock is correctly characterised as no more than treatment aimed at saving or avoiding costs, I would accept that it was not a means of achieving a 'legitimate aim' and that it was therefore incapable of justification. It would fall foul of the limitations upon justification explained in cases such as *Hill and Stapleton*. On the unusual facts of this case, I would not, however, regard that as a correct characterisation … ."

He went on to explain the "windfall" issue and why the ET's decision on justification was, as he put it, "well-judged".

67. That reasoning could be described as a version of "cost plus", but I note that Rimer LJ does not use that phrase.

O'Brien

68. The most authoritative recent consideration of the position is in the judgment of the Supreme Court, given by Lord Hope and Lady Hale in *O'Brien v Ministry of Justice* [2013] UKSC 6, [2013] ICR 499. The claim arose out of the denial of pension rights to Recorders (and other part-time judges), which was said to be contrary to the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which implements the EU Part-Time Workers Directive. The primary issue before the Court was whether Recorders were "workers" within the meaning of the Regulations (and the Directive). Following a reference to the CJEU, it concluded that they were. It followed that the denial of pension rights constituted direct discrimination. Under the Regulations direct discrimination may be justified. The issue accordingly arose of whether the issue of justification needed to be remitted. The Court held that it did not because no arguable basis of justification had been advanced.

69. One aspect of the justification advanced by the Minister was the high cost of providing pensions to part-time judges. The Court considered that issue at paras. 63-70 of its judgment, under the heading "cost". It started by observing, at para. 63:

> "The Ministry accept that cost alone cannot justify discriminating against part-time workers. But they argue that 'cost plus' other factors may do so. This is a subtle point which is not without difficulty."

I would respectfully echo the last sentence.

70. The Court then proceeded at para. 64 to quote paras. 35 and 36 from the judgment in *De Weerd*. It glossed para. 35 as follows:

> "In other words, richer states may have more generous benefits systems than do poorer states. Cost may inform how much the state will spend upon its benefits system, but the choices made within that system must pursue policy aims other than saving cost."

As to para. 36, it said:

> "It is one thing to set benefits at a particular level for budgetary reasons. It is another thing to pay women less than men because it is cheaper so to do. Sex discrimination is wrong whether the state (or the employer) is rich or poor."

71. At paras. 65-68 the Court considered the effect of the CJEU's observations in *Jørgensen* about the legitimacy of "reasons relating to the need to ensure sound management of public expenditure", observing at para. 67 that:

> "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."

It drew support from the decision of the Court in a non-employment context, in *European Commission v The Netherlands* C-542/09. It concluded, at para. 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."

72. Finally, at para. 70 the Court noted that its attention had been drawn to *Woodcock*, but it declined to express any view about whether it was rightly decided.

73. It will be noted that in those passages the Court treats the governing principle as being that stated in *De Weerd* and refers to decisions taken by "states" (e.g. "a Member State may decide for itself how much it will spend upon its … justice system"), subject to one parenthetical reference to employers (in para. 64). That is unexceptionable because

the exclusion of part-time judges from the judicial pension scheme was enshrined in primary legislation (the Judicial Pensions and Retirement Act 1993). It does not in fact seem that the Court was referred to *Hill and Stapleton* or *Kutz-Bauer* – or to *Cross*, in which the EAT carefully noted the difference in the formulations applicable to governments and to employers.

74. When it came to its conclusion on the Ministry's justification case as a whole the Court found, having dismissed the other factors relied on, that it came down to the proposition that "if recorders get a pension, then the pensions payable to circuit judges will have to be reduced". It continued, at para. 74:

> "That is a pure budgetary consideration. It depends upon the assumption that the present sums available for judicial pensions are fixed for all time. Of course there is not a bottomless fund of public money available. Of course we are currently living in very difficult times. But the fundamental principles of equal treatment cannot depend upon how much money happens to be available in the public coffers at any one particular time or upon how the State chooses to allocate the funds available between the various responsibilities it undertakes. That argument would not avail a private employer and it should not avail the State in its capacity as an employer. Even supposing that direct sex discrimination were justifiable, it would not be legitimate to pay women judges less than men judges on the basis that this would cost less, that more money would then be available to attract the best male candidates, or even on the basis that most women need less than most men."

75. Again, in that passage the Court addresses itself specifically to the position of states, although it does say in terms that the position would be the same for a private employer.

Unison

76. In *R (Unison) v Lord Chancellor* one of the challenges advanced to the lawfulness of the Employment Tribunal and the Employment Appeal Tribunal Fees Order 2013 was that it was indirectly discriminatory against (among other groups) women, and that that discrimination could not be justified since the only aim was budgetary, or to reduce "cost". The Court of Appeal – [2015] EWCA Civ 935, [2016] ICR 1 – rejected that argument. At para. 91 of my judgment, with which Moore-Bick and Davis LJJ agreed, I identified the impugned provision – what in an employment context would be the PCP – as being the charging of a higher level of fees for what were perceived to be more complex cases. I continued:

> "The underlying rationale is that there ought to be a relationship between the level of the fee and the degree of the demand on the Tribunals' resources. I do not regard that as invoking 'cost' or 'budgetary considerations' in the same sense as the Ministry of Justice was said to be doing [sc. in *O'Brien*] when it argued that it was unduly expensive to accord pension rights to part-time judges. Given that it is legitimate to charge tribunal fees in the first place, a graduated level of fees which reflects the extent to which the resources of the tribunal are engaged is no more than an application of ordinary principles of economic efficiency, which has regularly been accepted as relevant to

> justification: it is not necessary to cite more than the celebrated decision of the ECJ in *Bilka-Kaufhaus GmbH v Weber von Hartz* (C-170/84), [1987] ICR 110 – see para. 36 (p. 126 E-G). To avoid any possible misunderstanding, I am not to be taken as saying that economic efficiency will always be a sufficient justification for a PCP having a discriminatory impact, but [the claimant's] challenge was to the admissibility of this consideration at all."

At para. 92 I cited, to the same effect, an observation of Elias LJ at para. 89 of his judgment in the Divisional Court, where he said

> "… I would not in fact describe the first objective as costs saving. This is not a case of government refusing to correct discrimination because it would be too expensive. Rather it is more accurately characterised as requiring a contribution towards the cost of running the Tribunal Service, charging equal amounts from all who bring claims within class B."

77. Although the case proceeded to the Supreme Court, the claim based on indirect discrimination was not pursued there.

The Effect of the Authorities

78. I start with two preliminary points.

79. The first is the point which I have noted at para. 53 above, and which I have picked up in relation to *O'Brien* at para. 73. In expressing the applicable principle the CJEU authorities distinguish between cases where the discrimination is the result of a measure taken by central government, where they use the *De Weerd* "budgetary considerations" formulation, and cases where it results from the decision of the employer, where they use the *Hill and Stapleton* "solely [to avoid] increased costs" formulation. Although Burton P attached importance to the distinction in *Cross*, I have noted that the Supreme Court assumed that the principles applying in both kinds of case were the same. I do not in fact believe that the distinction is significant, at least in this appeal, but the CJEU's use of different language was clearly deliberate, and in what follows I will use the language of *Hill and Stapleton*.

80. The second point is that in the CJEU cases the employer, where proceeded against, was in each case a public authority (though not always an emanation of central government). However, I think it is clear that that fact was not of the essence: see *Kutz-Bauer*, para. 61 – "whether as a public authority or as an employer".

81. I turn to the fundamental question, which is what is meant by the phrase "solely [to avoid] increased costs", and more particularly what is the effect of the word "solely". On this, it seems to me that we are bound by the guidance given by Rimer LJ at paras. 66-67 of his judgment in *Woodcock*; but even if we were not, I would respectfully agree with it. He says in para. 66 that the CJEU's language "cannot mean more than that the saving or avoidance of costs will not, *without more* [my emphasis], amount to the achieving of a 'legitimate aim'". In other words, to take the paradigm case of discriminatory pay, an employer "cannot justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same".

82. That might seem too trite to need saying – "unsurprising", as Rimer LJ puts it – but it is not difficult to understand why the CJEU thought it important to spell it out. It is the same obvious but important point that the Supreme Court makes at several points in *O'Brien*: see para. 67 of its judgment ("very different from deliberately discriminating against part-time workers *in order to save money*"), para. 69 ("a legitimate aim *other than the simple saving of cost*") and the example given at the end of para. 74 ("it would not be legitimate to pay women judges less than men judges *on the basis that this would cost less*").

83. It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle (to adopt the Supreme Court's language in *O'Brien*) but it is real. The nature of the distinction can be illustrated by reference to some of the cases.

84. I start with *Woodcock* itself. In one sense the Trust's aim could indeed be said to be to avoid the cost of having to pay the claimant the enhanced benefits to which he would become entitled if he were still employed when he reached fifty. But that was not the whole story because it omitted the fact that those were benefits which he had no legitimate entitlement to expect. It was for that reason that Rimer LJ held at para. 67 that it would not be correct to characterise the Trust's aim as being "no more than treatment aimed at saving or avoiding costs".

85. In *Bainbridge* likewise it might be said that the council's aim in not making the same temporary pay protection payments to employees in the predominantly female jobs as were being made to employees in the predominantly male jobs was to save the cost of having to do so. But, again, that was not the whole story, because the reason why payments were being made to (for short) the men was to provide a temporary cushion against a loss of earnings which the women were not suffering. It is legitimate for a public authority (or indeed any employer) to seek not to make payments to employees to whom the rationale for those payments does not apply (and for whom it would indeed, in the language of *Woodcock*, be a windfall).[5]

86. Similarly in *Unison* both this Court and the Divisional Court did not accept that it was fair to characterise the Secretary of State's aim as being "budgetary" or concerned solely with "cost" in the relevant sense. Rather, he had the plainly legitimate aim of requiring a contribution towards the cost of running the Tribunal Service which reflected the different levels of complexity of different kinds of case.

87. By contrast, in the CJEU cases the justifications advanced by the employer in the domestic proceedings appear to have amounted to no more than the fact that it would

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5 That of course is only the first question. It remained for the council to show that the non-payment to the women was proportionate. At that stage questions such as the size and duration of the pay protection payments would arise. But that is not the issue for the purpose of the ground of appeal which we are concerned with.

cost more to treat job-sharers/part-timers in the same way as full-time employees.[6] The same is true of *O'Brien* (ignoring for the present the subtlety that the Court was using the *De Weerd* formulation): the Secretary of State's case was, as the Court analysed it, simply that it would be expensive to give pension rights to part-time judges.

88. The upshot of all this is that there is certainly an established principle that, to take Rimer LJ's formulation in *Woodcock*, "the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim" for the purpose of the defence of justification in a discrimination claim; but that that principle needs to be understood in the way that I have sought to explain it in the preceding paragraphs. It only bites where the aim is, as the CJEU put it in *Hill and Stapleton*, "solely" to avoid costs.

89. That being so, the "cost plus" label (and its cognates such as "cost alone" and "the plus factor") cannot be said to be incorrect, and it is sometimes too convenient a shorthand to eschew. However, that language is not in fact used either by Burton P in *Cross* or by Rimer LJ in *Woodcock*, and I would prefer to avoid it so far as possible. In my experience it can lead parties, and sometimes tribunals, to adopt an inappropriately mechanistic approach (see my observations in *Woodcock* quoted above). It is better, in any case where the issue arises, to consider how the employer's aim can most fairly be characterised, looking at the total picture. It is only if the fair characterisation is indeed that the aim was *solely* to avoid increased costs that it has to be treated as illegitimate.

90. Despite the length of that exposition, it is no more than the foundation for the particular issue raised by this appeal, which is (in short) whether the "plus factor" can consist of the fact that the employer is subject to financial constraints which oblige it to reduce its costs: can that be said to be that different from "cost alone"? I turn to that issue below.

THE PARTICULAR ISSUE

91. Mr Menzies' case as pleaded and as advanced in his skeleton argument can be summarised as follows. His submission to the ET had been that the Respondent's justification amounted to no more than that it was too expensive to maintain the previous rate of pay progression and accordingly constituted reliance on "cost alone". The Tribunal had not rejected that submission on the basis that this was a "cost plus" case. Instead it had drawn a distinction between cases where the aim was "cost-cutting" and cases where an "absence of means" forces the employer to do the act complained of: see para. 57 of the Reasons. That is a distinction without a difference. In either case the employer does the discriminatory act with the sole aim of reducing the financial burden on it: that is just what the authorities say should not be done. What the Tribunal had not done was to identify any other aim, so as to bring into play the "cost plus" justification.

92. I should start by saying that I do not believe that that submission accurately reflects the Tribunal's reasoning in para. 57. It was not evading the need to identify a "plus factor". On the contrary it found it in the fact that NOMS's budget for paying its employees had been frozen, so that it was required to reduce the rate of pay progression in order to

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6 Strictly, the Court was not concerned with the particular facts but was doing no more than stating the applicable principles. But it seems reasonably clear that it did not regard the justifications, at least in the way that they were described in the references, as identifying a legitimate aim.

"live within its means"; that was an important part of the picture and it held that it meant that NOMS's aims "cannot simply be described as cost cutting".

93. However, that only answers the form of Mr Menzies' submission. It is not an answer to the underlying substantive point, which is that "absence of means" cannot be treated as a distinct factor from "cost"; and that is the real point on which the argument before us focused. To put it another way, the issue is whether a justification can fairly be characterised as "cost alone" where the employer argues not simply that it would be more expensive for it to avoid the discriminatory impact of the measure in question but that the cost of doing so is positively unaffordable.

94. As to that, Ms Darwin relied on three cases which she said established that it was legitimate for an employer to take steps to ensure that it "lived within its means". I take them in turn.

95. The first was the decision of the EAT (myself presiding) in *HM Land Registry v Benson*, to which I have already referred. The Land Registry is a public body financed by the fees which it charges. It is required to break even year-on-year. At the time with which the case was concerned it had reserves but it could only draw on them with Treasury approval. A slump in its revenues meant that in order to break even it needed to reduce its workforce. It received Treasury approval to spend £50m from its reserves to finance voluntary redundancy or early retirement schemes, of which £12m was allocated to a particular "merging offices" scheme. The terms under which employees were selected for redundancy under that scheme had an age-discriminatory effect. There was some debate about how the relevant aim should be characterised for the purpose of the justification issue, given that it could be said to include several elements. At para. 34 of my judgment I said:

> "The uncertainty about how to characterise [the relevant aim or aims] … 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 Appellant, like any business, to seek to break even year-on-year … 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 Appellant had a 'real need' to implement the Merging Offices Scheme in 2008/9 …. And, most pertinently, it was in our view legitimate for the Appellant to impose a budget on 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."

It is fair to say that the employees did not in the EAT seek to argue that the employers' justification constituted reliance on "cost alone" and was thus inadmissible: see para. 23 of the judgment[7].

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[7] The point had been decided against them in the ET on a ground which I described (possibly with a degree of understatement) as "debatable"; but that aspect of the decision had not been challenged on the appeal.

96. The second case was the decision in *Edie v HCL Insurance BPO Services Ltd* [2015] UKEAT 0152/14, [2015] ICR 713. In that case the employer was faced with severe financial difficulties: the details are summarised at paras. 13-19 of the judgment of Lewis J in the EAT, and I need not summarise them here, save to note that its staff costs alone amounted to 115% of its revenue. In an attempt to reduce staff costs it introduced new terms and conditions which resulted in loss of some benefits which were particularly advantageous to a group of older employees. They brought age discrimination claims. At para. 57 of his judgment Lewis J quoted the ET's characterisation of the employers' aim as being "to reduce staff costs to ensure its future viability and to have in place market competitive, non-discriminatory terms and conditions". He went on, at para. 58, to cite *Benson* as authority for the proposition that "[i]t is, as a minimum, a legitimate aim for a business to seek to break even year-on-year … [and] … to make decisions about the allocation of its resources".

97. The decision of this court in *Harrod*, to which, again, I have already referred, arose out of a claim by police officers who had been compulsorily retired by the Chief Constables of their respective forces, using a power under regulation A19 of the Police Pension Regulations 1987 which had an age-discriminatory impact. The retirements were required in order to enable police forces to achieve a 20% reduction in their budgets as part of the austerity measures imposed by the coalition government in 2010. The issues in this Court focused more on the proportionality of those decisions than on the legitimacy of the underlying aim, though both *Woodcock* and *O'Brien* were referred to in the parties' submissions. But in the course of his leading judgment Bean LJ, with whom Elias LJ agreed, quoted a long passage from the judgment in *Benson* which included para. 34, and he said at para. 27 that he agreed with its analysis. In my own concurring judgment I identified the use of regulation A19 as the relevant PCP. I continued, at para. 38:

> "It is the choice of that method that has to be justified. The question is whether it was a proportionate means of achieving a legitimate aim. In my view the right way to characterise the forces' aim is that they wished to achieve the maximum practicable reduction in the numbers of their officers. That is unquestionably a legitimate aim."

I did not say, because it was not in issue, that the aim of reducing the number of officers was to achieve the required spending reductions; but that was the case.

98. Neither *Benson* nor *Edie* is binding on us, and in neither of them was it argued that the aim identified by the EAT as legitimate fell foul of the "cost alone" principle deriving from *Hill and Stapleton*. Likewise there was no such contention in *Harrod*, and I do not think that Bean LJ's general endorsement of my judgment in *Benson* nor my own reasoning can be treated as directed specifically to that question. Nevertheless, they do afford some support to the proposition that an employer's need to reduce its expenditure, and specifically its staff costs, in order to balance its books can constitute a legitimate aim for the purpose of a justification defence.

99. More importantly, however, I think that that proposition is correct in principle. There is nothing to suggest that the CJEU in *Hill and Stapleton*, *Kutz-Bauer* or *Steinicke* had in mind a case of the present kind, where an employer is having to make choices about how best to allocate a limited budget: the justification advanced in those cases was purely that avoiding discrimination would cost more. I can see no principled basis for

ignoring the constraints under which an employer is in fact having to operate. It is never a good thing when tribunals or courts are required to make judgements on an artificial basis. As Burton P in *Cross*, Elias J in *Bainbridge*, and myself and Rimer LJ in *Woodcock* have all observed, almost any decision taken by an employer will inevitably have regard to costs to a greater or lesser extent; and it is unreal to leave that factor out of account. That is particularly so where the action complained of is taken in response to real financial pressures, as was very clearly the case in all three of the authorities relied on by Ms Darwin and as is the case, on the Tribunal's findings, in the present case. It is also necessary to bear in mind that because age, unlike other protected factors, is not binary it is difficult, to put it no higher, for an employer to make decisions affecting employees that will have a precisely equal impact on every age group, however defined. This makes it particularly important for them to be able to justify such disparate impacts as may occur by reference to the real world financial pressures which they face.

100. It is important to emphasise at this point that the issue with which we are concerned relates only to the first step in the consideration of the justification defence. If it is permissible for an employer to rely, as a legitimate aim, on a real need to reduce or constrain staffing costs, it still has to show that the measures complained of represent a proportionate means of achieving that aim, having regard to their disparate impact on the group in question. It is in my view entirely appropriate that a proportionality exercise of that kind should be the focus of the justification enquiry. Such an exercise will enable the tribunal to examine carefully the nature and extent of the financial pressures on which the employer relies as well as the possibility that they could have been addressed in a way which did not have the discriminatory effect complained of. That kind of exercise was carried out by the tribunals in *Benson* and in *Edie* – and indeed by the Tribunal in the present case.

101. I recognise that it may sometimes be difficult for a tribunal to draw the line between a case where an employer simply wishes to reduce costs and cases where it is, in effect, compelled to do so. But tribunals often have to make judgements of that kind and there is nothing uniquely difficult about this one. The judgement that would be required if Mr Menzies' submission were correct – that is, to assess the justification on the basis that any consideration of the employer's financial position should be excluded – would be at least equally difficult, indeed more so.

102. Mr Menzies' principal response on this part of the argument was to rely on para. 74 of the judgment of the Supreme Court in *O'Brien* and specifically on the statement that "the fundamental principles of equal treatment cannot depend upon how much money happens to be available in the public coffers at any one particular time or upon how the State chooses to allocate the funds available between the various responsibilities it undertakes" and that that argument "would not avail a private employer and … should not avail the State in its capacity as an employer".

103. I do not believe that that passage is applicable to the present case, or others of the kind which I have been considering in the previous paragraphs. The Court was concerned with a case of (overt and deliberate) direct discrimination against part-time workers. At the end of para. 74 it expressly equates it with a case of direct pay discrimination against women. As it says, such treatment contravened "the fundamental principles of equal treatment". In that context it is hardly surprising that it should make it clear that neither a private employer nor the state in its capacity as employer could seek to justify such

discrimination (where, untypically, justification is an available defence) on the basis that times were hard and it could not afford to treat part-timers, or women, equally. But the present case does not involve direct discrimination. We are concerned with indirect discrimination – more specifically with a situation where the employer has altered its pay arrangements in a way which has had a disparate impact on employees of different ages (as such changes are very liable to do). I see no sign that the Supreme Court had in mind a case of this kind. What "the fundamental principles of equal treatment" require in such a case is that the disparate impact of the measures in question should be justified. Mr Menzies pointed out that the test of justification was expressed in identical terms in the case of indirect discrimination under section 19 of the 2010 Act and in the case of direct age discrimination: see section 13 (2). That is no doubt correct, but it does not follow that the question of the legitimacy of a particular aim requires the same answer in both contexts.

104. In the course of Ms Darwin's submissions there was some exploration, arising out of questions from the Court, of whether it was appropriate to take the constrained budget allocated to NOMS as a given or whether it was necessary to consider the Ministry's, or the Treasury's, justification for constraining the budget in the first place. The Court asked for a note from the Respondent explaining the relevant relationships more fully than appeared in the Tribunal's Reasons. Ms Darwin and Mr Roberts submitted such a note following the hearing and Mr Menzies provided a response. In the event, however, I do not think that this is an area which can be explored in this appeal. No issue of this kind arose in the ET or the EAT or is raised in the grounds of appeal, and Mr Menzies did not in his skeleton argument or opening submissions argue that the ET should have looked beyond the justification advanced by NOMS. In those circumstances I do not think I should express any concluded view. However, leaving aside the kind of case which the Supreme Court was discussing at para. 74 of its judgment in *O'Brien*, I would take some convincing that it was illegitimate for a government department or agency to seek to keep its pay budget within the limits imposed by the Treasury or a parent department. That was certainly the basis on which *Benson* was decided.

CONCLUSION ON GROUND 1

105. For the reasons given I do not accept that the Tribunal's self-direction at para. 57 of the Reasons was wrong in law. It was entitled to treat NOMS's need to observe the constraints imposed by the pay freeze as a legitimate aim.

106. It should be appreciated that this ground involves no challenge to the Tribunal's decision that the reduction in the rate of pay progression which NOMS implemented as a means of achieving that aim were proportionate. One element in its reasoning is the subject of ground 2.

GROUND 2: RELEVANCE OF "ACTIVE CONSIDERATION"

107. The Tribunal made it clear that a central element in its finding that the reduction in the rate of pay progression was justified was the fact that it had been imposed as a temporary measure and that active consideration was being given to changing the system so as to reduce the age-discriminatory effect of the scheme as it stood. The

point is primarily made at paras. 68-69 (see para. 36 above), but its importance is reinforced by what Judge Barklem calls the "shot across the bows" in para. 72.

108. Mr Menzies submitted that the fact that NOMS was intending to change the system was as a matter of principle irrelevant to the issue of whether it could be justified in the period to which the complaint related. As he put it in his skeleton argument, and reiterated in his oral submissions, "what might happen in the future was not relevant to whether the policy was justified at the present time".

109. I do not accept that submission, at least in the context of the Tribunal's reasoning in this case. An employer may sometimes feel obliged to take urgent measures which have an indirectly discriminatory effect on a group of its employees. Perhaps the disparate impact is something which is or should be appreciated from the start; perhaps it is something which only becomes apparent after a time. In either case I see no reason in principle why it should not be open to the employer to seek to justify those measures on the basis that they represented a proportionate short-term means of responding to the problem in question albeit that they could not be justified in the longer term. It is inherent in such a justification that the employer intends within a reasonable time to discontinue the measures in question, or modify them so that they no longer have the impact complained of; but the essence of the justification does not depend on that intention. Of course in other circumstances it is not open to an employer to defend a discriminatory state of affairs by saying "I know I am discriminating but I will do something about it soon". But that is not the case which the Tribunal was accepting here. The essential premise was that the reduction in the rate of progression was justifiable on a temporary basis. I note also that an essential part of the justification for the *prima facie* discriminatory pay protection payments in *Bainbridge* was that they were being made only for a limited time.

110. That of course only addresses the question whether it was permissible in principle for the Tribunal to have regard to this factor. There is no challenge to the reasonableness of its conclusion if the temporary nature of the measures taken by NOMS was indeed relevant; and, that being so, I should say nothing about that question. But it is clear from para. 72 that the Tribunal thought that NOMS's time for addressing the problem was coming very close to running out, and I am not surprised.

111. It will be seen that both the ET and the EAT referred to the decision of the Supreme Court in *Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] ICR 640. That case concerned what Lady Hale, with whom the other members of the Court agreed, called "a system in transition". At para. 47 of her judgment she said:

> "The question was not whether the original pay scheme could be justified but whether the steps being taken to move towards the new system were proportionate. Where part of the aim is to move towards a system which will reduce or even eliminate the disadvantage suffered by a group sharing a protected characteristic, it is necessary to consider whether there were other ways of proceeding which would eliminate or reduce the disadvantage more quickly."

I am not myself sure that the circumstances in *Naeem* were truly analogous to those of the present case; but the passage in question does at least confirm that the fact that a

system is in the course of change may represent part of the justification for the state of affairs at a particular time.

112. I would accordingly dismiss ground 2.

GROUND 3: EVIDENTIAL BASIS FOR "STOPGAP" FINDING

113. As appears from what I have already said, it was an essential element in the ET's finding of justification that NOMS's reduction in the rate of pay progression was intended as a short-term reaction to the pay freeze – or, as it put it at the end of para. 69 of the Reasons, that "it has never been viewed as anything other than a stop gap measure".

114. Mr Menzies submits that that finding was no more than an inference on the Tribunal's part, and indeed one which was contrary to what was pleaded in the Secretary of State's ET3 where the 2011 policy was described as applying in that year "and going forwards". The Tribunal had heard no evidence about what was in the mind of the decision-makers in NOMS in 2011. Mr Paskin, to whose evidence it attached such weight, had only been in post since 2015. On ordinary principles such an inference should not be drawn except on the basis of appropriate findings of primary fact which need to be properly spelt out: he relies on the well-known statements to that effect in the judgments of Balcombe LJ and Peter Gibson LJ in *Chapman v Simon* [1994] IRLR 124: see paras. 33 (3) and 43.

115. I do not see anything in this ground. In the first place, although the Tribunal used the word "infer" at the start of para. 69, I am not convinced that it was drawing an inference that this Court was concerned with in *Chapman v Simon*: that was a case where a tribunal had made a finding of unconscious racial motivation against a respondent. The findings in that paragraph are more in the nature of the Tribunal's overall conclusions. But I accept that that may not go to the heart of the point because it would still be necessary that there be an evidential basis for those conclusions. In my view the short answer to the submission is that the Tribunal explains the basis for its conclusion in para. 69 itself, namely that it was in the nature of a pay freeze of the kind imposed in 2010 that it was likely to be a temporary measure because, as it says, it would reasonably be assumed that "years of below inflation pay settlements are politically unsustainable". In my view that is a sufficient basis for the Tribunal's conclusion that NOMS regarded the reduction in the rate of progression as a temporary, or stopgap, measure. I see nothing in its conclusion inconsistent with the use of the phrase "going forwards" in the ET3.

DISPOSAL

116. I would dismiss the appeal.

McCombe LJ:

117. I agree.

Macur LJ:

118. I also agree.

ANNEX

PARAS. 5-17 OF THE ET'S REASONING: "PRIMARY FINDINGS OF FACT"

(Note: some minor typographical errors have been silently corrected)

Generally

5. We were presented with an agreed bundle of documents. We heard evidence from the Claimant on his own behalf, and, on the behalf of the Respondent, from Mrs Tracey Louise Kadir, the Head of the Local Delivery Unit, and from Mr Jason William Paskin, the Head of Pay and Reward. Having heard that evidence we reached the following conclusions in relation to the facts giving rise to the present claim.

6. The National Offenders Management Service ("NOMS") for England and Wales has responsibility for the supervision of offenders in the community and the provision of reports to the criminal courts to assist them in their sentencing duties. The service is presently part of Her Majesty's Prison and Probation Service ("HMPPS") and falls within the remit of the Respondent. NOMS is divided into regions across the country corresponding with the various police forces in each region.

7. Terms and conditions for the employees of NOMS are the product of collective bargaining and agreement at the National Negotiating Council (NNC) for the Probation Service. The Claimant took no issue with the contention that any agreement which was the product of collective bargaining would be binding on him.

8. Since 2008 (at least), in common with many large organisations, the Respondent has a pay structure which divides the roles into 6 pay grades or bands depending upon the work and responsibilities undertaken. Within each band there are a number of spinal points where salary is gradually increased from the bottom to the top of each band. Generally, an employee would be appointed at the bottom of the pay scale although exceptionally appointment would be at some higher point. In Kent a "Market Forces Supplement" may be paid in order to attract recruitment which would otherwise be inhibited because of the higher pay available in London.

9. The grades/bands we are concerned with are grades 3, 4 and 5. Within NOMS grade 3 staff would generally be unqualified. Grade 4 staff would generally be qualified as probation officers but would have minimal management responsibilities and Grade 5 staff would generally be qualified and would be expected to have management responsibilities. It is open to employees regardless of grade or position on the pay scale to seek promotion to a higher band. The Claimant had commenced working the Kent Probation Board in 2006. He was then a trainee probation officer and was equivalent to a band 3 employee. After 2 years he successfully completed his training and was appointed as a probation officer initially temporarily but then permanently. His salary was set by reference to the newly agreed band 4 and he started at the bottom of the pay scale. In May 2017 the Claimant applied for and was appointed into a Band 5 role as a "Senior Probation Officer".

10. NOMS is the product of a number of reorganisations and mergers. Mr Paskin told us that, and we accept, partially in consequence of that, there are a large number of spinal points within each pay band or grade. It seems that where there was a merger of two

pay scales all existing pay points had been preserved. It appeared from the documents that we have seen that the exact number of spinal points has varied year on year generally with some of the lower points being removed from a particular grade or additional points added at the top. In 2010 there were 23 spinal points in band 3, 25 spinal points in band 4 and 14 in band 5.

11. The agreed bundle contained what were entitled "2006 Pay Modernisation Documents". Those documents included a description of the job evaluation scheme described above and the various pay scales. At section 4 of that document under the title "Pay Progression" there is an explanation of how it was intended that an employee placed on a particular band would progress up to the top of the pay scale. From 1 April 2007 it had been agreed that an employee would progress by four pay points per annum up to a certain point on the pay scale which was described as a "development point". Having reached the development point the employee would then progress by two points per annum but thereafter would only progress by one point per annum subject to a nationally agreed development and review process. As such it was intended that some system of performance related pay would be introduced in the spinal points at the top of any particular pay band. As a matter of fact no agreement has ever been reached in respect of the development and review process and instead up till 1 April 2010 employees progressed automatically by three spinal points per annum until they reached the top of the pay scale. From 1 April 2010 that was reduced to two points and from 1 April 2011 to just one. Once an employee has reached the top of the pay scale there was no further automatic progression.

12. Each year there were negotiations at the NNC which had historically resulted in annual pay increases. Accordingly, an employee (other than one on the top of the pay scale) could expect to see their pay increase both by way of progression through the pay scale but also as a consequence of an annual pay rise. The annual pay rise would commonly not be negotiated until sometime after 1 April at which point the pay rise would be backdated.

The effect of the pay "freeze"

13. In the wake of the financial crisis of 2008 and the election of a coalition government in 2010 the then Chancellor of the Exchequer announced a public sector pay freeze with the aim of limiting pay increases across the public sector to 1% of the overall pay costs. In NOMS this gave rise to pay negotiations which resulted in a decrease in the rate of pay progression from 3 points per annum to 2. There was a further round of pay negotiations for the financial year commencing 1 April 2011. It seems that those negotiations were not complete until 1 February 2012. We were told and accept that the Respondent took the view that there was a contractual obligation to maintain pay progression but none to award annual pay rises and, crucially in this case, that the number of spinal points each employee would progress by each year were not contractual matters but were matters for negotiation on an annual basis.

14. We were provided with a circular dated 1 February 2012 in which the new negotiated terms were set out. There was no annual increase in salary at all. In lieu of the existing pay progression policy the new system was that employees on bands 1 and 2 were to progress at 2 points per annum, employees at bands 3-6 would progress at just 1 point per annum. It was explained, and we accept, that the reason for the disparity in treatment across the bands was that band 1 and 2 employees were the lowest paid and

would be the hardest hit by any pay freeze. In addition, the minimum pay point at the bottom of each pay band was to be raised by 1 spinal point. Again this protected the lowest paid in each band. The circular referred to a lack of income in part caused by a decision taken in 2014 to reorganise the service and privatise some parts. It was stated that the Respondent was committed to avoiding compulsory redundancies.

15. The changes to the pay system introduced by the 2012 circular have remained in force with the only material changes being:

    15.1. the raising of the minimum salary by one spinal point in most if not all years. The effect of this was that by 2015 the pay scale for band 4 had shortened and a new starter would commence on spinal point 80 whereas the Claimant had started on point 75 when he was first appointed to his Band 4 role; and

    15.2. for the year commencing 1 April 2013 pay progression was limited to one point per annum across all bands including band 1 and band 2 but a 1% pay rise was given across the board; and

    15.3. for the year commencing April 2015 employees not at the top of their pay band would again progress by 1 spinal point but a pensionable 1% pay increase was made to those employees at the top of their pay band.

16. It was only in 2015 that the Claimant realised that he was not progressing up the pay scale in the same way as he had in the past. He is not a member of any trade union and had not seen the annual announcements made as a consequence of the NNC negotiations. When the matter came to his attention he brought a grievance protesting that the system was unfair and discriminated on the basis of age. The Respondent did not uphold that grievance either at first instance or at the appeal meeting which was chaired by Tracey Kadir. She took the view that the Claimant was in no worse a position than a fellow employee, who had started on the same day but was older. When the Claimant's grievance was rejected he commenced the present proceedings.

17. Both Tracey Kadir and the Claimant agreed that a band 4 probation officer would take about 7 or 8 years to "come up to speed" by which we mean that they would have reached a level of experience, skill and development which would allow him or her to perform at the same level as any employee who had been employed for longer.

18. We as a tribunal were particularly impressed by the manner in which Jason Paskins gave his evidence. Whilst he is a senior employee of the Respondent he was prepared to make sensible concessions and he did not take a partisan approach to his evidence. He told us that he considered the present pay system to be unacceptable in many ways. He accepted that the legacy of a long pay scale was undesirable and stated that one of the roles that he had been assigned was to progress towards a system where performance, rather than the passage of time, was a more important feature of the reward structure. He suggested that this was a priority but that he had not made a great deal of progress to date. He spoke emotionally of the need to reward public servants properly in order to protect the integrity of the system. His view was that at present the probation officers were not being paid a fair wage for the important work that they did. He made further sensible concessions as to the potentially discriminatory effect of the present system to which we refer below.