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

THE EMPLOYMENT TRIBUNALS

BETWEEN

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

JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT PRELIMINARY HEARING

HELD AT: London Central **ON:** 31 May & 1 June 2016, In Chambers 2 & 3 June 2016

EMPLOYMENT JUDGE: Miss A M Lewzey (sitting alone)

Representation:

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

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

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

RESERVED JUDGMENT

The judgment of the Tribunal is that:

(i) Paragraph 1(1) of Schedule 22 to the Equality Act 2010 does not bar the Claimants from bringing their claims of less favourable treatment on the grounds of age which will proceed to a hearing.

(ii) The claims of direct age discrimination, indirect race discrimination and indirect sex discrimination were presented within time and the Tribunal has jurisdiction to consider them.

(iii) The case is listed for a one day preliminary hearing for case management purposes on <u>Wednesday 31 August 2016 at 10.00am at Victory House, 30-34 Kingsway, London, WC2B 6EX</u>.The additional listed days on Tuesday 30 August, Thursday 1, and Friday 2 September 2016 are vacated.

(iv) By consent it is ordered that each party must send to the other by 1 August 2016 a list of all documents upon which they will rely at the hearing which are relevant to the issues, to include all documents that adversely affect their own case, adversely affect or support the other parties' cases.

(v) By consent it is ordered that inspection of documents will take place by 8 August 2016.

RESERVED REASONS

<u>Introduction</u>

1 All of the Claimants are firefighters who have brought various claims of age discrimination, sex discrimination, race discrimination and claims for equal pay against the Respondents. The claims arise out of the public sector pension reforms and relate to the Claimants who were born on or after 1 April 1971 who have accrued less favourable pension rights for each month of work done after 1 April 2015 than colleagues born before that date.

2 Prior to 1 April 2015, the Claimants were active members of and accruing benefits in the Firefighters Pension Scheme 1992 ("the 1992 Scheme" or "FPS"). With effect from 1 April 2015 the Claimants ceased to accrue benefits in the FPS and began to accrue benefits in the Firefighters Pension Scheme 2015 ("the 2015 Scheme" or "NFPS") pursuant to the provisions of the Public Service Pensions Act 2013, the

Firefighters Pension Scheme England Regulations 2014 and other consequential regulations (together "the Regulations").

3 Each of the First to Fourth Respondents are Fire and Rescue Authorities ("FRAs"). Each of the Claimants was employed by one of the FRA's. The Fifth and Sixth Respondents are each a "responsible authority" for the purposes of section 2 of the Public Service Pensions Act 2013

4 This is a preliminary hearing listed to determine the preliminary issues set out below.

Preliminary Issues

5 The issues to be determined at this preliminary hearing (using the numbering set out in the Agreed List of Issues) (7 to 15) are as follows:

3.1 Are any of the claims out of time?

3.1.1 If so, which claims are out of time?
3.1.2 If so, should time be extended?

3.2 Are all or any of the domestic law claims (as construed and applied in the light of the relevant provisions of EU law) barred:

...

3.2.2 by paragraph 1(1) of Schedule 22 to the Equality Act 2010?

...

The Position of the Fifth and Sixth Respondents

6 The Fifth and Sixth Respondents have chosen, at this stage, not to plead any time limit points.

7 In relation to the other preliminary issues at issue 3.2.1 and issue 3.2.3 of the Agreed List of Issues (9), since the Lord Chancellor conceded in **McCloud v The Lord Chancellor and Secretary of State for Justice and the Ministry of Justice** ("**McCloud**") in the Employment Tribunal that Schedule 3 to the Equality Act 2010 did not prevent the Tribunal from hearing the judicial claims, the Fifth and Sixth Respondents do not now seek to rely on Schedule 3, paragraph 2(3) Equality Act 2010 as a defence to the present claims.

8 In relation to issue 3.2.4, the Fifth and Sixth Respondents do not pursue the issue on the grounds that the effect of section 70 of the Equality Act 2010 is that if the Claimants have an equal pay claim, then the facts that give rise to this claim do not also give rise to a sex discrimination claim.

9 In relation to issue 3.3, in view of the fact that the Fifth and Sixth Respondents do not argue that any of the preliminary points prevent the Employment Tribunal from hearing the Claimant's claims against them, it is unnecessary for the Tribunal to

determine whether the Claimants can maintain freestanding claims based on the Equal Treatment Directive (Directive 2000/78/EC) in the Tribunal.

10 In those circumstances the Fifth and Sixth Respondents played a limited role at the preliminary hearing, largely attending for observation purposes.

Evidence

11 I had a witness statement from Mr G M Goodman on behalf of the First to Fourth Respondents. Mr Short for the Claimants did not seek to cross-examine Mr Goodman. I admitted his witness statement.

12 I also had an agreed bundle of documents to which reference is made by use of the relevant page number. I also had a bundle of authorities.

Submissions

13 I had the following written skeleton arguments:

Skeleton Argument on behalf of the First to Fourth Respondents;
Skeleton Argument on behalf of the Fifth and Sixth Respondents;
Skeleton Argument on behalf of the Claimants; and
Supplementary Skeleton Argument on behalf of the Claimants.

14 Mr Short for the Claimants, and Mr Lynch for the First to Fourth Respondents, both made comprehensive oral submissions. The submissions are referred to as appropriate in the conclusions dealing with the individual preliminary issues before me.

Preliminary Issue on Paragraph 1(1) of Schedule 22 to the Equality Act 2010

The Law

15 Paragraph 1(1) of Schedule 22 of the Equality Act 2010 provides:

"A person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristic specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column.

Specified provision	*Protected characteristic*	*Requirement*
Parts 3 to 7	Age	A requirement of an enactment
Parts 3 to 7 and 12	Disability	A requirement of an enactment A relevant requirement or condition imposed by virtue of

		an enactment
Parts 3 to 7	Religion or belief	A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment
Section 29(6) and Parts 6 and 7	Sex	A requirement of an enactment
Parts 3, 4, 6 and 7	Sexual orientation	A requirement of an enactment A relevant requirement or condition imposed by virtue of an enactment"

16 The right not to be discriminated against on the grounds of age originates in EU law under Framework Directive 2000/78/EEC which provides:

> "Article 1
> Purpose
>
> The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
>
> Article 2
> Concept of discrimination
>
> 1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
>
> 2. For the purposes of paragraph 1:
> (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
> ....
>
> Article 3
> Scope
>
> 1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
> ....
> (c) employment and working conditions, including dismissals and pay;
> .....
>
> Article 6
> Justification of differences of treatment on grounds of age
>
> 1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."

17 Sections 61 and 62 Equality Act 2010 provide:

"61 Non-discrimination rule

(1) An occupational pension scheme must be taken to include a non-discrimination rule.

(2) A non-discrimination rule is a provision by virtue of which a responsible person (A)—

(a) must not discriminate against another person (B) in carrying out any of A's functions in relation to the scheme;

(b) must not, in relation to the scheme, harass B;

(c) must not, in relation to the scheme, victimise B.

(3) The provisions of an occupational pension scheme have effect subject to the non-discrimination rule.

(4) The following are responsible persons—

(a) the trustees or managers of the scheme;

(b) an employer whose employees are, or may be, members of the scheme;

(c) a person exercising an appointing function in relation to an office the holder of which is, or may be, a member of the scheme.

....

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

(8) It is not a breach of a non-discrimination rule for the employer or the trustees or managers of a scheme to maintain or use in relation to the scheme rules, practices, actions or decisions relating to age which are of a description specified by order by a Minister of the Crown.

......

62 Non-discrimination alterations

(1) This section applies if the trustees or managers of an occupational pension scheme do not have power to make non-discrimination alterations to the scheme.

(2) This section also applies if the trustees or managers of an occupational pension scheme have power to make non-discrimination alterations to the scheme but the procedure for doing so—

(a) is liable to be unduly complex or protracted, or

(b) involves obtaining consents which cannot be obtained or which can be obtained only with undue delay or difficulty.

(3) The trustees or managers may by resolution make non-discrimination alterations to the scheme.

(4) Non-discrimination alterations may have effect in relation to a period before the date on which they are made.

(5) Non-discrimination alterations to an occupational pension scheme are such alterations to the scheme as may be required for the provisions of the scheme to have the effect that they have in consequence of section 61(3)."

Section 212(11) of the Equality Act 2010 provides a definition of a scheme manager as follows:

> "(11) "Employer", "deferred member", "pension credit member", "pensionable service", "pensioner member" and "trustees or managers" each have, in relation to an occupational pension scheme, the meaning given by section 124 of the Pensions Act 1995."

Section 124 Pensions Act 1995 provides:

> " "trustees or managers", in relation to an occupational pension scheme, means—
>
> (a) in the case of a trust scheme, the trustees of the scheme, and
>
> (b) in any other case, the managers of the scheme,"

18 Section 4 of the Public Service Pensions Act 2013 provides:

> **"4 Scheme manager**
>
> (1) Scheme regulations for a scheme under section 1 must provide for a person to be responsible for managing or administering—
>
> (a) the scheme, and
>
> (b) any statutory pension scheme that is connected with it.
>
> (2) In this Act, that person is called the "scheme manager" for the scheme (or schemes).
>
> (3) The scheme manager may in particular be the responsible authority.
>
> (4) Subsection (1) does not apply to a scheme under section 1 which is an injury or compensation scheme.
>
> (5) Scheme regulations may comply with the requirement in subsection (1)(a) or (b) by providing for different persons to be responsible for managing or administering different parts of a scheme (and references in this Act to the "scheme manager", in such a case, are to be construed accordingly).
>
> (6) For the purposes of this Act, a scheme under section 1 and another statutory pension scheme are connected if and to the extent that the schemes make provision in relation to persons of the same description.
>
> (7) Scheme regulations may specify exceptions to subsection (6)."

19 Regulation 4 of the Firefighters Pension Scheme (England) Regulations 2014 provides:

> **"4 Scheme manager**
>
> (1) An authority is responsible for managing and administering this scheme and any statutory scheme that is connected with it in relation to any person for which it is the appropriate authority under these Regulations.
>
> (2) The appropriate authority in relation to a person who—
>
> (a) is or has been a member of this scheme; or

(b) is entitled to any benefit in respect of a person who is or has been a member of this scheme,

is the authority by whom the member was last employed whilst an active member of this Scheme [in relation to each of the member's pension accounts].

(3) The appropriate authority in relation to a pension credit member is the authority responsible for the pension debit member's pension account at the effective date of the pension sharing order.

(4) The appropriate authority is referred to in this scheme as the scheme manager."

Submissions

20 Mr Lynch, for the FRAs, submits in relation to paragraph 1(1) of Schedule 22 that the FRAs, which are the employers of the firefighters, do not have any overall central management control over the pension arrangements. He argues that the FRAs did not make or participate in the making of the Public Sector Pensions Act 2013 or the Regulations made pursuant to it, that the regulations require the FRAs to act in certain ways in regards to pensions available to their employees and that the effect of the Regulations is that those who qualify for protection cannot belong to the NFPS, but remain either permanently, or for a period, members of the old FPS. He argues that the effect is that the FRAs are passive recipients of the requirements of the Regulations made by others and are bound to apply them and, thus, the situation falls within paragraph 1 of Schedule 22. Mr Lynch focuses on the nuanced areas in which the defence under paragraph 1 of Schedule 22 applies, for example in relation to age discrimination, but not in relation to sex and race discrimination. A defence of statutory authority is provided where a legislative provision requires an employer to act in regard to its employees in a manner which gives rise to what would be age discrimination.

21 Mr Lynch argues that the reason why the reliance on paragraph 1 of Schedule 22 was dismissed in **McCloud** have no relevance to the position of the FRAs. The FRAs do not rely on section 18 of the Public Sector Pensions Act 2013 but on the regulations made by the Secretary of State for Communities and Local Government and the Welsh ministers. Mr Lynch draws attention to the fact that this Tribunal is not bound by the decision in **McCloud** and that the circumstances of the respondents in that case were very different from those of the FRAs. He argues that section 61 of the Equality Act 2010 applies discrimination law to pension schemes and makes clear that discrimination by a relevant person in regard to pensions can give rise to liability and that section 62 empowers certain limited parties to make changes to the pension scheme to amend any discriminatory provisions, but that the FRAs have no such power. As a result, the FRAs are bound by the Regulations and if those Regulations involve age discrimination then the FRAs are required to act in that discriminatory way and as a result, Mr Lynch argues, paragraph 1 of schedule 22 applies to provide a defence to the FRAs. The Claimants will not be left without an effective remedy as they may proceed against the parties responsible for making the Regulations, namely the Fifth and Sixth Respondents.

22 Mr Short, for the Claimants, argues that paragraph 1(1) of Schedule 22 is not engaged because the effect of the non-discrimination rule overrides any discriminatory

elements of the NFPS Regulations so that, when construed as modified by the non-discrimination rule those regulations do not require the Respondents to act in a discriminatory fashion and do not bring the Respondents within paragraph 1(1) of Schedule 22. He also argues that if paragraph 1(1) can only be construed so as to exclude age discrimination claims relating to statutory pension schemes then it is incompatible with EU law and should be disapplied. In any event he argues that to the extent that the Claimants are not entitled to rely upon any of the age discrimination provisions of the Equality Act 2010, they are entitled to bring freestanding claims relying directly upon the Framework Directive. Mr Short argues that although there is a factual difference between the present case and **McCloud**, where the Lord Chancellor was both in the nature of an employer and legislator, that difference does not affect many of the points decided in **McCloud**.

Conclusions

23 The right not to be discriminated against on the grounds of age originates in the Framework Directive. The starting point is section 39(2) of the Equality Act 2010 which provides:

> "(2) An employer (A) must not discriminate against an employee of A's (B) –
>
> (a) as to B's terms of employment;"

24 The effect of section 61(3) of the Equality Act is to insert a non-discrimination rule into the NFPS. Mr Short relies on paragraph 14.41 of the EHRC Code of Practice on Employment (2011) which provides:

> "The provisions of an occupational pension scheme shall have effect subject to the non-discrimination rule. So, for example, if the rules of the scheme provide for a benefit which is less favourable for one member than another because of the protected characteristic, they must be read as though the less favourable provision did not apply."

This is, of course, a Code of Practice and not a binding authority.

25 It is common ground that the NFPS treats people who were born on or after 2 April 1971 less favourably than people before born before that date on the grounds of age and also treats people who were born between 2 April 1967 and 1 April 1971 less favourably than people born before 2 April 1967 on the grounds of age.

26 Mr Lynch argues that careful consideration was given by Parliament and the lawmakers to the scope of paragraph 1 of Schedule 22, whilst Mr Short draws attention to the fact that no consistent approach applies across the protected characteristics. He draws attention to the wider exclusionary scope of paragraph 1 in relation to disability. The reasons for the thinking behind Schedule 22 paragraph 1(1) are not clear.

27 Section 61(3) of the Equality Act inserts a non-discrimination rule into the scheme. Liability rests with the responsible person. Section 62 gives the power to the trustees or managers of the scheme to make a non-discrimination alteration. The provision allows the scheme managers to bring the text of the scheme into conformity with the non-discrimination obligation. It is notable that the structure of section 62

reflects the same structure as that used in section 68 concerning the sex equality rule. As Mr Short has pointed out, there is a difference in wording between section 61 and section 67, although parallels are seen in the enforcement provisions at section 120 and 127. Mr Short attributes these differences in language to the separate development of equal pay law. That approach is supported by the decision of the Northern Ireland Court of Appeal in **Perceval-Price v Department of Economic Development [2000] IRLR 380** in which Carswell LCJ stated:

> " It is a well established consequence of the principle of supremacy of Community law that it is the duty of a national court, where there is a conflict between domestic law and a directly effective provision of Community law, to interpret domestic law where possible so as to accord with Community law, and where that cannot be done to disapply the conflicting provision of domestic law."

28 It is common ground that occupational pensions are a form of deferred pay for the purposes of EU law. Mr Short has referred me to **Ten Oever v Stichting Bedrijfspensioenfonds Voor Het Glazenwassers en Schoonmaakbedrijf [1995] ICR 74,** in which the Advocate General stated at paragraph 57:

> "The fundamental nature of the principle of equal pay for men and women laid down in Article 119, which constitutes an application of the prohibition of discrimination on grounds of sex and therefore of a fundamental right, means that any provision which is contrary to it, whether contained in national legislation, administrative provisions or in a contract or (trust) deed governed by private law, must be overridden by that rule. To take a different view would make it all too easy for the principle of equal treatment to be circumvented by bringing in persons who are not parties to the employment relationship."

29 I have also been referred to **Coloroll Pension Trustees Ltd v Russell (Case C-200/91) 1995 ICR 179 EC** at paragraph 31 to 32 which is authority that once a court has found that discrimination in relation to pay exists, and so long as measures for bringing about equal treatment have not been adopted by the scheme, the only proper way of complying with article 119 is to grant the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class.

30 Finally, Mr Short referred me to **Foster Wheeler v Hanley [2009] Pens LR 39 (CHD)** in which Patten J summarised the relevant principles concluding that article 119 has direct effect and operates to amend a pension scheme so as to eliminate discriminatory provisions relating to pension entitlement.

31 I am satisfied that section 61 must be construed so as to give effect to the directive. I must consider the effect of section 61 on the NFPS and then consider whether any enactment has been identified which requires the First to Fourth Respondents to do something which would be a contravention of part 5. It is common ground that a non-discrimination rule is inserted into the NFPS by section 61(1). Section 61(2) imposes a duty on the manager of the scheme not to discriminate in carrying out any of its functions. The manager of the scheme is required to give effect to the scheme, as modified by the non-discrimination rule unless paragraph 1(1) of Schedule 22 requires the manager to act otherwise.

32 Mr Short submitted that the Employment Tribunal in **McCloud** had accepted that section 61 should be interpreted in this way so as to give effect to the directive in paragraphs 42 to 52 of the judgment of Employment Judge Williams in that case. That

acceptance did not depend to any extent upon the quasi employer and legislator being the same body. As far as Mr Short was aware there had been no appeal from that decision. The decision in **McCloud** is not binding on me and the fact that no appeal has been made against that decision does not affect that fact.

33 On the clear wording of paragraph 1(1) of Schedule 22, a defence is provided to a person who does something which they are required to do by virtue of an enactment. The provision attempts to resolve conflicts between the requirements of the Equality Act and other statutory requirements.

34 Mr Lynch argued that the Employment Tribunal in **McCloud** made erroneous findings that any discriminatory provisions of the Regulations would be automatically removed by section 61 and, as a result, there could be no question of those regulations giving rise to a defence under paragraph 1 of Schedule 22 Mr Lynch argued that there is nothing in section 61 that justifies the view that that section automatically ends pension schemes if they contain a discriminatory provision. Mr Lynch argues that the definition of enactment in paragraph 1 is very inclusive and it would only be if there was a clear express provision to the effect that there was a discriminatory provision that the restriction would apply and the terms of paragraph 1 are to the opposite effect.

35 I must consider the meaning of "enactment" in paragraph 1 of Schedule 22. An enactment includes a statutory instrument and is defined in section 212(1) of the Equality Act as including subordinate legislation. The FRAs have submitted that they did not make or participate in the making of the Regulations or the primary legislation and that the Regulations require the FRAs to act in certain ways. They say that the power to change the rules of an occupational pension scheme so that they are no longer discriminatory is found only in section 62. However, the clear wording of section 62 to allows the trustees or managers to make non-discrimination alterations to the scheme. The Explanatory Notes to section 62 provide:

> "227. The clause gives trustees or managers of an occupational pension scheme the power, by resolution, to alter the scheme's rules to conform to the non-discrimination rule in clause 61.
>
> 228. They may use the power if:
> - they lack powers to alter the rules for that purpose, or
> - procedures for altering the rules, including obtaining consent, are unduly complex or would take too long."

36 I accept the submission of Mr Short that those adversely affected by the express provisions will not need to prove their case in order to demonstrate that those provisions were modified by the non-discrimination rule.

37 Because of the non-discrimination rule, the FRAs are not required to act in a discriminatory way by any enactment. It has been held, in relation to the equivalent provision found in the Race Relations Act 1976, by Lord Lowry in **Hampson v Department of Education [1991] 1 AC 171**:

> "Given the wide sweep of these provisions, the exceptions ought therefore... to be narrowly rather than widely construed whether language is susceptible to more than one meaning. "

38 I have also been referred to the obiter remarks of Underhill J, as he then was, in **Amnesty International v Ahmed 2009 ICR 1450, EAT** as follows:

> "56 The new point referred to at para 41 above depends on the effect of section 41(1A) of the 1976 Act [inserted by regulation 35(b) of the Race Relations Act 1976 (Amendment) Regulations 2003], to which we were not referred in the course of argument. This provides: [2009] ICR 1450 at 1478
>
> > "Subsection (1) does not apply to an act which is unlawful, on grounds of race or ethnic or national origins, by virtue of a provision referred to in section 1(1B)."
>
> Section 1(1B) was inserted into the Act in 2003 [by regulation 3 of the 2003 Amendment Regulations] as part of the amendments introduced in order to implement the Race Directive 2000/43: see para 61 below. Its immediate purpose is to identify the parts of the Act to which the EU-derived formulation of indirect discrimination set out in section 1(1A) applies. Accordingly it begins "the provisions mentioned in subsection (1A) are ..." One of those provisions is "Part II", being the part of the Act which proscribes discrimination in the employment field. Mr Epstein and Mr A'Zami, as we understand it, believed that because of the "pairing" between subsections (1A) and (1B) the effect of the cross-reference in section 41(1A) was limited to cases of indirect discrimination. However, that is not how we (or, we note, the editors of *Harvey on Industrial Relations and Employment Law* —see paras L1068 and Q119) read it: in our (fairly firm) view, the effect of section 41(1A) is to disapply section 41(1) in the case of all discrimination (direct or indirect) within the scope of the Race Directive. That is no doubt quite drastic, but it makes legislative sense: once racial discrimination came to be proscribed by EU law it could not be legitimate to rely on the provisions of domestic legislation by way of defence. This change in the law emphasises the problems to which the absence of any defence of justification may give rise: cf para 58 below...."

Mr Lynch submits that I should give no weight to this decision on the grounds that no submissions were made to Underhill J. However, in the present case the FRAs seek to rely on the provisions of domestic legislation by way of defence to a claim for discrimination which is prescribed by EU law.

39 Mr Short has also referred me to a judgment of Mitting J in the Employment Appeal Tribunal in **Heron V Sefton Metropolitan Borough Council (2014) UKEAT/0566/12/SM** in which he stated:

> "21. For the exception in paragraph 1(1) of Schedule 22 to the 2010 Act to apply the enactment must have direct effect upon the particular circumstances of the Claimant. On the facts of this case it did not. Further, and in any event, even if it had done it would have required to have been justified......"

Mr Short argues that there is nothing in the Equal Treatment Directive that permits a blanket derogation in relation to age, or indeed disability and religion or belief. He says that at the highest such a provision could be relied upon only where the particular enactment was itself justified. Mr Lynch, on the other hand, argues that it is difficult to work out how the Employment Appeal Tribunal came to the decision that it reached in **Heron.**

40 I have considered whether the provisions of section 18 of the Public Sector Pensions Act 2013 contain any requirement that falls within the third column of paragraph 1 of Schedule 22 to the Equality Act. There is no obligation that the FRAs must do anything or must act in any specific way which, but for the provisions of

Schedule 22 would constitute unlawful discrimination. Mr Lynch submits that given the effects of the non-discrimination rule, there is no such requirement. This is a matter of construction. It is unlikely that the legislature intended that an employee should be prohibited from bringing a claim of age discrimination.

41 As Mr Short says, any provision fixed by subordinate legislation should not be excluded from scrutiny. Section 212(1) of the Equality Act adopts the definition of occupational pension scheme in section 1 of the Pension Schemes Act 1993. I see no rationale for excluding such schemes from scrutiny under the Equality Act in relation to age. Mr Short submits that one of the objectives of the directive is to prohibit age discrimination in relation to pay in the public sector and that paragraph 1 must not be construed so as to exclude claims about terms and conditions that are set out in the subordinate legislation, as this would jeopardise the achievement of the objectives of the directive and deprive it of much of its effectiveness in the public sector. He refers to **O'Brien v Ministry of Justice [2012] ICR 955** at paragraph 35 and 36. Finally, he argues that even if paragraph 1 of Schedule 22 does bar any age discrimination claim under section 61 of the Equality Act then the claimants are entitled to rely directly upon their rights under the directive. I accept that submission.

42 In these circumstances, the FRAs are not entitled to rely on paragraph 1 of Schedule 22 of the Equality Act 2010 as a defence to the claims of age discrimination and accordingly, the Tribunal does have jurisdiction to consider them.

Preliminary Issue on Out of Time

The Law

43 Section 123(3)(a) of the Equality Act 2010 provides:

> "(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it."

44 In **Amies v Inner London Education Authority** [1977] **ICR 308 Bristow J** in the Employment Appeal Tribunal stated:

> "The applicant's complaint here is that by not appointing her, and by appointing a man with lesser qualifications, the employers have unlawfully discriminated against her. She herself has in our judgment given the right definition of the "act of discrimination" of which she complained to the tribunal under section 63 (1).
>
> Like any other discrimination by act or omission, the failure to appoint her, and the appointment of him, must have continuing consequences. She is not head of the department; he has been ever since October 13, 1975. But it is the consequences of the appointment which are the continuing element in the situation, not the appointment itself."

45 In **Sougrin v Haringey Health Authority [1992] ICR 650 CA** it was held that the employer's grading decision was a one-off act with the continuing consequence that the appellant was paid less than her white colleague.

46 In **Barclays Bank Plc v Kapur [1991] 2AC 355** Lord Griffiths held:

> "In the present case the Court of Appeal were in my view right to approve these two decisions and to classify the pension provisions as a continuing act lasting throughout the period of employment and so governed by subsection (7)(*b*). The matter can be further tested by taking the case of an employer who before the Act was passed paid lower wages to his coloured employees than to his white employees. Once the Act came into force the employer would be guilty of racial discrimination if he did not pay the same wages to both coloured and white employees. If he continued to pay lower wages to the coloured employees it would be a continuing act lasting throughout the period of a coloured employee's employment within the meaning of subsection (7)(*b*). A man works not only for his current wage but also for his pension and to require him to work on less favourable terms as to pension is as much a continuing act as to require him to work for lower current wages."

47 Lewison LJ stated in **Ministry of Justice v O'Brien (No 2) [2016] ICR 182 CA**:

> "It is, to my mind, clear from this passage that pension rights attributable to a particular period of service are acquired definitively during that period of service; and that the legal situation created by that period of service is definitively fixed on expiry of that period of service."

That decision was made taking into account the EU principles as set out in **Ten Oever v Stichting [1995] ICR 74.**

Submissions

48 Mr Lynch accepts that the equal pay claims, both by female firefighters and, in the form of piggyback claims by male colleagues of those female firefighters, have a six month time limit from the end of employment in respect of which there is no power to extend time. The equal pay claims proceed in any event, because the Claimants are still in employment. Mr Lynch argues that the act complained of by the Claimants is their transfer into the NFPS on 1 April 2015 whilst others were placed into protective regimes. Mr Lynch suggests this is a single act which may have continuing future effects but which happened on 1 April 2015. The early conciliation procedure was not commenced until more than three months after that date and therefore, Mr Lynch argues, the claims are out of time and do not form part of a course of conduct that amounts to a continuing act. Accordingly, he says that the Tribunal should find that

there is no jurisdiction to consider them. Mr Lynch further submits that if the claims are not in time then it would be just and equitable to extend time.

49 Mr Short argues that the claims are in time because since 1 April 2015 the Claimants have been being paid less on various prohibited grounds than their comparators and that that less favourable treatment constitutes conduct extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010 and is therefore to be treated as being done at the end of the period.

Conclusions

50 The subject of the discrimination claims relates to pension rather than salary. I take into account the judgment of Lewison LJ in **O'Brien v Ministry of Justice (No 2)** that pensions are deferred pay, the right to which accrues gradually throughout the Claimants' employment. Mr Lynch focuses on the difference between an act and a continuing activity. He argues that if the issue complained of is a continuing activity the date that time runs from is the date when that activity ceased. He says that I must determine whether this is an act on 1 April 2015 or continuing activity as a result of the Claimants being placed in a particular group. For this I must look at the substance of the complaint and determine whether the complaint is about an act or an ongoing situation. Mr Lynch submits that this is a complaint about an act. The Claimants did not qualify for protection and therefore they went into the new scheme. The old scheme has been closed. Mr Lynch says that this is a case where there are ongoing consequences and ongoing consequences do not amount to a continuing act.

51 I note Mr Lynch's argument that in the present case these are single acts with continuing effects as illustrated in **Amies** and **Sougrin.** He distinguishes **Kapur** as being closer to a general less formally determined approach to a group of employees being followed that drifted on and was applied to them over a number of years. He postulates a guillotine effect in the present case in which a decisive decision was made following the Hutton Report, as a result of which the Claimants complain that they were classified in a particular way. However, I take into account that **Kapur** clearly contemplates the classification of the pension provisions in that case as a continuing act lasting throughout the period of employment. Mr Lynch's argument that the House of Lords was led into error by the consideration of what constituted a deliberate omission does not seem to me to be the correct interpretation. He refers to the case cited within **Kapur** of **Calder v James Finlay Corporation** where a female could not obtain the benefit of a mortgage subsidy and that in those circumstances the employers were discriminating against her in the way they were offering access to the scheme and that therefore there was continuing discrimination for as long as she remained in employment. I reject this argument. The present situation seems to be as in **Kapur.** Since pension amounts to deferred pay, the denial of access to the pension scheme continues for the duration of employment and accordingly, the claims are not out of time.

52 In case I am wrong on the issue, I have considered whether an extension of time should be granted lest the Claimants are out of time. Mr Short argues that these claims are part of a collection of more than 6000 claims issued in batches by the Claimants' solicitors and that the Claimant's legal advisers believed and continue to believe that

the claims were in time. He argues it would not be just and equitable for the Claimants to lose the opportunity to pursue their claims by reason of any such error and that there is no prejudice to the Respondents because the period of delay is short, there is no impact on the cogency of the evidence, and the Respondents will be obliged to defend the equal pay claim on very much the same facts in any event. The prejudice to the Claimants would be severe as they would potentially suffer years of less favourable pay. I do take into account the guidance in **Robertson v Bexley Community Centre 2003 IRLR 434** in which Auld LJ stated at paragraph 25:

> "It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunal's consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.."....

53 I do take note that the Claimants would be prejudiced, whereas the Respondents would suffer little prejudice because they have to defend the equal pay claim. In addition, I take into account the number of Claimants involved and the complexity of dealing with a case involving so many Claimants. Even if I am wrong and the claims are out of time, it would be just and equitable in these circumstances to extend time and I would exercise my discretion to extend time.

54 In these circumstances it is my judgment that the claims have been presented within time and there is jurisdiction for the Tribunal to consider them.

RESERVED JUDGMENT AND REASONS

21st June 2016 London Central
Date and place of signing

S. M. Lewzey
EMPLOYMENT JUDGE

22 JUNE 2016
JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 JUNE 2016
AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE

IMPORTANT NOTES

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.