Appeal No. UKEAT/0113/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 18 October 2017
Judgment handed down on 7 November 2017

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

DR G PARKER — APPELLANT

(1) MDU SERVICES LTD
(2) TRUSTEES OF THE MEDICAL DEFENCE UNION PENSIONS & LIFE ASSURANCE SCHEME — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LYDIA SEYMOUR (of Counsel) Direct Public Access
For the First Respondent	MR ANDREW SHORT (One of Her Majesty's Counsel) Instructed by: Osborne Clarke LLP 2 Temple Back East Temple Quay Bristol BS1 6EG
For the Second Respondent	MR ANDREW SHORT (One of Her Majesty's Counsel) Instructed by: Gowling WLG (UK) LLP 2 Snowhill Snowhill Queensway Birmingham B4 6WR

SUMMARY

EQUAL PAY ACT - Article 141/European law

EQUAL PAY ACT - Indirect discrimination

EQUAL PAY ACT - Material factor defence and justification

EQUAL PAY ACT - Part time pensions

SEX DISCRIMINATION - Indirect

SEX DISCRIMINATION - Comparison

PRACTICE AND PROCEDURE - Delay in ET judgment

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Tribunal found that the provisions of a pension scheme did not unlawfully discriminate against those who had worked both part-time and full-time. The Tribunal's Reasons largely adopted the submissions of the Respondent. The key issues were whether the choice of comparator was wrong and whether the decision fell to be set aside due to the adoption of the Respondents' submissions.

In the particular circumstances of this case, where the facts were largely agreed, the Tribunal's approach to the Reasons could not be said to vitiate its judgment. The choice of comparator, namely a full-time worker who started on the Scheme at the same age and on the same date as the Claimant, did not amount to an error of law. The Claimant's suggested comparator would have failed to take account of a critical feature of the Scheme which was that accrual rates depended on the age of joining and the years remaining until normal pension date.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. The Claimant contended before the Employment Tribunal sitting in East London ("the Tribunal") that the pension scheme ("the Scheme") operated by her employer indirectly discriminated against workers who, like her, had a mixture of full-time and part-time service. The Claimant had retired after working for 27 years. Her full-time equivalent ("FTE") service, taking account of periods of part-time working, was 21 years. The Claimant's particular complaint was that, whereas a full-time worker who had worked 20 or more years as at the Normal Retirement Date would be entitled under the Scheme to the maximum available pension of 2/3 of final salary, she was only entitled to 21/27 (about 78%) of the maximum pension notwithstanding the fact that she had more than 20 years' FTE service. The Claimant contended that the Scheme amounted to double pro-rating in the case of those with some part-time service and put her at a particular disadvantage.

2. The Tribunal rejected the Claimant's claims. It found that a similarly aged comparator working full-time and who had commenced employment at the same time as the Claimant would have accrued pension at precisely the same rate as the Claimant. In rejecting the Claimant's claims, the Tribunal adopted, to a very considerable extent, the written closing submissions of the Respondents, which had been prepared by the Respondents' counsel, Mr Short QC. Ms Seymour, who appears on behalf of the Claimant in this appeal (and who also appeared below), as well as contending that the Tribunal had erred in law in coming to that conclusion, contends that the degree and nature of the cutting-and-pasting of the Respondents' submissions significantly undermined the Tribunal's decision such that it could not be treated as a safe decision.

Factual Background

3. The main facts were largely agreed between the parties before the Tribunal. They may be summarised as follows:

4. The Claimant was born in 1955. She started working for the First Respondent on 6 August 1987. She became a member of the Scheme on 6 September 1987. The Scheme is an occupational pension scheme established by a Declaration of Trust dated 19 January 1943, and which was governed at the time of the claim by the Definitive Deed and Rules dated 16 February 2009. It is a final salary scheme.

5. The Claimant worked as a full-time employee with MDU until March 1991. Following the birth of her daughter, the Claimant commenced working on a part-time basis and continued to do so until her retirement.

6. On 24 October 2013, the Claimant was provided with an estimate of her pension benefits by the then new Scheme Administrators, Aon Hewitt. The estimate provided that she would receive a maximum total yearly pension of £69,726.59. Her salary as at that stage was just over £100,000 per annum. This sum of almost £70,000 is the amount to which the Claimant would, on her case, have been entitled.

7. Aon Hewitt contacted the Claimant on 25 November 2013 to inform her that the previous estimate had been incorrect and provided her with a new estimated benefit of £52,798.96. This is the sum that the Respondents say is the correct amount due under the Scheme.

8. The Claimant made a request to retire early with her early retirement date being 12 January 2015. In October 2014, the Claimant was provided with a statement of pension benefits. This included the option of taking a lump sum and reduced pension. In November 2014, the Claimant notified her objection to the methodology used to calculate her pension benefit and made a complaint under the Scheme's Internal Dispute Resolution Procedure. That complaint was dismissed by the Trustees of the Scheme.

9. The Claimant retired on 12 January 2015. She received a lump sum of £279,423 and receives a yearly pension of £41,913.48. Both amounts are challenged as being the product of a discriminatory methodology.

Proceedings before the Tribunal

10. The Claimant's claims were heard over three days in July 2016. As one would expect in a case where the parties are represented by experienced counsel the Tribunal was provided with both skeleton arguments and detailed written closing submissions. At the conclusion of the hearing, the Tribunal, which comprised Employment Judge Hyde and two lay members, met in Chambers on two separate occasions in July 2016. However, the Tribunal's final Judgment dismissing the claims and its Written Reasons ("the Reasons") were not sent to the parties until 30 January 2017.

11. Whilst it is not unusual for Tribunals and Courts to include extracts from parties' submissions in their Judgments, the degree of copying and pasting in this case was extraordinary. After a relatively short introductory section setting out the evidence adduced, the issues to be determined and the agreed facts, the Tribunal proceeded to incorporate Mr Short QC's closing submissions on an almost word-for-word basis. It is apparent that

approximately 75% of the Reasons, essentially everything from paragraph 29 of the Reasons onwards, has been taken from Mr Short QC's submissions with only a few changes, such as recasting counsel's submissions as findings of the Tribunal.

The Grounds of Appeal

12. There are six grounds of appeal. These are as follows:

a. Ground 1: The Tribunal erred in adopting the wrong comparator in determining whether there had been individual disadvantage as a result of the methodology used by the Respondent ("the Respondents' Methodology") to calculate pension;

b. Ground 2: The Tribunal wrongly distinguished the decision in **Schonheit v Stadt Frankfurt am Main** (C-4/02) ("**Schonheit**") which, the Claimant submits, supports her claim;

c. Ground 3: The Tribunal identified the wrong aim for the purposes of considering justification and failed to have regard to the Claimant's submissions in this regard;

d. Ground 4: The Tribunal misinterpreted Rule 49 of the Scheme Rules in that it failed to recognise that an early un-reduced pension was available (subject to the employer's consent to take early retirement) in the special circumstances of the Claimant's cohort;

e. Ground 5: The Tribunal misinterpreted sections 61 and 70 of the **Equality Act 2010** ("the 2010 Act") in concluding that the Claimant was not entitled to bring her claim under section 61;

f. Ground 6: The Tribunal further erred in law in that:

i. It wrongly found that the approach proposed by the Claimant would have breached the relevant Inland Revenue tax rules applicable at the time;

ii. The Tribunal took account of irrelevant considerations, in particular, the perceived generosity of the Scheme;

iii. The Tribunal wrongly found that the Claimant's methodology did not comply with the requirement under the Scheme Rules to take into account the proportion of hours worked by a part-time worker to that in the employer's standard working week;

iv. The Tribunal made a finding of fact as to the identity of the decision-maker that was not explained and which was contrary to the evidence;

v. The Reasons are not **Meek**-compliant given the extensive cutting-and-pasting of the Respondents' submissions and having regard to the delay in promulgating the Judgment.

The Meek point

13. Although the **Meek** ground of appeal is a sub-ground of the sixth ground of appeal, it assumed rather more prominence in the course of Ms Seymour's oral submissions: it is said that the Tribunal's decision cannot stand at all by reason of the wholesale adoption of the Respondents' submissions. It was submitted that this had led to the Tribunal analysing the Claimant's case entirely through the lens of the Respondents' submissions and to a failure to analyse and properly consider the Claimant's submissions. Ms Seymour invites me to take the approach taken by Bean J (as he then was) in the case of **English v Royal Mail Group Ltd & Warburton** UKEAT/0027/08, where the Tribunal below was said to have plagiarised the Respondent's submissions. There it was held that:

"4. The Tribunal's judgment is as close to being an exact copy of the Respondents' submissions as we have ever seen. Not a word of it is original except for the statement at the beginning and end that the unanimous judgment of the Tribunal was to dismiss the claim. The reasons in between, which extend over nearly 10 pages, simply reproduce word for word the Respondents' closing submissions … paragraph by paragraph, occasionally omitting matters of detail such as citations from documents. There are some grammatical changes, most frequently the change from "the Respondents submit" to "the Respondents submitted", and from time to time a word is left out, but no other amendments.

5. The Tribunal could just as well have reduced their judgment to a single sentence. That would have read:

> **"For the reasons given in the respondents' closing submissions dated 21st May 2007, which we accept and adopt in their entirety, the claim is dismissed."**

That would at least have made clear to the reader what they were doing. Instead they used Mr Campbell's material *verbatim* without acknowledging it. Mr English described that to us as plagiarism. We agree.

6. It is very common for courts or tribunals to reproduce in their judgments passages from a party's written argument. The document may conveniently set out … the law applicable to the case. Or there may be an uncontentious recital of the facts, or the history of the litigation itself. There is nothing objectionable in a court doing this. But it is a matter of degree: and particularly where the material is contentious it is important to distinguish findings from submissions.

…

11. By contrast with the way [in which] Mr Campbell's submissions were treated, Mr English's written submissions were not mentioned in the decision. By reading the Tribunal's judgment one would not even know that Mr English had made any written submissions; still less that he had raised points of substance on which the Tribunal should have adjudicated.

12. The Tribunal owed it to Mr English to deal specifically with at least the principal points made in his closing written submissions. Explaining to the loser why he has lost, in accordance with the principles of *Meek v City of Birmingham District Council* [1987] IRLR 250 and *English v Emery Reimbold and Strick Ltd* [2003] IRLR 710, involves telling him, unless it is entirely obvious, why at least his main points in argument have been rejected. … It is not necessary to deal with every point irrespective of its weight, particularly when the matters raised are very numerous. … the more closely the Tribunal adhered to the submissions of the respondents, the more necessary it was for them to deal specifically with the competing submissions of Mr English. We regret to say that by simply copying out one document and wholly ignoring the other they brought the case substantially below what Frankfurter J in *Fikes v Alabama* [1957] 352 US 191 called the "Plimsoll line of due process". Mr English has not had a fair trial and determination of his claims. In those circumstances it is inappropriate for us to go on to consider the arguments on the merits.

13. It follows that in our judgment the Tribunal's decision cannot stand. The appeal must be allowed and the case remitted to a differently constituted Employment Tribunal."

14. The question is whether this Court should take the same approach and short-circuit the analysis of the substantive arguments by simply declaring that the Judgment cannot stand. In my judgment that would not be an appropriate course to take in the circumstances of this case. The reasons for that are as follows:

a. This was a case in which the facts were very largely agreed. This is to be contrasted with the situation in **English** where the principal issues were

whether the employer had discriminated against the Claimant by extending his probationary period and whether he had been victimised. Those issues, although not set out in detail in that Judgment, would undoubtedly have involved numerous issues of fact which needed to be determined by the Tribunal. It would generally be unacceptable for a Tribunal to address such issues simply by reference to the submissions of one side. In the present case, there were only very limited issues of fact to be determined. As set out in the Claimant's skeleton argument submitted to the Tribunal, it was accepted that the factual disputes between the parties were limited and related largely to two issues, one of which did not, in the event, need to be determined at all. The remaining factual dispute related to the advice that was given to the Trustees when the Claimant first made her request for a maximum 2/3 pension. That issue of fact was addressed by the Tribunal (although the adequacy of that finding is also the subject of the sixth ground of appeal considered below). The remaining issues were largely ones of law. I do bear in mind that the question of whether situations are comparable (and therefore the identification of the appropriate comparator) for the purposes of determining whether there is less favourable treatment is a question of fact and degree: see **Hewage v Grampian Health Board** [2012] ICR 1054 at [22]. However, as will be apparent from the analysis under Ground 1 below, I do not consider that the Tribunal failed to explain its conclusion in relation to that question. In the circumstances of this case, the approach taken by the Tribunal in adopting the Respondents' submissions, unsatisfactory though it might be, did not, in my judgment, fatally undermine its decision;

b. The Tribunal in this case, unlike that in **English**, did acknowledge the "considerable assistance" it gained from submissions of both parties and documents provided setting out examples which had been produced by the Claimant at the Tribunal's request;

c. I have been provided with a helpful comparison document which highlights the changes made by the Tribunal in transposing Mr Short QC's submissions into its Judgment. Those changes are not extensive. But they do demonstrate that the Tribunal made some attempt to show that the conclusions reached were its own. It is also important to note that substantial parts of the transposed material contained worked examples of different categories of worker and the pensions that they stood to receive. It is not suggested that these examples were incorrect. The Tribunal clearly found them to be very helpful. Given the nature of the case and the need to understand how the pension provisions operated in practice, I do not consider it inappropriate for the Tribunal to set out these examples in the Judgment in precisely the form submitted to them;

d. The Judgment does explain why the Claimant lost. The Tribunal very clearly concluded that the appropriate comparator accrued pension at the same rate as the Claimant, and that she was not, in their view, being paid less by way of pension entitlement than a full-time worker. Whether or not that conclusion was correct as a matter of law is considered below. However, insofar as it is said that the decision fails to explain why the Claimant lost, I disagree. It is right to note that certain aspects of the Claimant's submissions appear not to have been addressed fully or at all by the Tribunal. The significance of those failures is considered below under the grounds of appeal in which those

failures are raised. In my judgment, however, those failures were not such as to render the Judgment, when taken as a whole, non-**Meek**-compliant.

15. As to delay, the Claimant fairly accepts that the six-month delay does not of itself provide a reason for setting aside the Judgment. As stated in **Kwamin v Abbey National plc** [2004] ICR 841:

> **"… we do not agree that there is any particular period of delay which creates a presumption [that a decision should be set aside]. Each case must depend upon its own facts, and the unsafeness of the judgment must be considered against the background of the delay …" (Per Burton J at 849C)**

16. This is not a case where there is any concern that the delay had an adverse effect on the evidence or issues of fact. As I have already said this was not a fact-sensitive case. It has not been submitted that, for example, there were critical aspects of the evidence which were not referred to and which could raise the inference that the Tribunal had forgotten important matters. Instead, the issues that the Tribunal had determined were all set out in extensive written submissions to which the Tribunal, very obviously, had access when writing its Judgment.

17. Accordingly, I do not set aside this Judgment on the basis that it is not **Meek**-compliant. I turn now to consider the remaining grounds of appeal which attack the substance of the Judgment.

Ground 1 - Did the Tribunal err in its choice of comparator?

18. In order to ascertain whether the Tribunal erred in its choice of comparator, it is necessary to set out how the Scheme operated in respect of full-time and part-time workers. As is normal under such schemes, there are different benefits depending on whether a worker

leaves the scheme on the Normal Pension Date ("NPD"), leaves the scheme early before reaching the NPD, or takes early retirement before reaching the NPD. The Rules of the Scheme dealing with each of these situations provided as follows:

> **"Benefits on Retirement**
>
> **47. Normal Retirement Pension**
>
> **47.1. An Active Member, who ceases to be in Service at Normal Pension Date, shall be entitled to receive an annual pension from his Normal Pension Date at the rate specified in Rule 47.2.**
>
> **47.2. Subject to Rule 47.3 the rate shall be:**
>
> **(a) in respect of a Member who joined the Scheme before 17 March 1987;**
>
> **(i) where his Pensionable Service equals or exceeds fifteen years, two-thirds of his Final Pensionable Salary;**
>
> **(ii) where his Pensionable Service is less than fifteen years, one-twelfth of one-thirtieth of Final Pensionable Salary for each month of Pensionable Service;**
>
> **(b) in respect of a Member who joined the Scheme after 16 March 1987 and who had accepted employment with the Employer before 1 October 1994:**
>
> **(i) where his Pensionable Service equals or exceeds twenty years, two-thirds of his Final Pensionable Salary;**
>
> **(ii) where his Pensionable Service is less than twenty years, one-twelfth of one-thirtieth of Final Pensionable Salary for each month of Pensionable Service;**
>
> **(c) in respect of a Member who accepted employment with the Employer on or after 1 October 1994, one-twelfth of one-sixtieth of Final Pensionable Salary for each month of Pensionable Service.**
>
> **47.3. The amount of pension to be payable from the Scheme in respect of part-time Service of a Member shall be determined by the Trustees with the advice of the Actuary taking into account the proportion which the number of hours of such Member's Service in any week bears to the number of hours in the Employer's standard working week. If the Member's Service includes full-time and part-time Service the amount of pension shall be subject to such adjustments as determined by the Trustees with the advice of the Actuary."**

19. It can be seen from Rule 47.3 above that there is no specified methodology for calculating the pension on NPD of a worker with mixed full-time and part-time service. The Rules merely provide that the amount of pension shall be subject to an adjustment to be determined by the Trustees upon the advice of the Actuary. The particular methodology applied by the Respondents (in accordance with actuarial advice) was set out in the Respondents' grounds of resistance. It provides as follows:

"FTE PS / PS x 2/3 x FTE FPS

Where

- PS is the member's actual period of Pensionable Service until [NPD]

- FTE PS is the Full Time Equivalent ("FTE") Pensionable Service until NPD;

- FPS is the member's actual Final Pensionable Salary; and

- FTE FPS is the Full Time Equivalent Final Pensionable Salary."

20. Applying this formula (referred to herein as the "Respondents' Methodology" or the "N/NS formula") to the Claimant's case produces the following results:

21/27 x 2/3 x FTE Pensionable Salary.

21. In the case of early leavers, the Rules provide as follows:

45. <u>Calculation of Short Service Benefit</u>

45.1. … a deferred pension will be payable from his Normal Pension Date calculated under Rule 45.2 or Rule 45.3.

45.2. In respect of a Member whose Pensionable Service would, had he remained an Active Member until Normal Pension Date, have entitled him to a pension calculated under Rule 47.2(a)(i) or 47.2(b)(i) the amount of pension will be calculated using the following formula:

<u>N/NS x P</u>

Where:

N is the Member's Pensionable Service at the date his Active Membership ends.

NS is the Pensionable Service the Member would have completed had he remained an Active Member until his Normal Pension Date.

P is the pension calculated in accordance with Rule 47 but with reference to Final Pensionable Salary at the date his Active Membership ends.

45.3. In respect of a Member to whom Rule 45.2 does not apply the amount of pension will be calculated under Rule 47 (normal retirement) but by reference to his Final Pensionable Salary and Pensionable Service at the date his Active Membership ends.

…

45.5. A deferred pension under Rule 45.1 may be payable before Normal Pension Date in the circumstances and on the terms set out in Rule 48.1 (incapacity) and Rule 49.1 (early retirement)."

22. The early retirement provisions provide as follows:

"49.1. A Member on leaving Service or retiring before Normal Pension Date may with the consent of the Trustees elect to start receiving his pension at any time after he reaches his

Normal Minimum Pension Age provided that he has completed at least 5 years' Pensionable Service.

49.2. The annual rate of the pension mentioned in Rule 49.1 shall be calculated under Rule 47 (normal retirement pension) but by reference to his Final Pensionable Salary and Pensionable Service at the date his Active Membership ends and shall be reduced on such basis as the Trustees, having regard to the advice of the Actuary, determine to be reasonable to take account of its early payment."

23. In describing the nature of the Scheme, the Tribunal found as follows:

"29. For those who joined the scheme at about the same time as the Claimant (i.e. prior to October 1994), the scheme provided benefits that were (i) extremely generous; and (ii) rather unorthodox. The benefits were extremely generous in that:

29.1. they allowed people to accrue a 2/3rds pension in a very short period of time;

29.2. they allowed people who joined the scheme prior to 17 August 1988 to retire at age 60 (i.e. Normal Pension Age was 60).

30. The benefits were unorthodox in that members did not all accrue a right to the same increment of pension, for example 1/30th or 1/40th or 1/60th of final salary, for each year of service. The Respondents accepted that the Trustees' methodology would not be appropriate if there was such uniform or linear accrual.

31. Instead there was "non-uniform accrual":

31.1. members who worked full-time until they retired at Normal Pension Age of 60 after 20 <u>or more</u> years' pensionable service received the pension equivalent to 2/3rds of their final salary; but

31.2. as a result, the actual rate of accrual depended upon the number of years between joining the Scheme and age 60. Thus someone who joined the Scheme at age 40 could work for 20 years and their pension would accrue at 1/30th for each year worked; and someone who joined at age 30 could work for 30 years and her pension would accrue at 1/45th each year worked.

32. There was much discussion during the hearing about whether there was a cap of 20 years. The Tribunal accepted the Respondents' submission that there was no such "cap". Although there was a threshold or minimum of 20 years for the 2/3^{rds} pension, this was not a "cap". For those members who joined the scheme before 1 October 1994 (when a traditional uniform accrual rate of 1/60^{ths} was introduced) their rate of accrual was fixed when they joined the scheme: every year was given equal weight under the N/NS formula.

…

34. Members who did not work full-time until retiring at age 60 (either because they worked full-time but left before age 60 or because they worked part-time[)], received a pension that was pro-rated down."

24. As to the identification of comparator, the Tribunal found as follows.

"<u>Issue 4: Comparators: Is it necessary to identify a comparator in a claim under section 19? If so, what are the characteristics of such a comparator?</u>

89. It was necessary to identify comparators (who may be hypothetical comparators) in order to establish a comparative group disadvantage under section 19(2)(b). This is the essence of an indirect discrimination claim.

90. There must be no material difference between the circumstances of the Claimant and the comparator, see section 23(1) of the 2010 Act. In this scheme, the accrual rate of pension

depended upon the period between joining the scheme and age 60. The (hypothetical) full-time male comparator must be taken to join the Scheme on the same date and at the same age as the Claimant, otherwise there was a material difference in the individual's accrual rate."

25. It was this choice of comparator, namely a male who joined on the same date and at the same age as the Claimant, that was disputed.

26. It was common ground that the comparator had to be a person who had done the same amount of FTE work as the Claimant, i.e. approximately 21 years' FTE. The question then was, "What other features or characteristics should the comparator have?" The Tribunal, accepting the Respondents' case, concluded that the comparator should be somebody who joined at the same age and on the same date as the Claimant. It is common ground that such a comparator would have received less by way of pension than the Claimant. It was on that basis that the Tribunal went on to conclude that there was no disadvantage caused to the Claimant.

27. The Claimant submits that that choice of comparator was wrong and an error of law because he was in a materially different position to the Claimant. That difference is that the comparator, having worked for 21 years on a full-time basis, would necessarily have left the Scheme *before* reaching NPD, whereas the Claimant retired upon reaching NPD[1]. As the Rules treat persons differently depending on the NPD date, so says the Claimant, that comparator cannot be appropriate. The Claimant submits that there can be no perfect comparator because it is inherent in the fact of part-time working that a part-time worker's FTE service would not start and finish at the same time as someone working full-time; the part-time worker will necessarily have worked over a longer period of time to accumulate the same number of years FTE service as a full-time worker. In the circumstances, submits Ms Seymour, the best one can do is to find a "best fit comparator"; in the circumstances of this case given the importance of

[1] The Claimant in fact left very shortly before NPD, but did so with the consent of the Respondents and was entitled to an unreduced pension at that stage. However, this is not material to the choice of comparator.

A the NPD date that "best fit" leads to a comparator who has 21 years' FTE and an end-date which coincides with his NPD. In the alternative, it is submitted that the Claimant's proposed comparator is logical, reasonable and properly probative of the discrimination alleged, and should therefore have been adjudicated upon by the Tribunal.

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28. The Respondents submit that to choose a comparator who left upon reaching NPD would fail to give effect to a crucial feature of the Scheme which is that the accrual rate depended on the age that one joins the Scheme. Mr Short QC says that it is known the moment somebody joins at the age of 20 that she would have to work 40 years to get a 2/3 pension. That pension is earned at the rate of approximately 1/60 per annum. By contrast, somebody who joined the Scheme at the age of 40 would be entitled to a 2/3 pension upon completion of only 20 years' service. That person's accrual rate would be twice as fast at 1/30 per annum. The Respondents submit that the Claimant's analysis and her suggested comparator wholly ignore this feature of the Scheme, and that it is vital in order for there to be a fair comparison to choose a comparator who starts on the same date.

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29. In my judgment, the Respondents' submissions on this issue are to be preferred. I say that for the following reasons:

F

a. Whilst Ms Seymour is correct that there cannot be a comparator with the same start and end-dates as the Claimant, the particular nature of the Scheme, whereby accrual rates will differ according to the age at which one commences making contributions, means that a comparator with the same start date is the more logical choice;

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b. The start date will determine the Rules that apply to the worker. Thus, the level of benefits, even at NPD, differ according to whether a person started

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before 17 March 1987, between 17 March 1987 and 1 October 1994, or after 1 October 1994. It would not be sensible to select a comparator whose start date was different if that would mean that a different set of Rules were to apply;

c. The definition of NPD under the Scheme provides a further reason why the start-date is important. That provides that a member whose service commenced between 15 August 1988 and 1 October 1994 would have to work until his 62nd birthday before reaching NPD. Whilst this was not an aspect of the Rules addressed specifically by the Tribunal, it does underline its conclusions as to the need to have a comparator with the same start date as the Claimant;

d. The difficulty with the Claimant's approach, which effectively involves working backwards from the NPD until you reach the required 20 or more years' service, is that it ignores the fact that accrual rates differ according to the date when membership commenced. If there is to be equivalence with the Claimant's suggested comparator it would mean that every part-time worker with 20 or more years' FTE service would get the maximum pension irrespective of when they started. That would appear to put them in a materially more advantageous position than other workers whose salaries were higher than that of the Claimant and who had made greater contributions to the Scheme or who had made contributions over a longer period;

e. I do not agree that the choice of comparator in this case is a matter of selecting the 'best of a bad bunch' as it were. The nature of the Scheme, and in particular, the fact that accrual rates are higher for later starters, means that, at the very least, the comparator should have the same start date. Anything

else would mean that there will be a material difference between the circumstances of the Claimant and her comparator;

f. I do not see anything wrong in what the Tribunal said at paragraph 90 of its Reasons in explaining its choice of comparator. The Tribunal refers to the critical feature of the Scheme, namely that the accrual rate "depended upon the period between joining the scheme and age 60". Once that feature was identified, correctly in my view, it follows that the comparator would have to have joined the Scheme at the same time and age as the Claimant;

g. I do not agree with the Claimant's submission that retirement at the common NPD is essential for an appropriate comparison. The fact that a comparator with 21 years' service would have had to choose to leave the Scheme before NPD does not render that person inappropriate as a comparator. A person leaving the Scheme early does not thereby lose accrued benefits up to the point of leaving or suffer some penalty by way of a reduced pension. His pension (which would be deferred) is lower than it would be had he stayed to NPD simply because he would not have earned as many years. The issue is whether the rate at which pension was accrued up to that point was unfairly advantageous to the comparator. That rate of accrual can be readily compared with that of the Claimant notwithstanding the fact that the comparator would necessarily have left before reaching NPD.

h. The Tribunal also referred in its Reasons to the evidence of Mr Agius, the Scheme Actuary:

> **"Mr Agius was correct to say that the appropriate comparison should be between, say, the Claimant as a full-time worker and the Claimant as a part-time worker. Such a comparison (which coincidentally was the one envisaged by Regulation 3 of the 2000 Regulations) isolated the impact of working part-time rather than full-time (which was the basis of this case) as all other variables remained the same. If two variables were changed at the same time (i.e. full-time to part-time as well as starting at age 32 to starting at age 40) it was impossible to identify which of them had caused**

> **any disadvantage. The comparison had to be made by altering one feature at a time (i.e. changing full-time to part-time, or changing the start date, not both) to identify the impact of feature."**

Ms Seymour argued that the Respondents' choice of comparator also involved a change of more than one variable because it involved one person working to NPD and the other not doing so. However, the NPD is not a variable in the same sense that the other factors may be said to be variable; the NPD is a fixed element of the Scheme and remains so even in the case of early leavers. There is no material difference to the rate of accrual introduced by reason of the fact that the person leaves early. However, even if the Respondents' comparator worked to NPD, and then had his pension pro-rated down to 21 years' service so as to be comparable to the Claimant, it would still result in there not being any disadvantage in the accrual rate overall.

i. I was referred in the course of argument to the case of **Kalu v Brighton & Sussex University Hospitals NHS Trust** (UKEAT/0609/12/BA), where it was held that the purpose of making the comparison needs to be understood in order for the comparator properly to be identified. The purpose of making the comparison in this case is to determine whether the Claimant was forced to accrue pension at a reduced rate by reason of the application of the N/NS formula where the member has some part-time employment. Once that is understood, it becomes clear that, in a scheme where accrual rates depend on the date of starting and age, those factors must be common to both the comparator and the Claimant.

30. As to the fall-back position, namely that the Tribunal should have adjudicated on the Claimant's comparator nonetheless because it was logical, reasonable and probative of the issue, it is my view that Tribunal was not obliged to take that course. I was referred to the case

of **Pike v Somerset Council** [2008] Pens LR 403, which dealt with the question of the appropriate choice of the pool for comparison in a discrimination case. In that case HHJ McMullen said:

> **"23. … Yet it is the Claimant who has to put forward the pool for comparison and she is entitled to have that claim adjudicated. If she proves on the balance of probability that that pool is logically correct the fact that another analysis equally logical shows that she is not correct should not defeat her claim."**

31. In my judgment, that extract does not mean (and Ms Seymour did not submit) that the Tribunal is bound to adjudicate on *any* comparator put forward by the Claimant. However, it is said that where a comparator appears to be logically probative of the question then the Tribunal should adjudicate on the basis of that comparator. For reasons already set out above, I do not consider that the Claimant's chosen comparator *was* logically probative of the issue to be determined. But in any case, where the Tribunal has fixed upon a particular pool, or, as in this case, a particular comparator, it cannot be said to have erred in law if that pool or comparator is suitable for assessing whether there is discrimination. That is so even if there might be another pool or comparator that could also have been selected: see **Grundy v British Airways plc** [2008] IRLR 74 at [27] and [31], per Sedley LJ.

32. For these reasons, ground 1 of this appeal must fail. The Tribunal did not err in its choice of comparator. The Tribunal went on to find that this comparator was not in a more advantageous position as regards pension than the Claimant. There is no separate appeal against that finding. The Respondents submit that the consequence of this is that the appeal must fail overall. I agree. If there is no disadvantage to the Claimant then none of the claims of discrimination under the various heads of claim can succeed. However, for completeness and out of deference to the detailed and helpful submissions received from both counsel, I shall deal with the other grounds of appeal below.

Ground 2 - Distinguishing *Schonheit*

33. Advocate General Geelhoed described the operation of the relevant occupational pension scheme in **Schonheit** as follows:

> **AG 60. The following example will serve as an illustration. Let us assume that an official has worked for 30 years on a part-time basis. His notional pension (as if he had worked full-time for 30 years) is then calculated as follows: 35% for the first 10 years; 30% (15×2%) for the 11th to the 25th year; and 5% (5×1%) for the 26th to the 30th year, making a total of 70%.**
>
> **AG 61. If the pension abatement is now applied that gives a pension of 35% (70% times 15/30."**

34. The Advocate General's worked example demonstrates two things. First, that the scheme is linear for certain periods with stepped changes in the rate of accrual after a set number of years has passed. Second, that the scheme is frontloaded in that there is a much higher rate of accrual in the early years. That feature meant that part-time workers could gain an unfair advantage over full-time workers, and, in order to address that anomaly, the authority applied pension abatement to part-time workers, as shown in the example. The difficulty with the abatement, which the ECJ found unlawful, was that it was disproportionate to periods of part-time work and could not be objectively justified. The Claimant contended before the Tribunal that the Scheme in the present case had a similar effect and was similarly unlawful.

35. The Tribunal described the scheme in **Schonheit** as follows:

> **"85.2.6. As noted above, *Schonheit* was not dealing with the type of scheme at issue in this case (where the accrual rate is different for those who started at 30 rather than 40). Instead, it was dealing with a linear scheme with annual increments of 1.875% of salary (about 1/53rds) for each year of service. The unjustified reduction was an additional reduction made as a result of transitional provisions from a complex earlier scheme (which had staged, but still constant, rates of accrual in which the pension was always related to the amount of work done: so that someone who worked FT for 30 years would accrue less pension than someone who worked FT for 40 years but more pension than someone who worked FT for 20 years)."**

36. Ms Seymour's straightforward submission here is that the Tribunal was wrong to distinguish **Schonheit** and should have recognised that the scheme there was similar to the present one. It was submitted, in particular, that the Tribunal erred in describing the scheme in

Schonheit as a linear scheme, that being one where pension is accrued by all members at a constant rate e.g. 1/30 or 1/60.

37. In my judgment, the Tribunal did not err in distinguishing **Schonheit**. The Tribunal did not simply refer to the **Schonheit** scheme as "linear". Reading paragraph 85.2.6 in its entirety, and in particular the part in parenthesis, shows that the Tribunal had well in mind the staged accrual rates under that scheme. It was not incorrect to describe the scheme as "linear" because during each of those stages the accrual rates were constant. Moreover, the accrual rates were the same irrespective of when you started; that is to say all employees under the scheme in **Schonheit** would have accrued pension at the highest rate for the first 10 years of service. By contrast the Scheme in the present case was such that the accrual rate differed according to age as at commencement. Whether or not that is correctly described as "non-linear", it is certainly not the same, in my judgment, as the scheme in **Schonheit**.

Ground 3 - Justification

38. The Claimant's principal complaint under this ground is that the Tribunal failed to analyse the Respondents' case on justification properly in that it did not scrutinise the actual justification relied upon at the time and instead focused only on the *ex post facto* justification put forward at the hearing. In support of the proposition that the Tribunal is bound to inquire as to the actual justification for the impugned measure, reliance is placed on the following passage in **Seldon v Clarkson Wright & Jakes** [2012] ICR 716:

> **"60. There is in fact no hint in the Luxembourg cases that the objective pursued has to be that which was in the minds of those who adopted the method in the first place. Indeed, the national court asked that very question in the *Peterson* case [2010] All ER (EC) 961. The answer given, at para 42, was that it was for the national court "to seek out the reason for *maintaining* the measure in question and thus to identify the objective which it pursues" (emphasis supplied). So it would seem that, while it has to be the actual objective, this may be an ex post facto rationalisation." (Per Baroness Hale of Richmond)**

39. It is not entirely clear from this passage whether the Tribunal is required to scrutinise the objective pursued at the time the measure was introduced, or just the *ex post facto* rationalisation of it. Reading the passage as a whole, and having regard, in particular, to the comment that the *Luxembourg* cases do not require the objective pursued to be that which was in the mind of those who adopted the method in the first place, the better view, in my judgment, is that the reference to "actual objective" is the one relied upon, even if that is an *ex post facto* rationalisation. This view appears to be supported by subsequent cases. In **Ministry of Justice v O'Brien** [2013] ICR 499, the Supreme Court said as follows:

> **"47. The Ministry of Justice face the difficulty that they have not until now articulated a justification for their policy. It is clear from the history that when the 2000 Regulations were made the Lord Chancellor took the view that judges were not "workers" for this purpose, a view which was maintained until this court rejected it following the review hearing of this case in July 2012. This does not preclude the ministry from now advancing a justification for maintaining the policy: see *Seldon v Clarkson Wright & Jakes (Secretary of State for Business, Innovation and Skills intervening)* [2012] ICR 716 … But, once again, this does not preclude the ministry from now advancing a different and better justification …" (Per Baroness Hale of Richmond)**
>
> **"76. … Just as it will not be sufficient for the partners simply to assert that their aims were designed to promote the social policy aims that the article has identified, it does not matter if it said nothing about this at the time or if they did not apply their minds to the issue at all." (Per Lord Hope of Craighead DPSC)**

40. Whilst it seems obvious that a justification that is fully evidenced and which was articulated at the time the measure was implemented would garner greater respect than one put forward a long time after implementation, it is clear from the passages above that an employer is not precluded from relying upon a later justification. Insofar as the employer and/or Trustees did so in the present case, there was no error of law in the Tribunal focusing on that justification.

41. There is a further complaint under this ground which is that the Tribunal failed to address the Claimant's arguments on justification or explain why they were rejected. However, the real task for the Tribunal was to consider the Respondents' justification, if it was required, and not the suggested justification that the Claimant considers that the Respondents truly had in

A mind, unless of course, the Tribunal had concluded that the Claimant's suggestion was correct. In the present case, not only was there a finding that there was no disadvantage to part-time workers (thereby obviating the need for justification), the Tribunal clearly accepted, as a matter of fact, that the justification put forward by the Respondents at the hearing was the actual justification. The Tribunal proceeded to analyse that justification in paragraphs 85.2 and 86 of the Reasons and found that the Trustees' methodology fulfilled the objective test of being a proportionate means of achieving the legitimate aim set out at paragraph 85.1 of the Reasons, namely to provide:

> **"… a generous accrual rate to allow those joining at a late stage in their working lives to reach comfortable level of pension but where the maximum benefit was payable only if the member remained in service until their retirement age, so that they were encouraged to remain in service until that retirement age."**

Accordingly, I do not find any error in the Tribunal's approach to justification.

Ground 4 - Misinterpreting Rule 49 of the Scheme Rules

42. The Claimant's argument here is that Rule 49 of the Rules operated so as to confer on full-time workers in her cohort the option (subject to the employer's consent) of leaving before NPD but without any reduction in respect of early payment. (Those in the Claimant's cohort were told that the normal reduction in the case of early retirement would not be applied.) That would mean that the comparator selected by the Tribunal, i.e. a full-time worker of the same age, and with the same start date as the Claimant, could have obtained an unreduced pension, whereas the Claimant, by dint of being a part-time worker, would have had her pension reduced by the N/NS formula.

43. I consider that the Claimant's argument is flawed for a number of reasons, some of which were addressed by the Tribunal at paragraphs 35 to 39 of the Reasons (it is not necessary to set those paragraphs out in this Judgment):

a. Rule 49 deals with early retirement and not the situation where someone chooses to leave the Scheme early (with a pension pro-rated to their length of pensionable service up to that point) which is dealt with by Rule 45. The interrelationship between the two provisions is not the subject of precise drafting. However, it is tolerably clear that the potential for an unreduced pension (if there is consent for early retirement) was not intended to override the early leaver provisions under Rule 45. If that were not the case, then those early leaver provisions would be rendered redundant;

b. The Claimant's argument appears to treat both early leavers and early retirees as covered by the same Rule, whereas their treatment is clearly intended to be separate. Indeed, it would not make commercial sense to confer on an early leaver a pension that is not the subject of a proportionate reduction given that he would not have earned the higher amount by working the full amount of years to NPD;

c. The absence of commerciality in the suggestion is underlined by the fact that, as the Tribunal noted, there was no evidence of the Trustees ever having consented to someone who started at age 30 but left at age 50 taking a full 2/3 pension;

d. There was a Deed of Amendment dated 15 February 2012, which clarified the operation of the Rules in this regard. Whilst that Deed cannot be used to construe the earlier Rules which the Deed sought to amend, it is supportive of the intended operation of the Rules. Bearing in mind that a pension scheme

should be "*construed so to give a reasonable and practical effect to the scheme*", and that "*technicality is to be avoided*" (**British Airways Pension Trustees Ltd v British Airways plc** [2002] Pens LR 247 at [28]), it seems to me that the Respondents' construction, which avoids the impractical and unreasonable result that a person gets a full pension without having earned it, should be preferred;

e. In any case, the Claimant's construction is irrelevant to her personal situation since the Deed of Amendment was in force by the time of her retirement. It is the treatment as at that date that is relevant to her claim. The Claimant's construction, even if correct, could only theoretically have benefited the hypothetical comparator who started on the same day and at the same age as her and who reached 21 years' service before the Deed of Amendment took effect in 2012. However, that comparator would have accrued pension at the same rate as the Claimant and she was not at a disadvantage in terms of accrual. The potential disadvantage would only have arisen if the Trustees would have consented to him receiving an unreduced pension notwithstanding the fact that he had not earned it. Such consent was extremely unlikely. As such, no realistic disadvantage is established.

Ground 5 - Misinterpreting sections 61 and 70 of the *Equality Act 2010*

44. The Claimant's principal complaints of indirect discrimination were pursued under s.19 (indirect discrimination) and ss.65 to 67 (equal pay) of the **2010 Act**. The Claimant's argument is that she had an alternative cause of action under s.61 (non-discrimination rule) of the **2010 Act**. Section 61, so far as relevant, provides:

> **"(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 discrimination 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.

…

(10) A non-discrimination rule does not have effect in relation to an occupational pension scheme in so far as an equality rule has effect in relation to it (or would have effect in relation to it but for Part 2 of Schedule 7)." (Emphasis added).

45. It is argued that as section 61(1) only excludes the non-discrimination rule where a sex equality rule *has* effect in relation to an occupational scheme (the provisions of Part 2 of Schedule 7 not being relevant for present purposes), then where an equality rule is shown not have that effect, the Claimant can bring a claim under s.61(1) in the alternative. The Claimant further contends that this alternative is not purely academic because there are additional hurdles for a claimant under the equal pay route than there are in seeking to enforce the non-discrimination rule.

46. I do not accept the Claimant's analysis of these provisions of the **2010 Act**. These provisions are clearly designed to ensure that claims relating to the terms of an occupational pension scheme are to be pursued under sections 65 to 67 of the **2010 Act**. These provisions mirror the division between claims of sex discrimination relating to the terms of employment, and other acts of sex discrimination, that existed when the **Equal Pay Act 1970** was still in force, and which was continued under the **2010 Act**. Far from s.61(10) of the **2010 Act** providing an alternative claim under s.61(1), its operation seeks to ensure that any claims involving the rules of an occupational pension scheme (such as this claim) are to be pursued under ss.65 to 67 by determining whether a sex equality rule has effect. If it is shown that it does not, then any further claim under s.61(1) would involve precisely the same issues and

would amount to a "second bite at the cherry". It seems unlikely that Parliament would have intended these provisions to have that effect.

47. In any case, even if it is shown that a sex equality rule does not have the discriminatory effect alleged, then a further claim under s.61(1) would appear to be entirely academic. This is because the Respondent would have succeeded in showing (as they did in this case) that there was no disadvantage to part-time workers by reason of the rule in question and/or that the rule was objectively justified. Ms Seymour suggested that the alternative would not be academic since a claim under s.61(1) of the **2010 Act** would not involve the same hurdles as a claim under ss.65 to 67 and that such a claim does not require an actual comparator. However, given that the essential ingredient of any claim under s.61(1) would be to establish that there was discrimination within the meaning of the **2010 Act**, the likelihood of a claimant succeeding under that provision, having failed under ss. 65 to 67, seems vanishingly small.

48. Accordingly, I find that the Tribunal did not err in law when it concluded that any claim under s.61(1) of the **2010 Act** would amount to a duplication of matters that were "plainly intended" to be dealt with under s.67.

Ground 6 - Other Errors

(i) Was the Tribunal correct to find that the Claimant's methodology would result in a breach of the tax rules which applied at the time?

49. The relevant passage in the Tribunal's Reasons provides:

> **"45. The Tribunal considered that there would be nothing fair or equitable about that outcome. In fact, given that this approach could lead to someone who had always been a part-time worker receiving an annual pension that was more than 2/3rds of their actual salary (and even, potentially, in excess of 100% of the actual salary), such an approach would have been in breach of the tax rules that applied prior to April 2006: it would not have been appropriate or equitable to treat those who had some full-time service, such as the Claimant, more favourably than those who had always worked part time. Although that tax regime ceased to apply from A-day in 2006, it was not appropriate to relax the rules to make this pension even more**

> **generous, given that benefits had been made very much less generous for those who joined in or after October 1994 (who accrued annual increments of 1/60th final salary), and joiners after 2002 did not have any final salary benefits at all." (Emphasis added)**

50. The Claimant submits that her submissions before the Tribunal were focused on the position of workers moving from full-time to part-time service and that the relevant tax rules allowed for workers with some part-time service to receive a pension entitlement of up to 2/3 of their FTE pensionable salary. In light of those submissions, the Claimant argued that the Tribunal was incorrect to reach the conclusion it did.

51. However, it is quite clear from the passage above that the Tribunal, in stating that some part-time workers could end up with an annual pension that was in breach of the rules, was dealing with the position of those who had *always* worked part-time. In that context, the Tribunal was entitled, in my judgment, to find that it would not have been appropriate or equitable to treat someone who moved from full-time to part-time service more favourably than someone who had always been part-time. I therefore find that there was no error here.

(ii) Did the Tribunal take account of irrelevant considerations?

52. It is said that the Tribunal's repeated references to the generosity of the Scheme were irrelevant in that it is no defence to an allegation of discrimination that the benefits received are more than those that might be received under a different Scheme. I see no error of law here at all. The Scheme was unusual in that it enabled employees who may have started with the MDU at a later stage in their life to build up a full pension very quickly. That can fairly be described as "generous", but that characteristic is also relevant to the nature of the Scheme and its operation. In any case, there is nothing in the Reasons to suggest that the Tribunal allowed the generosity of the Scheme to cloud or obscure its analysis of whether the Scheme had any discriminatory effect.

(iii) Did the Tribunal wrongly find in paragraph 69.6 of the Reasons that the Claimant's Methodology does not take account of the points set out in that paragraph?

53. Paragraph 69.6 of the Reasons provides:

> **"69.6. The Trustees' methodology was more compatible with the wording of Rule 47.3, which required the determination of the amount of the pension "to take into account the proportion which the number of hours of such Member's (part-time) Service in any week bears to the number of hours in the Employer's standard working week." The Trustees' methodology plainly did this: in the Claimant's case the proportion was, on average, 4/5. The Claimant's methodology did not so obviously take this proportion into account."**

54. The Claimant argues that that conclusion was wrong and that her methodology was in accordance with the provisions of Rule 47.3. In my judgment, this ground of appeal does not raise any issue of law. According to the Respondents' calculations, which the Tribunal accepted, the Claimant's methodology would have resulted in her obtaining 100% of the pension that she would have earned had she remained full-time notwithstanding the fact that she had only worked on a 4/5 (or 80%) basis over that period. In those circumstances, I do not see any error of law in the Tribunal's conclusion that her methodology did not so obviously take that proportion into account.

(iv) Was the Tribunal wrong to find that the decision was made by the Trustees?

55. The relevant part of the Reasons provides:

> **"<u>Issues 21 and 23: (21) By whom was any discretion exercised? (23) Was either respondent acting on behalf of, or knowingly aiding etc., the other?</u>**
>
> **87. The Tribunal found that the discretion was exercised by the Trustees on their own account."**

56. It was submitted that, in respect of this particular issue of fact, which was one of the few to be decided, there was evidence in support of the Claimant's contention that the decision was made by or with the employer. The relevance of the issue, according to the Claimant, is that the employer cannot avoid obligations incumbent on him in setting up an occupational pension

A Scheme by setting up a trust: See **Coloroll Pension Trustees Ltd v Russell and Others** [1995] ICR 179 ECJ at [21].

B 57. It is right to say that the Reasons do not show whether the evidence on this issue was properly taken into account, or how it was weighed up by the Tribunal, in reaching its conclusion. Paragraph 87 of the Reasons was, on any view, an inadequate analysis of this factual issue. That said, the issue must be viewed in context. It was, at best, a minor issue C amongst a vast range of issues which the Tribunal had to consider; minor because there was never any suggestion in this case that the Claimant could not pursue a claim against the Trustees. As such, the issue of who took the decision would appear to have very little to do D with the substance of the Judgment. It is also relevant to note that in an earlier section of the Reasons, the Tribunal does refer to the facts that the *Trustees* had rejected the Claimant's complaint. That was one of the agreed facts. In that context, it is perhaps not all that surprising E that the Tribunal saw fit to dispose of the issue with, as the Claimant put it, a "one-liner". Had this issue involved a dispute of fact that was central to the claim, then of course it would have been incumbent upon the Tribunal to deal with it in much more detail. More fundamentally, the only legal challenge here must be one of perversity. Given the background of the agreed facts, F that challenge appears to me to be hopeless, whatever criticism might be made of the Tribunal's approach to the evidence.

G **Conclusion**

58. For the reasons set out above, and notwithstanding Ms Seymour's powerful submissions, none of the grounds of appeal succeed. The appeal is dismissed.

H