EMPLOYMENT TRIBUNALS

Claimant: Mr C Heskett

Respondent: Secretary of State for Justice

Heard at: London South (Ashford)
On: 17 & 18 July 2017

Before: Employment Judge John Crosfill & members
Mrs R Serpis
Mr D Clay

Representation

Claimant: Mr Gordon Menzies of Counsel

Respondent: Ms Claire Darwin of Counsel

RESERVED JUDGMENT

1. The Claimant's claim of indirect discrimination because of age brought pursuant to Sections 19 and 39 of the Equality Act 2010 are dismissed.

REASONS

Introduction

1. The Claimant works for the Respondent as a probation officer. By his claim form, presented to the Employment Tribunal on 16 February 2016, the Claimant alleged that the Respondent's pay progression policy was indirectly discriminatory because of age contrary to sections 19 and 39 of the Equality Act 2010. The Respondent denied that there was any unlawful discrimination.

The proceedings and issues to be determined

2. On 14 April 2014 a preliminary hearing took place before Employment Judge Kurrein and he ordered the Claimant to provide further and better particulars of his claim in particular setting out how his claim was to be advanced. In compliance with that order the Claimant provided further and better particulars

in which he stated that the "policy, criterion or practice" that placed persons younger than 50 years old at a particular disadvantage when compared to those over 50 was:

2.1. *"The change in the Respondent's pay progression policy in April 2011 which changed the annual pay band increase from 3 points to 1 point; and/or*

2.2. *Pay is primarily based on length of service and/or experience and/or loyalty"*

3. There was a further preliminary hearing on 9 August 2016 which had been listed to consider whether the claim had been presented in time and if so whether the Claimant should be ordered to pay a deposit as a condition of being permitted to pursue his claim. The Respondent contended that the claim had little reasonable prospects of success. That hearing was conducted by Employment Judge Self who held that the claim had been presented in time and that it was not appropriate to order a deposit.

4. A final preliminary hearing, again conducted by Employment Judge Kurrein, took place on 11 January 2017. He made directions for the final hearing. He recorded the issues that had been agreed by the parties as the issues to be determined by the tribunal as follows:

"*Age Discrimination*

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

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

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

3.2 pay is based solely on length of service?

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

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

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

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

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

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

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

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

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

Primary findings of fact

Generally

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

6. The National Offenders Management Service ("NOMS") for England and Wales has responsibility for the supervision of offenders in the community and

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

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

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

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

10. NOMS is the product of a number of reorganisations and mergers. Mr Paskin told us that, and we accept, partially in consequence of that, there are a large number of spinal points within each pay band or grade. It seems that where there was a merger of two pay scales all existing pay points had been preserved. It appeared from the documents that we have seen that the exact number of spinal points has varied year on year generally with some of the lower points being removed from a particular grade or additional points added at the top. In 2010 there were 23 spinal points in band 3, 25 spinal points in band 4 and 14 in band 5.

11. The agreed bundle contained what were entitled "2006 Pay Modernisation Documents". Those documents included a description of the job evaluation scheme described above and the various pay scales. At section 4 of that document under the title "Pay Progression" there is an explanation of how it

was intended that an employee placed on a particular band would progress up to the top of the pay scale. From 1 April 2007 it had been agreed that an employee would progress by four pay points per annum up to a certain point on the pay scale which was described as a "development point". Having reached the development point the employee would then progress by two points per annum but thereafter would only progress by one point per annum subject to a nationally agreed development and review process. As such it was intended that some system of performance related pay would be introduced in the spinal points at the top of any particular pay band. As a matter-of-fact no agreement has ever been reached in respect of the development and review process and instead up till 1 April 2010 employees progressed automatically by three spinal points per annum until they reached the top of the pay scale. From 1 April 2010 that was reduced to two points and from 1 April 2011 to just one. Once an employee has reached the top of the pay scale there was no further automatic progression.

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

<u>The effect of the pay “freeze”</u>

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

14. We were provided with a circular dated 1 February 2012 in which the new negotiated terms were set out. There was no annual increase in salary at all. In lieu of the existing pay progression policy the new system was that employees on bands 1 and 2 were to progress at 2 points per annum, employees at bands 3-6 would progress at just 1 point per annum. It was explained, and we accept, that the reason for the disparity in treatment across the bands was that band 1 and 2 employees were the lowest paid and would be the hardest hit by any pay freeze. In addition, the minimum pay point at the bottom of each pay band was to be raised by 1 spinal point. Again this protected the lowest paid in each band. The circular referred to a lack of income in part caused by a decision taken in 2014 to reorganise the service

and privatise some parts. It was stated that the Respondent was committed to avoiding compulsory redundancies.

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

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

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

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

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

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

18. We as a tribunal were particularly impressed by the manner in which Jason Paskins gave his evidence. Whilst he is a senior employee of the Respondent he was prepared to make sensible concessions and he did not take a partisan approach to his evidence. He told us that he considered the present pay system to be unacceptable in many ways. He accepted that the legacy of a long pay scale was undesirable and stated that one of the roles that he had been assigned was to progress towards a system where performance, rather than the passage of time, was a more important feature of the reward structure. He suggested that this was a priority but that he had not made a great deal of progress to date. He spoke emotionally of the need to reward

public servants properly in order to protect the integrity of the system. His view was that at present the probation officers were not being paid a fair wage for the important work that they did. He made further sensible concessions as to the potentially discriminatory effect of the present system to which we refer below.

Basic legal framework

19. The Claimant relies upon section 19 of the Equality Act 2010. That section reads as follows (immaterial parts omitted):

> *19 Indirect discrimination*
>
> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> > *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> >
> > *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> >
> > *(c) it puts, or would put, B at that disadvantage, and*
> >
> > *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*
>
> *(3) The relevant protected characteristics are—*
>
> *age;*

20. Section 39 makes it unlawful in the field of work for an employer to indirectly discriminate against an employee with regards to the terms and conditions of employment offered to that employee.

21. Paragraph 10 of Schedule 9 of the Equality Act 2010 contains an exception to the general provisions of the Act and the material parts read as follows:

> *Benefits based on length of service*
>
> *10 (1) It is not an age contravention for a person (A) to put a person (B) at a disadvantage when compared with another (C), in relation to the provision of a benefit, facility or service in so far as the disadvantage is because B has a shorter period of service than C.*

(2) If B's period of service exceeds 5 years, A may rely on sub-paragraph (1) only if A reasonably believes that doing so fulfils a business need.

(3) …..(6)

(7) For the purposes of this paragraph, the reference to a benefit, facility or service does not include a reference to a benefit, facility or service which may be provided only by virtue of a person's ceasing to work.

Addressing the issues

22. Whilst we have set out the majority of our primary findings of fact above it is necessary for us to make further secondary findings which we do below. We do so under the headings of the issues as they had been agreed between the parties.

23. We shall set out the parties competing positions and relevant law under each of the headings below.

Has the Claimant identified a PCP which applied to him?

24. The Respondent's position is that the Claimant's case falls at this first hurdle. It was argued by Ms Darwin that:

24.1. The Claimant cannot rely upon the change in policy that took effect from 1 April 2011 as amounting to a PCP; and

24.2. That, as a matter of fact, the second PCP identified by the Claimant, did not exist because the pay system presently in force was not based "solely on length of service" as articulated in the agreed list of issues.

We shall deal with these arguments in turn.

25. In support of her arguments that a change in policy cannot amount to a PCP Ms Darwin relied upon ***ABN Amro Management Services Ltd & Anor v Hogben*** **UKEAT0266/09/DM**. In that case the Claimant's case was that a change in a redundancy policy was indirectly discriminatory. The EAT upheld an appeal against a refusal to strike out that claim. The principle reasons for that decision are in paragraphs 26 and 27 and, with parts omitted, are as follows:

"26 The rival contentions raise the question of what is the correct analysis where an employer introduces a change in his employment practice, and the workers to whom the earlier practice applied have a different age profile from those dealt with under the new practice……. In the

present case those in the advantaged group are ex-employees (or at least employees under notice of termination) But it would not be impossible to construct an example where both groups were in employment. It is important however in all such cases to appreciate that the two groups do not exist at the same time. There is no moment at which some employees are treated one way and some another: both before the change-date and after the change-date everyone is treated the same. The difference in treatment complained of is only established by looking from one side of the change-date to the other. This is not, therefore, a case of the kind sometimes encountered where, at a given date, employees A and B may be treated differently because of some temporal criterion such as date of first employment. On the contrary, the difference in treatment complained of may have occurred at widely different times, and it is indeed unclear how far back, or forward, from the change-date it is necessary to go in order to determine the composition of the two groups.

27 It is difficult to analyse such a situation in terms of reg. 3(1)(b). It is artificial and unnatural to describe the change from one substantive PCP to another as itself constituting a policy or criterion. To make the same point another way, what is "applied" to the claimant in such a case is not the change itself but the new substantive policy brought about by the change; and unless that policy is itself discriminatory reg. 3 is not engaged. I do not think that this difficulty can be got around by relying on the word "practice" as opposed to "policy" or "criterion": no doubt "practice" is a wider word, which has the effect of extending the scope of the definition of indirect discrimination, but it is nevertheless of the same general character as "policy" and "criterion", and the points made above seem to me to apply equally. Likewise, I do not see how the mere existence of a state of affairs under which a group to which the claimant belongs is disadvantaged compared to a different group can be described as the "application" of a PCP: it may be the result of the application of a PCP, but that is another matter. Another way of putting the point would be to say that the fact that different practices applied at the relevant times is a material difference in the circumstances of the two groups."

26. Ms Darwin placed further reliance on ***Edie v HCL Insurance BPO Services Ltd*** **[2015] ICR 731**. She said that in that case the EAT confirmed that a change in policy could not amount to a PCP. We do not accept the arguments put forward by Ms Darwin. It was quite clear to us that the Claimant was complaining about the pay policy that had been in place since 2010/2011. Whilst that arose because of a change made on that date it was the ongoing effect of that change which was the subject of the complaint. We consider that Ms Darwin's approach unduly restricts the way the Claimant actually put his case to artificially focus on the change in policy rather than the effect of that change.

27. We accept that ***ABN Amro Management Services Ltd & Anor v Hogben*** is authority for the proposition that a PCP cannot be founded on a change in policy whereby the comparator group was subjected to one policy and the complaining group to a new policy. However, ***Edie v HCL Insurance BPO Services Ltd*** recognised that there is a distinction between that situation and

one where both the disadvantaged group and the comparator group are subjected to the new policy. There is no reason why in that latter case the implementation of the change could not amount to a PCP. It therefore does not provide authority for the broad proposition set out in Ms Darwin's note (although the submissions of counsel for the employer rejected by the EAT do make the same point).

28. We further do not consider that the fact that some, or all, of the comparator group might have had a historical advantage by reason of the pre 2011 policy excludes the possibility of arguing that the change to the present policy amounted to the imposition of a PCP. The new policy preserves the benefit of any pay progression accrued prior to the change. At the same time it reduced pay progression to 1 point per year. This is what we understand to be the PCP complained of. In other words, the Claimant is saying that the PCP is the present pay policy that applies both to him and to the other probation officers. Understood like that there can be no proper objection to this PCP.

29. We accept that Section 23 of the Equality Act 2010 requires that there should be no material difference between the circumstances of the advantaged and disadvantaged groups for the purposes of Section 19. We do not consider that the fact that the advantaged group may have been the beneficiaries of a previous policy means that there is a material difference in circumstances in the present case. In ***ABN Amro Management Services Ltd & Anor v Hogben*** the key fact was that there was no time during which the same policy applied to the advantaged and disadvantaged groups. Here that is not the case. The groups said to be advantaged and disadvantaged work side by side, doing the same work at the same time and subject to the same pay policy. Whilst historical advantage might be relevant to justification we do not consider it prevents the Claimant relying on the change to the present pay policy as being a PCP.

30. Ms Darwin attacks the second PCP identified by the Claimant and argues that as a matter of fact the Respondent's pay system is "not solely based on length of service". We note that the list of issues identified by Employment Judge Kurrein differs from the way the Claimant actually put his case in his further and better particulars where the word "primarily" rather than "solely" is used. Ms Darwin relies on the explanation of the pay system set out in the witness statement of Jason Paskin. He says that pay was dependant on pay band and thereafter on pay progression. In his witness statement he suggested that pay progression was dependant on performance. In theory pay progression could be withheld in cases of poor performance. Even assuming that to be the case it is correct to say that an employee performing adequately would progress up the pay scale.

31. We recognise that Ms Darwin is strictly correct that the rate of pay is not "solely" determined by length of service. We do not understand the Claimant to disagree that pay is dependent on pay band and that there was a theoretical possibility of progression being withheld in the case of poor performance. It seems to us that the Respondent is focussing on the word "solely" to the exclusion of the complaint that the Claimant had actually advanced. He attacks the new pay progression policy. That policy is based on

length of service and assumes progression each year until the top of the pay scale is reached. The Respondent is aware that the Claimant puts his case in that way and has dealt with that complaint in the evidence. Clearly the pay policy overall, as applied to all of the employees, is capable of amounting to a PCP and it would be artificial to deal with the case on any other basis.

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

Was the PCP applied to the Claimant?

33. Whilst this was identified as a separate issue there was no dispute that, the new pay policy which is how we understand the first PCP and the pay progression policy within that, were applied to the Claimant. That issue is therefore resolved in his favour.

Did the PCP(s) place the Claimant at a material disadvantage in comparison to employees aged over 50?

34. It is for the Claimant to establish that the PCP materially disadvantaged the under 50s. The Respondent had provided statistical data for employees employed at "LDU Cluster Kent". That information included all of the Band 3,4 and 5 employees. It showed:

    34.1. whether they were under or over 50 on 31 March 2014, 2015, 2016 and 2017; and

    34.2. their length of service divided into bands (with a caveat that this information may not be reliable); and

    34.3. their "fte" equivalent salary as at 31 March 2017.

35. The proper interpretation of those statistics was an issue before us. The Respondent contended that, in measuring any material disadvantage, it was necessary to disregard any employee who had progressed to the top of the pay scale. It was argued that, if the complaint was that the pay progression policy was discriminatory, then only those people affected by progression should be included. It was argued that as those employees at the top of any pay band were no longer subject to progression they should be disregarded. The Respondent argued that when those persons at the top of the pay scale were ignored the statistics showed only a minor difference in average pay between the two comparator groups. In fact, calculations (broadly) agreed between the parties and drawn from the statistics provided showed average pay as follows:

35.1. Band 3: Under 50 £22,942 over 50 £23,994.22

35.2. Band 4: Under 50 £31,104 over 50 £31,492.10

35.3. Band 5: Under 50 37,755 over 50 £37,166

36. In support of the arguments above Ms Darwin relied upon the EHRC Code of Practice on Employment and ***Essop & Others v Home Office (UK Border Agency); Naeem v Secretary of State for Justice*** **[2017] UKSC 27** and in particular paragraph 41 where Lady Hale stated:

> *"Consistently with these observations, the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that:*
>
> *"In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively."*
>
> *In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it" - ie the PCP in question - puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."*

37. It is notable that the reason why the proper pool for comparison was in issue in ***Naeem*** was that it had been argued by the employer that only chaplains employed from 2002 (the entry date for Muslim chaplains) should be included in the pool. At paragraph 40 that approach is rejected Lady Hale says:

> *"The second argument relates to the group or "pool" with which the comparison is made. Should it be all chaplains, as the Employment Tribunal held, or only those who were employed since 2002? In the equal pay case of Grundy v British Airways plc [2007] EWCA Civ 1020; [2008] IRLR 74, at para 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in Allonby v Accrington and Rossendale College [2001] EWCA Civ 529; [2001] ICR 1189, at para 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of Appeal in this case, he observed that "There is no formula for identifying indirect discrimination*

pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition".

38. We do not accept the Respondent's arguments that we should exclude from the pool any person who had reached the top of the pay scale. Whilst those persons no longer progress through the pay scale the reason that they are at the top is that they have historically done so. All of the employees are affected by the pay policy as a whole (encompassing both of the PCPs) and it is appropriate to include all of them in any examination of whether the PCPs have any discriminatory effect.

39. When the statistics include those people at the top of each pay scale the following picture emerges:

    39.1. Band 4 under 50 £31,104.72 over 50 £33,247.82: and

    39.2. Band 5 under 50 £37,755.50 over 50 £39,155

40. We further note that when looking at Band 4 approximately 14 of the employees aged over 50 were at the top of the pay scale on a salary of £36,084 whereas only 3 employees aged under 50 were at that salary.

41. It was the Respondent's case, not contradicted by the Claimant, that employees entering into the probation service will come from a wide range of age groups. We were told and accept that one reason for this is that the probation service is often attractive to people seeking a second career. This might mean that some employees retire before reaching the top of a pay scale.

42. In approaching the statistical evidence, we were mindful that we had been provided with a relatively small sample. The pay scales are applied nationally but we were only provided with one region. We therefore approached them with a degree of caution.

43. One part of the evidence that was not controversial was that by 2015 the band 4 pay scale went from spinal point 80 to 98. Pay progression had been held to 1 point per year of service since 2011. It seemed to us that as a matter of simple logic such a pay scheme would inevitably give rise to a material disadvantage favouring the older employees over the younger employees. When this suggestion was put to Jason Paskin by the tribunal he readily agreed that, on the assumption that average age at recruitment remained static the lengthy pay scale would give rise to a significant difference in pay between the older and younger employees. He explained that the Respondent was well aware of the dangers in having such a lengthy pay scale and explained that that was one of the reasons why he was working towards changing the scheme. As we stated above we considered Jason Paskin to be a thoughtful and measured witness. We were impressed that he

did not seek to deny what appeared to be the obvious potential for discrimination in the Respondent's pay scheme.

44. We also note that the potential for discrimination in respect of benefits conferred as a consequence of long service is recognised in Paragraph 10 of Schedule 9 of the Equality Act 2010. It is simply a matter of common sense that length of service and age are inextricably interlinked. It is not possible to obtain 5 or 10 or 15 years of service without getting 5 or 10 or 15 years older. We understood the Respondent to be suggesting that this might not be the case given the wide entry range into the service. We accept that there is some possibility of retirements affecting the overall picture. However, apart from that there was no evidence that the age of the intake was increasing by 1 year per annum and that seems inherently unlikely. When this matter was suggested to Mr Paskin he readily accepted, and had already recognised, that a lengthy pay scale could be expected to result in a difference in treatment by reason of age.

45. This logical position would by itself have been sufficient for us to find that the pay scheme adopted by the Respondent placed the under 50s at a material disadvantage in comparison with the over 50s. Whilst we have some reservations about the statistical evidence such evidence as there was tended to suggest that there was a material disadvantage this was particularly so when including all of the employees rather than those progressing up the pay scale. For the avoidance of any doubt even without that latter evidence we would have concluded that there was a material disadvantage inherent in the scheme.

Is the Claimant at that particular disadvantage?

46. The Claimant had been employed since 2006. By April 2011 he had progressed up the pay scale but was still not at the top. He has not got sufficient length of service to get the maximum pay. As he says in his witness statement this impacts him directly as he receives lower wages than others doing the same job but indirectly as his pension entitlement is based on a "career average" and so his retirement will be impacted by his pay. He therefore does suffer from the disadvantage.

Justification

47. It follows from our findings above that the issue central to this case is whether or not the Respondent can justify the prima facie discriminatory pay scheme. The parties were essentially in agreement as to the proper approach to justification. We have had regard to all of the authorities provided to us but take as a convenient summary the relevant principles as set out in ***Chief Constable of West Yorkshire & another v Homer*** **[2012] ICR 708** in the opinion of Lady Hale where she said:

"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.

20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."

48. The manner in which the Respondent puts its case on justification in its ET3 is as follows:

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

49. In her skeleton argument Ms Darwin adds some further strands to that initial argument. She says that it is a legitimate aim to reward loyalty and experience and in that regard she relies on ***Homer***. She also refers to the need to secure efficiencies by avoiding job losses and relies on ***Allen v GMB*** **[2008] IRLR 690** in support of that as being a legitimate aim. She suggests that the Claimant's primary complaint is the fact that he has not had the benefit of accelerated pay progression such as was the case prior to the 2011 changes. She argues that ring-fencing past advantages can in any event be a legitimate aim and relies on ***Sprecht v Land Berlin [2014] ICR 966*** in support of that contention.

50. Mr Menzies counters those arguments. He contended that the principle driver for the changes introduced in 2011 (retrospectively) was cost. He argued that cost by itself could not amount to a legitimate aim capable of justifying discrimination in this regard he relied upon ***Woodcock v Cumbria Primary Care Trust*** **[2012] EWCA Civ 330**. He argued that the Respondent had failed to adduce any sufficient evidence to establish that the disparate treatment could be justified.

51. In considering whether the Respondent had discharged the burden of showing that the prima facie discriminatory pay scheme was justified we considered the following matters to be important. Insofar as these amount to an expansion of our primary findings of fact, that is intentional.

    51.1. In 2010 a political decision was taken that until further notice the overall cost of public sector pay should not increase beyond 1% per annum.

    51.2. In the present case the new pay scheme was introduced after negotiations with the recognised trade union. The product of those negotiations was that three different groups are treated differently.

        51.2.1. Whilst those employees in the Claimant's position were provided with modest pay progression which for them meant that it would take many years for them to reach the top of the pay scale and their pay might slip behind rises in the cost of living.

        51.2.2. The worst paid employees were initially treated more generously. They progressed at 2 points per annum.

        51.2.3. The employees at the top of the scale initially received no pay rise at all. This remained the case until the changes effective from 1 April 2015 when a 1% award was made. Given that there has been a regular year on year cost of living increases this group's real income is decreasing at the fastest rate. Given that in general people will tend to get used to a standard of living this group are disadvantaged despite the fact that they are the highest paid.

51.3. Subsequent negotiations have resulted in changes to the scheme. Amongst these changes are the shortening of the pay scale by elevating the entry point. Those changes have shortened the scale and mitigate any discriminatory effect.

51.4. The Respondent wishes to, and is taking, slow but active steps to address the deficiencies in the present pay scheme. Mr Paskin told us, and we accept, that this is a matter which he is authorised to, and is committed to, address as soon as possible. We have regard to the fact that introducing an element of performance related pay is something that has been the subject of negotiations through all of the documents we have looked at. We are alive to the fact that not all employees welcome such changes and the introduction of changes will not necessarily be speedy no matter how committed the employer.

Was the introduction of the present pay policy a means of achieving a legitimate aim?

52. Ms Darwin reminds the tribunal that the question is not whether the legitimate aim that the employer has adopted is justified but whether the means to achieve it can be. She relies upon ***Chief Constable of West Midlands Police v Harrod*** **[2017] IRLR 539** and ***HM Land Registry v Benson*** **[2012] IRLR 373** in support of that proposition and Mr Menzies did not take issue with that being a proper statement of the applicable law.

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

54. It has been held both domestically and at the level of the CJEU that it is a legitimate aim to reward loyalty and experience ***Sprecht v Land Berlin*** and ***Allen v GMB*** and ***Naeem*** (para 39). However, that would still leave open the issue of whether the means to achieve that aim is proportionate to which we shall return below.

55. In the context of indirect age discrimination, the CJEU have held that it could be a legitimate aim to preserve existing rights (often referred to as ring fencing) see ***Sprecht v Land Berlin*** and ***Unland v Land Berlin*** **[2015] ICR 1225** the same point has been recognised domestically in ***Pulham and others v London Borough of Barking and Dagenham*** **[2010] IRLR 184** which was not cited to us but provides further support for the cases which were.

56. No direct authority for the proposition that it will be a legitimate aim to attempt to allocate resources to the lowest paid in preference to the higher paid has been cited to us but it seems to us that attempting to achieve basic fairness could be a legitimate aim.

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

58. In the circumstances we are persuaded that the implementation of the new pay policy was for the legitimate aims identified by the Respondent.

Were the means adopted rationally connected to the aim(s) to be achieved?

59. We find that the means adopted by the Respondent include not only the reduction of the pay progression from 3 points per annum to one for the band 4 employees not at the top of the pay scale but also the decision to maintain 2 points per annum in the lower bands and to freeze pay entirely for those at the top of each band. Sharing the resources was intended to a desire to give some incentive to retain employees and was an alternative to redundancies. All of these actions are rationally connected to achieving the legitimate aims relied upon by the Respondent.

Were the means adopted proportionate – no more than reasonably necessary?

60. This issue requires that Tribunal to have regard both to the discriminatory effect on the Claimant and the business needs of the Respondent and we take each into account below.

61. The disadvantage that the Claimant suffered by the changes to the pay policy is best illustrated by his position in 2015. By then he had been a probation officer for 8 years and on the evidence before us would have been “fully up to speed”. Had pay progression been maintained at the rate of 3 points per annum he would have reached the top of the pay scale (Spinal point 102) and been paid at the same rate of those with the same skills. Instead as a consequence of the changes he has progressed to spinal point 86. The difference in pay is about £5,000 per annum. He does the same work and has the same skills as those employees fortunate enough to have accrued sufficient pay progression (under the old or new policies or both).

62. If the pay scheme presently in force remained in place for the next 23 years, it would mean that a new starter would take 23 years to reach the same level of pay as a person already at that level. The evidence before us was that a

probation officer is "fully up to speed" in 7 or 8 years. Clearly the link between skill and pay has been broken by the introduction of the new pay progression policy and that factor, by itself, is insufficient to justify maintaining the scheme. The same reasoning does not apply to loyalty which the authorities suggest could merit reward. Having said that we consider that it would be a matter of far less weight than skill and experience.

63. As such the pay scheme, if pay progression is maintained at 1 point per year and no changes are made to the entry point, will become progressively more discriminatory on the grounds of age. The effect of the employees who benefitted from the pre 2010 policy will recede as those employees reach retirement age. What would be left is a scheme which rewarded length of service but with little correlation with skills of experience

64. We consider it important in assessing justification that, in the group of over 50s (and some, but far fewer, under 50s), there are a number of individuals who would have progressed to the top of the pay band prior to 2010. At that time an employee could progress from the bottom to the top of the scale in around 8 years. It seems to us that whilst even an 8 year pay progression scale might require objective justification on the evidence before us there was a clear correlation between the pay progression and the skills and experience that a probation officer could be expected to acquire. Whilst such a pay scheme might lack the sophistication of a pay scheme based on properly measured performance it has the benefit of simplicity and in our view any prima facie discrimination would have been a justified means of rewarding experience. The consequence of this finding is that we consider that the individuals who were at the top of the pay scale by April 2011 were not there as a consequence of any discriminatory act but as a consequence of the Respondent respecting pay progression accrued prior to the changes.

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

66. The Claimant suggested in his evidence that there should have been a move towards performance related pay. He suggested that that was the only fair system. Whilst Mr Paskin also felt that performance related pay was a fairer measure he described the difficulties with introducing such a system. The tribunal noted that, since 2012, there had been an intention to introduce an element of performance related pay but that no final agreement had been concluded. We are alive to the fact that performance related pay has been resisted in many public sector organisations. We accept that a move to performance related pay would be difficult and would take time.

67. We do not think it was reasonably possible for the Respondent to do otherwise than to preserve the accrued rights of those employees who had reached the top of the pay bands. Those people in 2010 would have been the most skilled. Implementing pay cuts to that group would have been inviting an exodus of the most skilled employees. The measure of freezing that groups pay until April 2015 was as robust as could have reasonably been expected. We consider that some degree of ring fencing of those accrued rights was necessary and proportionate. We may not have reached the same conclusion if we had consider that those accrued rights had arisen because of a discriminatory policy.

68. We have accepted that the Respondent is alive to the fact that progression through its pay scales is now so painfully slow that most of the correlation between pay progression and skills and experience has been lost. We accept that the Respondent is doing what it can to change the system in as short a time scale as possible. It has already shortened the pay scale by five spinal points and we were told by Mr Paskin that he intends to review the scheme as soon as he is able. We have set out above our conclusion that if the present scheme ran for 23 years the level of indirect discrimination requiring justification would inexorably rise. We accept that the Respondent recognizes this and intends to take steps to reduce the discriminatory effect of the present scheme. We note that in ***Naeem*** the Supreme Court found no fault with the decision of the employment tribunal who had held that "managing an orderly and structured transition" amounted to a serious objective (see paragraph 43). We consider that the fact that an employer is alive to, and is taking steps to change, a potentially discriminatory PCP is a matter that we can properly take into account in assessing justification.

69. We infer from the evidence that we heard that Respondent has reacted to the pay freeze on the assumption that it would be a temporary measure. It was not unreasonable to take that view as it could reasonably be thought that years of below inflation pay settlements are politically unsustainable. In our view, whilst the situation has persisted for over 6 years, it could still be thought to be temporary or transient in nature and that provides justification for not immediately radically changing the pay policy. Put differently it has never been viewed as anything other than a stop gap measure.

70. An alternative way of reducing payroll cost is to make redundancies. We note that this is something that the Respondent has sought to avoid. Redundancies would not only be harmful for a vital public service but of course they would be harmful for the individuals who lost their jobs. In the light of this the options available for the Respondent were limited to sharing the resources available as fairly as possible.

71. Taking all of the matters above into account it is the unanimous decision of the Tribunal that, at the present time, the pay policy (comprising the PCPs complained of) is justified as a proportionate means of achieving the legitimate aims identified. The claim must therefore be dismissed.

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

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Employment Judge

John Crosfill

Date 15 September 2017