RESERVED JUDGMENT
SA

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		*Respondents*
(1) Miss R Lockwood (2) Mr D W Inglis	**AND**	(1) Department of Work & Pensions (2) Cabinet Office

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 5, 6 & 7 September 2011

EMPLOYMENT JUDGE: Mr G P Sigsworth **MEMBERS:** Mrs W Bishop
Miss SK Sootarsing

Appearances

For the Claimant: In person

For the Respondent: Mr A Nawbatt, of Counsel

JUDGMENT

It is the unanimous Judgment of the Tribunal that:

(i) **The Respondents did not unlawfully discriminate against the Claimants on grounds of their age.**

(ii) **The Respondents were not in breach of contract by reason of the non-payment to the First Claimant of six months notice pay.**

RESERVED JUDGMENT

October 25, 2012 London Central
Date and place of signing

EMPLOYMENT JUDGE

JUDGMENT SENT TO THE PARTIES ON
03 November 2011
AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS

RESERVED REASONS
SA

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
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Date of Hearing: 5, 6 & 7 September 2011

REASONS OF THE EMPLOYMENT TRIBUNAL

1 These two cases are the lead cases in a group of claims brought to the Employment Tribunal, challenging the Civil Service compensation scheme on the basis of age discrimination. The First Respondent in each case was the Claimant's employer. The Second Respondent is a party to the proceedings as the department responsible for the implementation and administration of the Civil Service compensation scheme (CSCS). Ms Lockwood presented one claim to the Tribunal on 18 December 2007. She claims age discrimination and also has a separate claim of breach of contract for non-payment of the six months notice pay she would have received had her redundancy been compulsory rather than voluntary. Mr Inglis presented two claims to the Tribunal, on 28 January 2008 and 6 October 2010, but he has indicated in correspondence that the second claim was not supposed to be a new claim but merely a supplementary submission to the original claim, and he has withdrawn that second claim (in so far as it is necessary to do so). Further, Mr Inglis was permitted at the case management discussion held on 13 September 2010 to substitute an amended claim form in place of the original one, to clarify that his comparator is someone over the age of 35 years (rather than someone under the age of 30 years). This hearing has been listed to determine all the claims of these two Claimants.

2 Ms Lockwood was 26 years old on the date of termination of her employment on 21 September 2007. Mr Inglis was 33 years old on his effective date of termination of 31 August 2008.

The relevant compensation payable under CSCS rules 2.8, 2.8(a) and 2.9(a) is calculated as follows (subject to a maximum compensation cap of 3 years pay):-

(a) one months pay for each year of service, plus

(b) the lesser of:

(i) one months pay for each year of service given after 5 years service and

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(ii) one months pay for each year of service given after the employee's 30th birthday, plus

(c) one months pay for each year of service after the employee's 35th birthday.

3 The material statutory provision is regulation 3 of The Employment Equality (Age) Regulations 2006, which provides as follows:

(1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if –

(a) On the grounds of B's age, A treats B less favourably than he treats or would treat other persons, or

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but-

(i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

(ii) which puts B at that disadvantage,

and A cannot show the treatment or, as the case may be, provision, criterion or practice, to be a proportionate means of achieving a legitimate aim.

(2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(3) In this Regulation-

(a) 'age group' means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages; and

(b) the reference in paragraph (1) (a) to B's age includes B's apparent age.

4 The following issues arise in these claims:

(1) The parties agree that these are cases of direct age discrimination. Are the Claimants (who were aged 26 and 33 respectively at the date of the termination of their employment) in materially comparable circumstances to employers aged 35 and above whose employment is terminated?

(2) If so, whether the payment of more compensation to those at or over 35 is justified- i.e. is it a proportionate means of achieving legitimate aims?; and

(3) In relation to Ms Lockwood, whether she is contractually entitled to six months notice pay in circumstances where it is contended by the Respondents that her employment terminated by mutual agreement.

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5 The Tribunal heard oral evidence from the Claimants and from Mr Peter Spain, head of the internal dispute resolution and pensions technical team in the scheme management executive of the Cabinet Office. The Tribunal also considered documents that they were referred to in an agreed bundle of documents. At the end of the evidence, the parties presented written submissions and made oral submissions. The Tribunal reserved its judgment.

Findings of Fact

6 The Tribunal made the following relevant findings of fact in respect of each Claimant's case.

Ms Lockwood

7 Ms Lockwood began her employment with the DWP at the age of 18, working for the Benefits Agency, on 18 October 1999 as an administrative officer. She continued in that post throughout her employment, but from time to time was given extra responsibilities, specialist duties and acted as deputy for her line manager. On 2 April 2007, her position was declared as surplus and she received a letter confirming this. She was declared surplus because she had not secured a vacancy in either a Benefits Delivery Centre or any other DWP office within her mobility. On the same day, the Department announced the voluntary redundancy scheme. The scheme was said to be voluntary and an applicant had the right to withdraw their application at any stage up to the point at which they formally accepted the offer of release. The financial terms were offered on a voluntary basis. As the Claimant was under 50 with at least one years qualifying service, she was entitled to be compensated under the CSCS compulsory severance benefits provisions. It was anticipated that releases would be effective from 31 July 2007. In a question and answer brief in the annex to the written provisions, question 3 asks, is there any entitlement to a period of notice or payment in lieu? Answer to that question is given as, no. Release dates are agreed mutually with the business and as such no other formal notice, or payment in lieu, is appropriate. The compensation payable was the same, regardless of the pension scheme the individual was in, although the Claimant was in the classic scheme. As referred to above, compensation was payable under CSCS rules 2.8, 2.8a and 2.9a. The application for the voluntary release scheme was regarded by the DWP as the applicant volunteering to terminate their employment. It was not regarded as a dismissal and therefore there was no entitlement to notice pay. The Claimant raised a query about this, but she was told in email exchanges with relevant managers in May 2007 that the Department was not in the circumstances terminating her employment unless she volunteered to leave and therefore it was not a redundancy situation. The employer was not regarded as terminating the contract when notice would be appropriate as the employee was volunteering for early release. In another email, the responsible manager, Mr Paul Armstrong, pointed out to the Claimant that the scheme was voluntary and she was under no obligation to accept the offer and terms of it. If she did not wish to agree to the terms of the scheme she could remain in the Department. The terms of the scheme did not require notice by either party and therefore if she did not wish to comply with those terms her option was to remain in the Department's employment. It was pointed out to the Claimant that the terms of the scheme meant that she was only entitled to 6 months notice if the Department declared her redundant and they had not done this, and therefore she was not entitled to 6 months notice. If she did not wish to accept the terms they would then deploy her into a vacancy.

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8 After a prolonged email exchange, the Claimant must have been aware of the DWP's position on this. She was then sent a formal offer of voluntary early release on 26 June 2007. In that letter from the early exit manager, it was said that the manager was writing to confirm that Ms Lockwood's application for management approved voluntary early release had been approved. If she accepted the offer the DWP would confirm in writing the final details of the financial terms based on her last day of service. The letter went on to say that if she did accept the offer then they would need to discuss and agree her final release date. Release dates would be agreed on a business need basis, but must be effected by 21 September 2007 at the latest. There may be occasions when a release date would be delayed by the DWP so as to continue to meet business demands and maintain standards of service to their customers. The Claimant signed the early release form, accepting the offer, in these terms: "I wish to formally accept the offer of management approved voluntary early release and accept that by signing and returning this letter the acceptance is legally binding and may not be unilaterally retracted." The Claimant signed that on 29 June 2007. On 6 July 2007, the early exit manager wrote again to the Claimant confirming that her application for early release had been approved and that her last day of service would be 21 September 2007. The Claimant had had a meeting with a manager on 4 July 2007 when she had been told that her release date would be 21 September. She said to the manager that she did not agree with the date and felt that she was due longer notice. She does not seem to have pursued with the management, by way of grievance or in writing of any sort, that she already had a job to go to, due to start on 2 August 2007, and she never made any formal request or any complaint about this or that she would like her release date to be brought forward. Although she put in a formal written grievance on 14 August 2007, that was not in relation to her termination date, but was in pursuit of what she regarded was her entitlement to 6 months notice pay, and also for age discrimination. What the Claimant appears to have wanted at this point was not a change to her release date, but simply her 6 months notice pay, as if she was being made compulsorily redundant. In the event, her new employer could not take her until January 2008, as they employed somebody temporarily when the Claimant could not start with them in August. So far as the Claimant's grievance is concerned, then the DWP under their procedures could not deal with the grievance as a grievance, because it was about a policy. Instead, they dealt with it as a complaint. In respect of the period of notice complaint, the same points made by the DWP in these proceedings were made then. As the Claimant had volunteered for the terms of the scheme, she was not entitled to payment in lieu of notice, as she would have been redeployed if she had not accepted the voluntary terms. So far as the age discrimination complaint is concerned, then she was invited to pursue her complaint if she wished to do so with the pensions centre.

9 Ms Lockwood was a member of the classic scheme, having joined DWP on 18 October 1999. She applied for voluntary redundancy, her application for voluntary redundancy was accepted and her employment with DWP terminated with effect from 21 September 2007. On termination of her employment Ms Lockwood had accrued 7.9288 years (7 years and 339 days) of reckonable service and was aged 26. She therefore received a lump sum of £10,849.04, calculated as follows, in accordance with the CSCS rules:

(a) £16,419.70/12 x 7.9288, plus b) 0, plus c) 0.

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Mr Inglis

10 Mr Inglis joined DWP (Disability and Carers' Service) on 27 January 1997 on a casual appointment, starting as a permanent employee on 27 January 1998, when he was then aged 22. His employment terminated on 31 August 2008, when he was 33 years old. He was in post as an administrative officer. He also applied and was accepted for the voluntary early severance/redundancy scheme. He told us that he had worked for eleven and a half continuous years with the DWP, and was told in November 2007 that the office he worked in was scheduled to close and that he would be offered early severance on compulsory grounds. He left under the voluntary scheme, although he miscategorises this is as compulsory early severance, and believes that he has been put in an unfavourable position compared with other employees by reference to the amounts of compensation that he received. He had done the same or similar work to employees over the age of 35 and had the same length of reckonable service.

11 On 18 January 2008, the appropriate manager wrote to him confirming that his application for management approved voluntary early release had been approved. He must have then returned the enclosed documentation, accepting that offer, because he then received by letter 22 January 2008 confirmation that his application for early release had been approved and that his last date of service would be 31 August 2008.

12 Mr Inglis was a member of the classic scheme, having joined DWP on 27 January 1997 on a casual appointment, and starting permanent employment on 27 January 1998. He applied for and was accepted for voluntary redundancy, with an effective termination date of 31 August 2008. Mr Inglis in fact rejoined the Civil Service in March 2010, and is employed by the Scottish Executive. On termination of his employment with DWP, Mr Inglis had accrued 10 years and 204 days (10.5589 years) of reckonable service and was aged 33. He therefore received a lump sum of £18,330.97, calculated as follows, in accordance with the CSCS rules:

(a)16,006.67/12 x 10.5589, plus (b) 16,006.67/12 x3.1836, plus (c) 0.

Respondents' Evidence

13 The Cabinet Office manages the Civil Service arrangements for retirement pensions and compensation benefits payable on early termination of employment. The Principle Civil Service Pension Scheme (PCSPS) is the occupational pension scheme for the Civil Service. The Civil Service Compensation Scheme (CSCS) sets outs the tariffs that can be applied by departments when civil servants' contracts are terminated. The PCSPS and the CSCS are both statutory schemes made under Section 1 of the Superannuation Act 1972. Before 1995, the rules relating to compensation were included within the PCSPS and, even after a separate CSCS was established, there remained a strong link between the pension terms and compensation terms applying on the loss of office by employers covered by the scheme. The PCSPS has undergone considerable reform over recent years, with the introduction of a new final salary pension scheme (premium) in October 2002 and a whole career pension scheme (nuvos) in July 2007.

14 The CSCS terms have not been reformed to the same timetable. The terms which applied at the time of the Claimants' departures were little changed from those

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introduced in 1987, following a period of review which started in 1983. Furthermore, the particular compensation terms relating to the Claimants' circumstances have not changed from when they were introduced into the PCSPS with effect from 1 June 1972. The 1972 terms in question evolve from similar terms introduced with effect from 1 March 1969. The terms changed in 2010, but this does not affect the Claimants. The CSCS provides financial protection in the form of compensation to people who lose their jobs prematurely through redundancy or re-organisation, with benefits calculated principally on the basis of length of service, so that all service is rewarded irrespective of age (albeit not always equally); with the 'trigger' for compensation being age on the date of departure (rather than age on joining) from the Civil Service.

15 The Official Side and the Staff Side of the National Whitley Council carried out a fundamental and wide ranging of review of the arrangements and compensation for premature retirement which led to an agreement in November 1971. The terms agreed included provisions for mobile established staff retiring early on the grounds of redundancy. For those aged under 40 or with less than 10 years service, they were to be entitled to one months pay for each year of service, and a further months pay for each year of service (except for the first 5 of total service) completed between the 31st and 36th birthday; and a further two months notice for each year of service completed after the 36th birthday. In the 1971 discussions about the new terms, the Official Side told the Staff Side that the proposals: 'were designed to be most generous for those whose need was greatest. Those in the earliest part of their career would be likely to find it much easier to get other jobs... the proposals for enhancement between 31 and 36 and at higher rate between 36 and 40 were necessary to achieve a satisfactory balance between those under 40 who received their compensation in the form of a lump sum only and those over 40 who received a continuing payment, having in mind the generally accepted proposition that 40 was something of a watershed and that alternative employment was harder to find for those over that age... the provisions were not intended to be discriminatory in any way, but were simply designed to achieve a satisfactory build up to the age of 40.' A working group convened to consider what the new terms should be had earlier suggested that the calculation should be based both on age and length of service to recognise 'the likely weight of family responsibilities', (i.e. the fact that younger workers were less likely to have family responsibilities) and the 'difficulty in finding another comparable job'. These compensation terms were then included in the PCSPS from 1 June 1972, although the redundancy terms for mobile staff under age 40 had been modified a little and were broadly the same as the compulsory early severance terms which applied to the Claimants.

16 Having regard to the scheme and the later modifications and amendments to it, meant that by the time the Claimants came to be compensated under the scheme, those leaving early on compulsory or voluntary redundancy on the ground of restructure or on the ground of limited efficiency, received either compulsory early retirement or compulsory early severance benefits, depending on their age and length of service. The Claimants, being under the age of 50, received compulsory early severance benefits. These benefits are the same for those who are made compulsorily redundant or who volunteer for redundancy, but those who are made compulsory redundant, in accordance with the Civil Service code, are also entitled to six months notice or payment in lieu thereof (presumably). The period of notice or pay in lieu in the case of compulsory redundancy was in recognition of the fact that the employee would

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be or might have been made redundant against their will. During the course of consultations with the unions in 1987 and when changes were made at that date, and indeed recently in 2009/2010, the unions did not seek to have the compulsory early severance rules changed on the basis that they felt they were discriminatory on the grounds of age.

17 It is not necessary for us to go into the wide ranging changes, as they post date the termination of employment of these Claimants. All that needs to be said is that it was felt by many, and the incoming government, that the compensation arrangements were inflexible and expensive (and they are certainly generous as compared with other compensation schemes in other parts of the job market). It is also said by the Respondents that the opposition of certain unions to the substantial reforms proposed in the consultation document, entitled 'Fairness for All', demonstrated the difficulty in bringing about effective reform of the scheme, which involves striking a balance between reducing costs and ensuring that the interests of the existing members of scheme were protected to the satisfaction of the recognised trade unions.

18 Mr Spain identified certain policy aims, as he put it in his evidence, of the CSCS. He referred to the Civil Service ethos. In order to deliver high quality public services a productive and engaged work force was required; and in order to attract, engage and retain high calibre staff the Civil Service must offer terms which will be inviting to prospective employees and act as an incentive to existing staff. This included not only a reasonable package of terms during the period of employment but also generous terms after leaving service. Work force planning; and it is contended by the Respondents that early termination terms will be attractive, so that individuals volunteer for departure when work force numbers need to be reduced or when it is desirable to facilitate either promotion opportunities or the refreshing of talent. The 2004 spending reviews set stretching efficiency targets for the Civil Service, which included significant work force reductions. The Civil Service seeks to avoid compulsory redundancies wherever possible and a combination of measures, including redeployment and use of CSCS terms, enabled reductions to take place with comparably few compulsory redundancy notices issued.

19 Administrative workability. There are approximately 600,000 employees across the Civil Service and related bodies who are potentially covered by the scheme. It is therefore important to ensure that the eligibility criteria and the level of benefit applicable to particular individuals are easily understood and administratively workable. There must be what were referred to as 'bright lines'; i.e. rules that can be operated across the Civil Service in order to achieve consistency and operational effectiveness. It is not possible to look at each individual case to determine benefits for each individual; the rules must allocate benefits by reference to clear rules that can be applied with certainty in every case. There were apparently 34,000 departures on CSCS terms during the period 2005 to 2008.

20 The aim of redundancy compensation under the CSCS, according to Mr Spain, is to provide a proportionate financial cushion until alternative employment is found or as a bridge into (earlier than planned) retirement. The compensation seeks to reward the individual length of service and to provide financial protection that reflects their presumed personal circumstances. The cost to the tax payer has to be borne in mind. The rules were revised in 1987, so that a continuing payment was paid to those over the age of 50. Mr Spain said the aim of the design of the lump sum compensation

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payable before that age was that there should be a proportionate build up to the more generous pension terms payable at 40 (then 50). The proportionate build up means that financial protection increases with age. This reflects the fact that younger workers generally react more easily and more rapidly to the loss of their jobs. Mr Spain provided statistics to illustrate turnover in the Civil Service, with higher turnover in the younger age groups; for example 8.8% up to the age of 24 as against 3.9% in the age group 35-39. The rate levels off for those in their 40's, reaching a low of 3.4%, before increasing to its highest point in the age group 60 plus, reflecting retirements at or above normal pension age.

21 Mr Spain also relied on statistics from the Office for National Statistics about the probability of an unemployed individual moving from unemployment to employment and how that varies by age. The ONS found that an unemployed person in the age group 18-24 is 11.2 percentage points more likely to move into employment than someone aged 35-49. Likewise, an unemployed person in age group 25-34 is 8.1 percentage points more likely to move into employment than someone aged 35-49. The General Lifestyle Survey conducted by the ONS in 2009 showed that 5% of those aged 16-24 were married. This increased to 41% of the group aged 25-34, and 59% of the group aged 35-44. The average age at date of marriage in 2007 for women was approximately 34 years of age, and 36 years of age for men. The data produced by the Office of the Deputy Prime Minister in 2002 and by the Council of Mortgage Lenders in 2009 indicates that the average age of first time house buyers was around 32 or 33 from 2002-2007, and had increased to around 37 by 2009. The statistics relating to marriage and property purchases provide an illustration of responsibility that older workers are more likely to have than younger workers, and are consistent with the conclusions about the heavier family responsibilities (and thus greater need) of older workers reached by the working group in 1969, says Mr Spain.

22 Calculations have been done by the Cabinet Office's analysis and insight team. If the age-related element of the calculation of the compensation figures were removed, the cost to the public purse would increase significantly, according to Mr Spain, and in the case of the Claimants would roughly have doubled. In the case of Ms Lockwood, instead of receiving £10,849, she would receive £25,705, a multiple of 2.4. In the case of Mr Inglis, instead of receiving £18,330, he would receive £35,583, a multiple of 1.9. The total cost in the period 2005-2008 was already approximately £337 million. The A & I team were also asked to calculate the average cost if everyone who met the eligibility criteria received a payment calculated using the compulsory early severance provisions without the age references. Across the bands, up until the age of 34, the multiple is roughly 2, reducing to 1.4 from the age of 35. Looking at the staff as a whole, the average compulsory early severance compensation under the old scheme rules with the age references was £37,700 for those eligible to receive it. If the age references were removed, this increases to £43,800, a difference of £6,100.

23 Mr Spain also said that it was not possible to look on an individual basis at the ease and speed with which an individual might react to the loss of their job when determining their compensation, or at their personal financial position. At an individual level these are unknown quantities, which would be very difficult if not impossible to calculate. Getting individuals to complete questionnaires, for example, would be very resource intensive. Further, they might refuse to co-operate and it would be impossible to know whether the information they were giving was accurate. It was important to

ensure that staff across the board were being treated fairly and consistently. It was difficult to see how any form of means testing would be reliable, practical or desirable from a policy point of view. In the case of Ms Lockwood, she told us that she has been cohabiting with her partner for some time and they intend to get married shortly and she shares in the cost of a mortgage. Mr Inglis is married with two young children. Their personal circumstances are therefore more akin to those in the age group above 35.

The Law

24 A number of authorities were referred to by the parties, and in particular the Respondents. In support of the Respondents' case that the Claimants and their comparators are in materially different circumstances, the Respondent relied upon the case of **Barry v Midland Bank Plc [1999] ICR 859, HL.** This case had for consideration whether a redundancy payment scheme infringed the Equal Pay Act 1970. Four of their lordships held that there was no discrimination requiring objective justification. Lord Slynn, in his judgment, stated:

> 'The first question which arises is whether there is a difference in treatment at all between full-time and part-time workers for the purposes of the Act of 1970 and the Treaty. In that regard it is not sufficient merely to ask whether one gets more or less money than the other. It is necessary to consider whether, taking into account the purpose of the payments, there is a difference in treatment. The purpose of the payment here is to provide support for lost income during the period immediately following redundancy. As the industrial tribunal put it, it is 'to cushion employees against unemployment and job loss.' It is not to remunerate for past service... even if the payment takes into account years of service to reflect loyalty to the employer.'

Lord Slynn then quotes from the European Court of Justice in **Barber v Guardian Royal Exchange Assurance Group [1990] ICR 616.** 'There the ECJ said that a redundancy payment makes it possible to facilitate (the employee's) adjustment to the new circumstances resulting from the loss of his employment and which provides him with a source of income during the period in which he is seeking new employment.'

In **Lindorfer v Council of the European Union** (13 November 2006), the Advocate-General made a number of comments. She said, first, that the general principle of equal treatment, or prohibition of discrimination, has consistently been defined as requiring that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. That definition implies a two stage analysis. First, are the situations comparable, so that they call for the same treatment, or are they different, so that the treatment should be differentiated? Second, if the two situations are not treated as indicated by the answer to the first question, is there objective justification for the diversions? In practice, however, there may be some blurring between the assessment of characteristics which differentiate situations and the assessment of objective justification for differentiated treatment of otherwise comparable situations (or for uniform treatment of otherwise different situations). See paragraphs 21-23 of the Opinion. The Respondents referred to two cases in the EAT presided over by Mr

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Justice Elias. These were **Loxley v BAE Systems Ltd [2008] IRLR 853** and **MacCulloch v Imperial Chemical Industries Plc, unreported on 22 July 2008.** There, the learned judge sets out the legal principles with regard to justification:-

1 The burden of proof is on the Respondent to establish justification once a prima facie case of discrimination is established. This is in accordance with general principles and is reflected in regulation 37 on the burden of proof (in the Age Regulations 2006).

2 The classic test was set out in **Bilka-KaKaufhaus GmbH v Weber von Hartz [1984] IRLR 317** in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must 'correspond to a real need... are appropriate with a view to achieving the objectives pursued and are necessary to that end'. This involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to 'necessary' means 'reasonably necessary': See **Rainey v Greater Glasgow Health Board [1987] IRLR 26, HL.**

3 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys and Hansons Plc v Lax [2005] 1RLR 76, CA.**

4 It is for the Employment Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable responses' test in this context; **Hardys and Hansons Plc v Lax.** In analysing the issue of justification, the Tribunal must carry out a critical examination to reflect that analysis and its reasoning: **Hardys and Hensons Plc v Lax.**

5 Mr Nawbatt referred us to two specific paragraphs of the judgment in **MacCulloch**. In paragraph 25, the judge said the fact that the rules are fixed and do not vary with individual circumstances is a feature of the scheme which itself needs justifying. However, he surmises that in practice that will not be difficult in a scheme of this nature, since transparency and equality of treatment are important principles in their own right. The EAT did not accept that in assessing justification for schemes of this kind it is necessary or appropriate to focus on the matters specifically referable to the individual but not shared by others of the same age or length of service. The employer has never sought to treat the Claimant less favourably as an individual, but only in so far as she falls into a particular category defined by age and length of service.

In paragraph 36 of the judgment it was said that that the employer indicated that older workers can be a block on recruitment, and they encourage turnover and the prevention of blockage in the employment system if some older workers are tempted to leave. That is, in principle, capable of being a legitimate objective, say the EAT. Indeed, Article 6 (of the framework equal treatment Directive 2000) itself refers to labour markets and employment policy objectives as being, in principle, capable of justification.

Mr Nawbatt pointed to paragraph 42 of the EAT judgment in **Loxley**.:-

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'We should add that we fully recognise that the fact that an agreement is made with the trade unions is potentially a relevant consideration when determining whether treatment is proportionate. The position of the ECJ in the case of **Palacios de la Villa v Cortefiel Servicios SA [2007] IRLR 989** strongly supports that proposition. The court recognised that one of the considerations that could properly weigh in the assessment of whether compulsory retirement was justified was that the rules in question had been collectively agreed. Plainly the imprimatur of the trade union does not render an otherwise unlawful scheme lawful, but any tribunal will rightly attach some significance to the fact that the collective parties have agreed a scheme which they consider to be fair.'

The Respondent also argues that the question is whether the term or provision has a legitimate aim and, if so, whether there is a proportionate means of achieving that aim in place. If, in this case, it is proportionate to choose 30 or 35, the fact that it would be less discriminatory to have chosen 25, 40 or even 45 cannot render the ages chosen unlawful. Further, the fact that an employer might have justified a cut off at any other age does not mean it is unable to choose one at all: see **Seldon v Clarkson, Wright and Jakes [2011] ICR 60, CA**, at pargraph 39.

26 The Respondent also referred to the case **of Kücükdeveci v Swedex Gmb & Co [2010] IRLR 347, ECJ.** Here, the ECJ considered German legislation that provided for periods of notice entitlement to be increased incrementally as the employee's length of service increased but disregarded any periods of service before the age of 25. The legislation introduced a difference of treatment between persons with the same length of service, depending on the age at which they commenced their employment. This disadvantaged younger workers generally compared to the older ones, in that the former, despite several years' seniority and service, might be excluded from benefitting from the progressive extension of notice periods in the case of dismissal according to the length of the employment relationship, which older workers with comparable seniority would, by contrast, be able to benefit from. The ECJ commented that such a difference of treatment would not constitute discrimination if it was objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim were appropriate and necessary. The ECJ concluded that the aims of the national legislation were legitimate: to strengthen the protection of workers according to the length of service in the undertaking, and to facilitate the recruitment of younger workers by increasing the flexibility of personnel management. It reflected the assessment that young workers generally react more easily and rapidly to the loss of their jobs, and that greater flexibility can be demanded of them. However, in this case, the ECJ held that the means of achieving those aims were not 'appropriate and necessary', since the provision applied to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal. The ECJ further noted that the legislation itself affected young employees unequally, in that it affected young people who enter an active life early after little or no vocational training, but not those who started work later after a long period of training.

The Respondent argues that, unlike the German legislation, the CSCS does reward all employees under the age of 50 for their length of service. They all receive a months pay for each year of service. However, additional months are awarded to those aged 30 (or later if the employee's fifth year of service is later) and again to those aged

35. This staged scheme enables all employees to benefit from their length of service but at a lower rate for younger employees, unlike in **Kücükdeveci** where service below the age of 25 was disregarded completely.

Conclusions:

27 Having regard to our findings of fact, and applying the appropriate law, and taking into account the parties' submissions, the Tribunal has reached the following conclusions:

27.1 We conclude that there are material differences between the age groups, and in particular those below the age of 30 and those above the age of 35, as relevant to this case, as demonstrated by the statistics that we have seen. We refer not only to the government statistics, but also to independent ones from the Office for National Statistics and the Council of Mortgage Lenders etc. The Claimants, although it was always open for them to do so, have not provided statistics to contradict these. Indeed, the evidence they have produced is insufficient to counter the evidence that the Respondents have produced by way of the statistics and on all other matters. Although, of course, we do not have to accept the Respondents' evidence, when there is no counter-evidence, and the statistics in themselves appear to be reasonable and reasonably independent, then it is difficult for us to ignore them. We conclude that such statistics, on a balance of probabilities, are sufficient to demonstrate a material difference between those who are below the age of 35 and those who are above it. Individuals in the younger categories and in their twenties can generally be expected to react more easily and more rapidly to the loss of their jobs and greater flexibility can, in general, be expected of them given their lesser family and financial obligations. The higher turnover of employees in the different age categories, referred to in our findings of fact, illustrates this. Also, the statistics support the contention that younger people are more likely to move into employment more easily than older people. So far as financial commitments are concerned, then in 2007, the year with which we are concerned, the average at date of marriage was 34 years for women, and 36 years for men. Ms Lockwood makes the point that the statistics show that many people cohabit at younger ages. However, she has not provided evidence to show that such cohabitees have onerous financial commitments, such as mortgages and children, to the same degree as those who are married. First time house-buyers are more likely to be over the age of 30 than under it, and probably over the age of 35.

27.2 Our conclusions in this case could end there, as we have concluded that, on a balance of probabilities, we are persuaded that the Claimants' were in a materially different position from their comparators. However, in case we are wrong about this, we have also reached conclusions in respect of the defence of objective justification. A number of points can be noted.

(1) The scheme was set up in 1972. Although there has been no evidence about it, no doubt statistics in support of home ownership and marriage etc. would have been rather different then than they are today and as provided to us. To that extent, the Respondents reliance on these statistics is fortuitous. However, that does not mean that they cannot place reliance on them in the circumstances of these cases. We have to consider the defence of objective justification in relation to any discrimination that arose in 2007 and 2008.

(2) We note that continuing payments after termination of employment were made to people from the age of 40 in the original scheme, but the age at which such payments could be received was raised to 50 in 1987. However, the band for differential payments of lump sums compensation do not appear to have been raised commensurately. Thus, the width of the bands now varies substantially, whereas there were five year stages before - from 30-35, from 35-40, and then above 40. Now, the bands are from 30-35 and then from 35-50, and above 50. If the continuing annual payments age had been set at 50 at the outset, then we believe that the other bands would have been at higher ages also, i.e. higher than 30-35 and then above 35. However, the fact that different age bands could have been chosen, does not mean that the ones in place are wrong or discriminatory, on the case law.

(3) As Ms Lockwood submits, the data relied on to justify the bands structure is narrowly focused on age, and does not recognise sub-groups in relation to qualifications and experience, or indeed regional variations. The statistics are quite crude, and there is a certain lack of sophistication in them. She also points to the large disparity between payments over a relatively narrow age band. She argues that particularly cogent justification is therefore required because of the substantial disparate adverse impact.

(4) Mr Inglis argues that the scheme is based on reasoning and data which belonged to a different era. The data does not have contemporary relevance to the current working and social environment post age discrimination legislation of 2006. It reflects a society in which employees did not have the same level of protection against age discrimination as now. Mr Inglis left work in August 2008, by which time the current age discrimination legislation was in place. He argues that, at the date that his employment was terminated, there was no justification for stereotyping older employees as experiencing any quantifiable disadvantage when attempting to re-enter the workplace, because prospective employers could not discriminate against them. However, we would say that not only is age a factor, but also characteristics associated with a higher age, such as higher salary, being in a senior job, lack of updated skills and experience, etc. Mr Inglis, as did Ms Lockwood, seeks to urge his personal characteristics and circumstances, but we accept the Respondents' arguments on that. It is not possible or sensible to look at each applicant for voluntary early release individually and separately. Mr Inglis also argues for a levelling down, to a standard rate, such as has now happened. However, this would not help him. We are not concerned with what the Respondents might have done, so much as whether what they did do could be objectively justified.

(5) We have come to the conclusion that the aim of the Respondents to produce a proportionate financial cushion until alternative employment is found, or as a bridge to retirement and the receipt of pension, by way of staged payments and a banding process, was a legitimate aim. The cost to the public purse for such schemes is substantial, and compensation cannot be unlimited. There has to be a fair and rational allocation of benefits to those who have lost jobs prematurely. We remind ourselves that everybody benefited from this legitimate aim, including those in the under 30 age bracket and the Claimants. It is just that older employees benefited more.

(6) We are also satisfied on the evidence that the Respondents adopted proportionate means to achieve the legitimate aim, and the methods of implementation

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were reasonably necessary, and were sufficiently robust or strong as to counter any argument that might be raised on the question of substantial disparity of treatment.

First, so far as administrative workability is concerned, then it is vital to have clear cut bands so everybody knows where they are. It is not appropriate to take individual circumstances into account, in an organisation as large as the Civil Service. Here, there was a transparent scheme, clearly understandable. A staged approach was clearly appropriate, and although the age bands may have been chosen differently, it cannot be said, on the statistical evidence and the other evidence that we have heard, that the bands chosen were inappropriate or disproportionate.

Second, the cost argument. To pay the sums paid to older employees to everybody would have been a substantial burden on the public purse. However, we note that it would have of course been cheaper to have no such differential scheme, and treat everybody in the same way, as indeed appears now to be the position from 2010. Everyone would be entitled to one months' pay in lieu for every year of service. That will no doubt save the Treasury a substantial sum of money.

Third, the statistics support the Respondents, and there are no statistics from the Claimants to contradict them. It is quite clear that younger employees suffer unemployment for a shorter period of time, and that they will have fewer financial and family responsibilities. Both men and women over the age of 35 are more likely to have children than those under the age of 30, and thus have additional family and domestic responsibilities, as well as less flexibility and mobility so far as finding alternative employment is concerned. So far as Ms Lockwood is concerned, her comparator with the same length of service as her starting at the age of 35 would have to be 43 years old, for her to be able to argue the fullest of disparate treatment. A 43 year old would almost certainly be in a worse position on the open labour market than someone of Ms Lockwood's age.

Fourth, we accept entirely the Respondents' arguments on workforce recruitment and planning. It is a perfectly legitimate aim and a proportionate means of achieving it to have incentives in place for existing staff and new recruits, not only by reference to their salary but also to other benefits such as the voluntary early release scheme. Further, in order to facilitate promotion and refresh talent, such a scheme incentivises people to volunteer for redundancy. It was no doubt attractive to these Claimants, because they applied. We also accept that someone who starts work in the Civil Service aged 20 is less likely to view the job as a long term career, as against someone who starts at the age of 35.

Fifth, although the disparity between the Claimants and their comparators is quite substantial, we conclude that the Respondents have established cogent business aims and proportionate means of implementing them which outweigh the discriminatory effect of the measure.

Sixth, the unions have not sought to argue that the scheme was discriminatory and they have not challenged it on that basis. Again, that fact is something that we can and do find has significance in our conclusions on objective justification.

(7) Thus, for these reasons, we conclude that the Respondents' case on objective justification, if such be needed, has been made out on a balance of probabilities.

27.3 We turn finally to deal with Ms Lockwood's breach of contract claim. We conclude that the Claimant here is seeking to convert a voluntary termination or severance into a compulsory redundancy, entitling her to six months notice, just because she says there was no agreed termination date. However, we make these points. First, the Claimant knew the DWP's case very clearly and knew their position, well before she signed the acceptance form. We refer back to the email correspondence. It was always open to her to withdraw her application and seek redeployment within the DWP. Second, the Claimant signed that acceptance form knowing that the scheme provided for no notice pay in her circumstances. She also signed the acceptance form knowing that her release date would be no later than 21 September 2007, and therefore that that was a fallback date by which she might be required to leave. Third, the Claimant was fixated on the six months notice pay issue, and did not, it seems to us, make any or any proper effort to change her termination date so that she could take up her new employment. She did not write any letters or emails as she did over the six months notice pay issue, and although she said she raised it verbally with her manager, she does not seem to have pursued it any further than that. Fourth, the Claimant made a grievance in writing concerning the six months notice pay issue and in respect of age discrimination, but made no reference in that grievance to the lack of agreement on the termination date. The fact is, there was no breach of contract by the Respondent. Therefore, the Claimant has no entitlement to six months notice pay under the scheme that she signed up for, as there has been no wrongful dismissal.

RESERVED REASONS

October 27, 2011 London Central

Date and place of signing

EMPLOYMENT JUDGE

REASONS SENT TO THE PARTIES ON

28 November 2011

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS

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