EMPLOYMENT TRIBUNALS

Claimant: Mr G B N White
Respondent: Ministry of Justice

Hearing at: London Central **On:** 17 and 18 November 2014: reserved judgment 19 and 20 November 2014

Employment Judge: Mr J Macmillan (sitting alone)

Representation:
Claimant: In person

Respondent: Mr Charles Bourne QC
Ms Claire Darwin of Counsel

RESERVED JUDGMENT

The claimant's complaint of age discrimination fails and is dismissed

REASONS

Background and issues

1. Mr White is a retired circuit judge, a status to which he objects. He was required to retire on the 6th December 2012 on reaching his 70th birthday which he claims to be an act of age discrimination on the part of the respondent. When he commenced these proceedings on the 5th March 2013 his only ground of complaint was in respect of the policy which required all serving judges (with some dwindling number of exceptions which I will deal with below) to retire on reaching that age. He subsequently added by way of amendment to his claim two further complaints. The first was that the requirement for circuit judges who had held only a fee paid appointment on the appointed day for the purposes of the transitional provisions of the Judicial Pensions and Retirement Act 1993 (JUPRA) (see paragraphs 6 and 7 below) to retire at 70 whereas those who had already been appointed to their salaried positions by that date could retire at 72, was a breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The second was in respect of the decision not to appoint him to the post of deputy circuit judge after his retirement which was also said to be

an act of age discrimination. Both of those claims were subsequently dismissed on the grounds that they were out of time. This hearing therefore concerns only the policy of requiring judges to retire at 70.

2. Age is one of the characteristics protected by the Equality Act 2010. Mr White contends that the application of a blanket retirement age of 70 is direct discrimination contrary to s. 13 of the Act and that by virtue of s. 50(2)(b) as the holder of a public office and by virtue of s. 50(6)(c) he may not have his appointment terminated because of age. Mr Bourne QC for the respondent does not contend that Mr White is wrong in any of those particulars but denies that age discrimination is the result. The respondent relies primarily on the exception provided by s. 191 of and Schedule 22 to the Act which provide that an employer 'P' will not contravene an age discrimination provision *"if P does anything P must do pursuant to a requirement of an enactment"* which, by virtue of s. 212 includes an Act of Parliament. The enactment upon which the respondent relies is s. 26 of JUPRA which gives statutory force to the retirement age policy.

3. Mr White in response takes three points. The first is that the provisions of s. 26 of JUPRA do not amount to a requirement for the purposes of Sched 22 of the Equality Act as they are not absolute: exceptions may be made. Secondly, that as the author and originator of the so called requirement the government, of which of course the respondent is part, is not permitted to take advantage of it as it is a requirement which it has imposed upon itself. I will call this the 'self-serving' point. Thirdly that s. 26 of JUPRA is in conflict with the Directive which gave rise to the UK law on age discrimination (the Equal Treatment Framework Directive [2000/78/EC]) which permits Member States to justify age discrimination only if the difference of treatment complained of is *"...within the context of national law ... objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary"* [Art 6(1)]. The enforced retirement of judges at 70 cannot, Mr White contends, be objectively justified and in consequence s. 26 of JUPRA must be disapplied.

4. Mr Bourne rejoins that, on the contrary, the policy enshrined in s. 26 of JUPRA is indeed objectively justified and in consequence if any successful attack can be mounted on Scehd 22 on any other grounds, which he denies, the respondent is saved by s. 13(2) of the Equality Act which provides: *"If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim'* which is the domestic law equivalent of the EU test of objective justification. Thus the issue before me is primarily whether the compulsory retirement of all holders of judicial office at the age of 70 (subject to the minor exceptions which I have already mentioned) is objectively justified. Additionally Mr Bourne relies, though I suspect not heavily, on Art 2(5) of the Directive which provides that the Directive is without prejudice to national measures which in a democratic society are necessary, inter alia, for the protection of the rights and freedoms of others. He submits that if I was to come to the conclusion that the arguments advanced by the respondent in support of the claim of objective justification on the issues of judicial independence and inter-generational fairness are necessary for such a

purpose, then the Directive has no application.

5. At the start of the hearing I explored the issues in more detail with Mr White and Mr Bourne. At that stage Mr White was not prepared to concede that any fixed retirement age could be objectively justified but at the conclusion of the evidence he abandoned this position and accepted that whilst a compulsory retirement age was objectively justified, that age should be 75 not 70. If I was against him on that contention then his reserve position was that that age should be 72. Mr Bourne nonetheless invited me to deal with the question of whether a fixed retirement age was objectively justified as there are other cases awaiting hearing brought by retired lay members of the Employment Tribunal, to whom s. 26 of JUPRA does not apply, where the point may not be conceded. Mr Bourne accepted that by virtue of the Directive the burden was on the respondent to establish both that there was a need for a compulsory retirement age and that that age should be 70.

Does s. 26 JUPRA amount to a 'requirement'?

6. So far as material, s. 26 provides as follows:

> *"(1) Subject to the following provisions of this section, a person holding any of the offices for the time being specified in Schedule 5 to this Act (a 'relevant office') shall vacate that office on the day on which he attains the age of 70 or such lower age as may for the time being be specified for the purpose in the enactments and instruments to that office, whenever passed or made.*
>
> *...*
>
> *(5) If, in a case where this subsection applies, the appropriate person considers it desirable in the public interest that the holder of a relevant office should continue in that office after his compulsory retirement date, he may authorise the person to continue in office, either generally or for such purpose as he may notify to the person, for a period not exceeding one year and not extending beyond the day on which the person attains the age of 75.*
>
> *(6) If, on the expiration of the period for which a person is authorised to continue in office –*
>
> *(a) by virtue of sub-section (5) above, or*
>
> *(b) by any previous exercise of the power conferred by this section,*
>
> *the appropriate person considers it desirable in the public interest to retain the person in office for a further period, he may authorise him to continue in office, either generally or for such purpose as he may notify to the person, for a further period not exceeding one year and not extending beyond the day on which the person attains the age of 75.*
>
> *(7) After the day on which a person attains the age of 75, he shall not hold any relevant office .....*
>
> *...*
>
> *(11) Schedule 7 to this Act shall have effect for the purpose of making transitional provision in relation to persons holding relevant offices*

immediately before the appointed day; and –

(a) subsections (1) and (3) above are subject to the provisions of that Schedule; and

(b) any references in this section to the compulsory retirement date for an office shall be construed in accordance with those provisions.

(12) In this section … any reference to vacating an office includes a reference to retiring from it."

7. Circuit judge is one of the relevant offices specified in Schedule 5. Paragraph 3 of Schedule 7 preserves as the compulsory retirement date of judges who held a salaried position on the appointed day, the retirement date of their 'pre-commencement', i.e. existing, judicial office.

8. Mr White contends that the powers of extension provided for by sub-sections (5) and (6) deprive s. 26 of the characteristics necessary to amount to a requirement, in particular when contrasted with the absolute prohibition from sitting beyond 75. I reject that contention. Both s. 26 and Schedule 7 refer to the retirement date of 70 as being 'compulsory.' The terms of sub-section (1) are mandatory: a person holding a relevant office 'shall' vacate that office, i.e. retire, on their 70th birthday. An extension may only be granted if the appropriate person (who by virtue of sub-section (12) would be the Lord Chief Justice in the case of a circuit judge) considers it desirable in the public interest. I have heard no evidence to suggest, and Mr White does not contend, that such extensions are granted routinely or even frequently. In moving that the Judicial Pensions and Retirement Bill be read a second time in the House of Lords, the then Lord Chancellor, Lord Mackay of Clashfern, said (Hansard 16 June 1992 HL Deb c123):

"I must emphasise that I believe this power would be used sparingly and applied only where it was clearly in the public interest to do so, taking careful account of all the relevant considerations in particular such things as the health of the judicial office holder in question."

There is no suggestion that that has proved not to be the case. It is not in dispute that before an extension can be granted a business case justifying the extension has to be made.

9. In my judgment s. 26 of JUPRA is undoubtedly a requirement of an enactment for the purposes of Sched 22 of the Equality Act. All judges (apart from those benefitting from the transitional provisions, who are a fixed and dwindling number) are obliged to retire on their 70th birthday. It is compulsory. If they wish to stay on they must obtain an extension, which applies to them personally, for no more than a year at a time and which may be limited in terms of the work which they can undertake and then only if a public interest exception to the general rule has been established. Part of that pubic interest, possibly the major part, is the demands for the time being imposed on the system in terms of the need for judges which clearly fluctuates over time. There is absolutely no evidence that there is any kind of presumption that 'compulsory' does not mean what is says.

The 'self-serving' point

10. Mr White submits that as the government is the author of JUPRA the 'requirement' is self-imposed and therefore not in reality a requirement at all. Any government could seek to opt out of the age discrimination requirements of the 2010 Act in a way denied to other employers by securing the passage of legislation to impose an obligation on itself. This, he submits must be wrong in principle.

11. The submission, in my judgment, ignores both the constitutional and factual realities. If the government had secured the passage of legislation that gave only it the benefit of what Mr White describes rather inaccurately as an opt out, there might be some force in his argument. But it has not done so. Schedule 22 applies equally to all who satisfy the very broad concept of 'employer' for the purposes of Part 5 of the Act. What Mr White is arguing for is in fact to disadvantage the Crown in its role as employer. Although he applies his argument in the context of s. 26 of JUPRA which necessarily only applies to the Crown, it is not at all difficult to imagine circumstances in which both the Crown and other employers would benefit equally from the provisions of s. 191 of and Sched 22 to the 2010 Act in respect of some other statutory requirement. If Mr White is contending that in those circumstances only non-Crown employers could have that benefit he does not explain why the Crown should be so disadvantaged. There is nothing in the Directive to justify such a conclusion and as the concept of public employment is widespread and well established throughout the EU it would be difficult to argue that the possibility of governments as well as other employers benefitting from such an exception to the general prohibition against discrimination on the grounds of age, had not been appreciated. The clearest possible words in either a Directive or an Act of Parliament would be required to justify such a novel contention. Given the context of a statutory requirement which can only apply to a very limited number of public servants of whom Mr White is one, this looks suspiciously like special pleading.

12. Furthermore, Mr Bourne is plainly right when he submits that Mr White ignores the constitutional position which, properly understood, demonstrates that his basic premise is false. Contrary to Mr White's submission, governments do not make law, they only promote it. Law is made by the Queen in Parliament. That governments commanding large majorities might reasonably expect to see their legislative wishes fulfilled is no answer to that objection. The point is misconceived.

Objective justification
- the facts

13. Unlike some of the defences of objective justification that have been advanced before me in the Judicial Pension Scheme litigation which have been entirely post hoc, the issues surrounding a compulsory retirement age of 70 for judges have been thoroughly and regularly considered by government over more than 20 years. The starting point must be JUPRA itself which introduced the retirement age. Prior to that, some judicial appointments had a retirement age of 72, some of 75 and some none at all. Since JUPRA the only judges who are not

required to retire at 70 are those whose previous retirement ages are preserved by the transitional provisions of the Act. I am indebted to the evidence of Dr James Murrell of Judicial HR at the respondent's Judicial Office for his very helpful and detailed account of the genesis of the compulsory retirement age and its periodic re-examination which was not challenged in any material respect by Mr White. I propose only to summarise the most important points.

14. The process began with a meeting of Judicial Heads of Division in December 1991 which agreed that the Lord Chancellor should consider changing the age of retirement for High Court and circuit judges to 70 with the possibility of an extension to 75. The Lord Chancellor consulted appropriate bodies and individuals on the proposal with a majority of respondents - 31 to 7 - being in favour. When JUPRA was debated in the House of Lords at second reading Lord MacKay informed the House that he had consulted on a 'general' retirement age of 70 and that the consultation had indicated 'general support' for the proposal. I am not clear whether the original proposal and consultation which Dr Murrell refers to had widened beyond circuit and High Court judges or whether Dr Murrell's understanding of the nature of the original proposal is erroneous, but nothing turns on it. By the time the Bill was presented 70 was to be the retirement age for at least the great majority of judges. The proposal received widespread support in the House although a small minority of speakers favoured either a lower or a higher age. In summing up the debate Lord MacKay observed that there had been general agreement that a retirement age of 70 was appropriate. Among those supporting it was Lord Taylor of Gosforth, making his maiden speech as Lord Chief Justice, who strongly welcomed the proposal and noted that *'the judiciary has over the last couple of years taken the initiative in urging a reduced retirement age.'* Lord Ackner, a Lord of Appeal in Ordinary, took a 'positive pleasure' in agreeing with the proposal and added that as Chairman of the Bar Council some 35 years earlier he had recommended 70 as the age of retirement to the then Lord Chancellor. Lord Alexander, a member of the Bar, entirely agreed but suggested that ultimately the retirement age should come down to 65, a suggestion which he said had also been made by the Bar Council. In short, the proposal had widespread support among the senior judiciary and those members of the profession who were consulted. The only significant concern, and that among a minority, was that the retirement age may have been set to high.

15. Subsequently the question has come under consideration during the development of the Constitutional Reform Act 2005 in connection with the retirement age for the Justices of the Supreme Court when the issue was again debated in the House of Lords having first been the subject of consultation. Retaining the age of retirement at 70 for Supreme Court judges met with the approval of 53% of respondents to the consultation. In 2010 in the context of the abolition of the statutory retirement age of 65 for employees, which came into effect on 1st October 2011, a lengthy Position Paper was produced which explained the rationale behind both a compulsory retirement age and setting that age at 70. Appended to it were 4 alternatives each of which was examined and rejected with reasons. The paper explained that during the passage of JUPRA into law and since *"the age of 70 has been seen to represent a balance between the desire of judges wishing to serve and the public interest in sustaining a*

judiciary fully effective in discharging its responsibilities" [para 13]. The paper also noted [at para 21] that it was unclear whether there was any great desire among judges themselves for change.

16. The statistics maintained by the respondent bear this last point out. Although the evidence of Simon Hayllar of the Forecasting and Modelling Unit of the MoJ was that about 35% of judges retire in their 69th year (he was relying for this evidence on recollection only) Dr Murrell's evidence was that only a very small minority of those who retired – 9% in 2010; 17% in 2011 and 8% in 2012 – did so on their 70th birthday. By contrast in the same years 17%, 23% and 28% of overall retirees retired at 65 with the average retirement age for the 5 year period 2008 to 2012 being 66½. According to the 2010 Position Paper the average age for the salaried judiciary at that time was around 67/68 years of age [para 21]. As Mr White conceded, the discriminatory impact of a retirement age of 70 is therefore not great. In fact he went further and conceded that the number of serving judges who would be discriminated against by maintaining a retirement age of 70 – roughly 17 a year on Mr Hayllar's evidence - is probably lower than the number who would be adversely affected by being denied the opportunity for appointment or promotion, or have that opportunity delayed, if the age was increased to 75. Whether he was right to make that concession isn't at all clear as the numbers would appear to be much the same – each delayed retirement probably resulting in a delayed appointment or possibly a lost opportunity for promotion.

17. In July 2010, no doubt as part of the same exercise, the then Lord Chief Justice wrote to the Lord Chancellor to record that he had discussed the proposal that judicial retirement age generally should be raised to 75 with judges of the Court of Appeal and High Court and with the Judges' Council which represents circuit judges. He reported that: *"Although different views were expressed, there was a strong feeling that it would be inappropriate to do so."* He then set out the judges' reasons for this view, which I will return to in more detail below, which are in essence the same as those relied upon by the respondent in these proceedings and which, with one late addition, the Ministry has relied upon since the subject was first discussed in 1992. Further consideration was given in 2010 to the difficult question of whether to make an exception for Supreme Court justices on the grounds that they are nearly always appointed rather late in their judicial lives but once again the idea received little support, the preference being for a uniform age for all judges.

18. In international terms a retirement age of 70 is on the high side rather than the low side. Out of the list of 79 countries whose judicial retirement ages have been provided by the respondent, only 9 have a higher age than 70 for all or some of their judges whereas 39 have a lower age for all or some of their judges and 32 have a retirement age of 70 for all their judges.

19. There are five clearly stated policy objectives behind having a compulsory retirement age and fixing that age at 70. Mr White does not dispute either the genuineness or the justification of those objectives nor does he submit that they are not ones on which the respondent may rely as a matter of law. His complaint is only that they could be achieved equally well by setting the age at 75. Those

policy objectives – the legitimate aims for the purposes of Art 6(1) of the Directive – are as follows:

> (a) promoting and preserving judicial independence by having a set retirement age (albeit with limited provision for extension) rather than individual decisions in every case
>
> (b) preserving the dignity of the judiciary by avoiding the need for individual assessment of health and capacity
>
> (c) maintaining public confidence in the capacity and health of the judiciary
>
> (d) workforce planning, ensuring that there is an appropriate number of judges at the necessary levels of seniority to meet the needs of various jurisdictions and enabling reasonably accurate forecasts of future need
>
> (e) sharing opportunity between the generations by balancing experienced judges' need to continue in office for a reasonable time against newer appointees' need for career progression opportunities (and thereby also promoting diversity in the judiciary)

Apart from the bracketed words at the end of (e) which have only emerged as a consideration in more recent times, these policy objectives have been constant since the early 1990's. Clearly, (a) and (b) speak mainly to the need for a compulsory retirement age while (d) and (e) speak to that age being set at 70 and (c) speaks to both.

20. Mr White is a judicial member of the Parole Board. He submits that the terms under which he sits on the Board are a strong indication that either no compulsory retirement age is justified or alternatively that setting it a 70 is unreasonably low. All Parole Board members are appointed under the same terms. The appointments are public rather than judicial, that is they are not handled by the Judicial Appointments Commission. The appointment of non-judicial members is dealt with by the Commissioner for Public Appointments while the appointment of judicial members is the responsibility of an internal board chaired by the Chairman of the Parole Board who is either a Lord Justice of Appeal or a High Court judge. Mr White did not challenge the evidence of Ms Margaret Garrett of the MoJs Arm's Length Governance Division, which is responsible for the Board, that judicial members (serving or retired circuit judges who hold either a murder or rape ticket or who have significant Mental Health Review Tribunal experience) are not exercising functions as members of the judiciary when they sit on the Board. Appointments are (currently) for terms of 5 years with an expectation of automatic renewal for a further five years and the possibility of further appointment thereafter but on re-application. All, or at least the great majority of post-holders are part-time and fee paid. There is no upper age limit and Mr White is likely to serve until he is 78. There are two significant differences between the tenure of judges and that of even judicial members of the Board. The first is that the latter are subject to appraisal every two years and may be included in an annual monitoring exercise while the former are not. Secondly, their appointments may be terminated by the Secretary of State on five grounds which include failing satisfactorily to perform their duties and acting in

contravention of the Board's Code of Conduct[1]. A judge may only be removed for misconduct or incapacity on the grounds of health. In the case of High Court judges and above removal from office requires the sanction of both Houses of Parliament. There is currently no mechanism in place for removing a judge on performance grounds which fall short of misconduct or incapacity.

21. Mr White invites me to say that such a strong analogy can be drawn between the work of the Parole Board and that of the courts that it demonstrates the fallaciousness of the respondent's contention that it is reasonably necessary to have a judicial retirement age of 70. He relies in particular on the judgment of the Supreme Court in the conjoined appeals of ***Osborn v. The Parole Board, Booth v. The Parole Board*** and ***ex parte Reilly*** [2013] UKSC. The appeal concerned the circumstances in which prisoners seeking release from prison on parole should be granted an oral hearing. In para 2 of his judgment Lord Reed summarised his conclusions and at (i) referred to the Board's duty under s. 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms where that article was engaged. That would be achieved by complying with common law standards of procedural fairness including the holding of oral hearings where appropriate. Even though the Board sits in private and does not hear evidence on oath it makes decisions concerning the liberty of the subject on the basis of evidence which can be the subject of challenge, both parties being represented by lawyers. Reasons are required to be given and may be the subject of judicial review and the Board's decisions are binding subject to that limited right of appeal. There is therefore an obvious analogy to be drawn although the strength of that analogy is perhaps moot as Mr Bourne submits. In ***R (on the application of Brooke and others) v. The Parole Board*** [2008] EWCA Civ 29 at para 43 Phillips LCJ giving the judgment of the court said: *"The role of the Parole Board cannot be compared too closely with that of a court".*

- the policy objectives

22. As the reasons underlying the policy objectives which the respondent advances as its legitimate aim are not challenged either as to the fact of them or the need for them I can deal with this aspect most effectively by quoting from contemporary documents and extracts from witness statements.

23. Promoting and preserving judicial independence is, as Mr Bourne submits, not just a constitutional aspiration but a 'black letter law' requirement: see Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms read with s. 6(1) of the Human Rights Act 1998 and the Constitutional Reform Act 2005 s. 3(1). The quoted passages have to be read in that context. Although not a black letter law requirement, preserving the dignity of the judiciary by avoiding the need for individual assessment of health and capacity goes inseparably with the requirement for judicial independence.

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[1] While I note that in ***ex parte Brooke and another*** (see para 21) the former ground – failing satisfactorily to perform duties -was held to be incompatible with the independence of members of the Board, Ms Garrett's evidence that it was still included in members terms was not challenged by Mr White and he made no submissions to me on the conclusions if any which I could draw from ***ex parte Brooke*** in the context of the analogy which I discuss in paragraph 21. It would therefore be dangerous for me to draw any conclusions from it and I must proceed on the basis that Ms Garrett's evidence is correct

24. Lord Chief Justice to the Lord Chancellor; letter dated 30 July 2010:

> *"As we have previously discussed, the implementation of this policy* [increasing the retirement age to 75] *would require the introduction of robust procedures for removing judges who ought not to carry on beyond the age of 70. That may be easier said than done; it is one thing to remove a judge who is seriously ill – or to persuade him to retire; it would be rather different to try to persuade someone to go who was in reasonable physical health, and had no actual mental illness, but was thought to have 'gone off the boil' intellectually. The advantage of having a fixed retirement age at 70, is that the great majority of judges are still in good health mentally and physically at that age, and there is nothing personal about saying they must go."*

25. The Lord Chancellor to a Supreme Court judge; letter February 2011:

> *"I believe that, by applying an objective and impersonal framework to judicial retirement, the risk of any perception by the public that a decision about whether or not to retain a judge in service should be influenced by the nature of his/her decisions while sitting on the Bench is greatly diminished. At the age of 70 the majority of judges are still in good health mentally and physically – more than equal to the unique stresses of judicial office. I feel the existing compulsory retirement date of 70 is objectively justified and is consistent with existing equality legislation."*

26. The 2010 Position Paper. At para 10; *"Judicial independence is protected by ensuring that the Executive does not have a role in determining, on an ad hoc basis, the retirement age of any individual judge."* At para 16:

> *"The introduction of a mandatory retirement age over the age of 70, or abolishing it altogether, is likely to require the introduction of firm processes for the removal of judges…. Enhanced appraisal and removal processes, employing significant judicial resources in order to protect judicial independence, would need to be developed – and any 'robust' procedure able to identify those in good health but just not able to perform as effectively as in earlier years could only be built from an accurate benchmark of the proper rate of judicial productivity. The current mandatory retirement age of 70 obviates the need for potentially contentious, subjective, and unkind judgments."*

27. Lord McNally, Minister of State for Justice during the passage of the Crime and Courts Act through the House of Lords (Hansard 27th June 2012 HL Deb c277)

> *"Mandatory retirement ages for judicial office-holders have played an important role in ensuring that the judiciary is, and is seen to be, independent. Quite rightly, once appointed to a salaried position, it is difficult to remove a judge from office before retirement. This, of course, is constitutionally correct and removes any risk of unwarranted interference for the Executive. While many judges may be able to continue to work, and to contribute as fully as ever, beyond the age of 70, that will not always be the case. Without the mandatory retirement age, if a judge*

beyond 70 insisted on continuing, there would be no way of removing him even where his colleagues considered that he was no longer quite as sharp as he used to be. Therefore a standard retirement age, set at the right level, is needed."

28. In his witness statement (para 13) Dr Murrell said:

"It would be distasteful and undignified if the individual capacity of a judge were to be disputed in the public domain. In deciding what is the appropriate retirement age to meet this aim we have used judgment and consensus to select an age which is not too low, allows members of the judiciary the opportunity to serve for an appropriate period but at which capability is most likely not to be an issues except in exceptional circumstances."

29. On the issue of maintaining public confidence in the capacity and health of the judiciary, the final sentence of the Lord Chief Justice's letter quoted in paragraph 24 above is important. The Position Paper of 2010 para 13: *"Public confidence in the justice system remains essential. During the JUPRA's passage into law and since, the age of 70 has been seen to represent a balance between the desire of judges wishing to serve and the public interest in sustaining a judiciary fully effective in discharging its responsibilities."* These words were repeated almost verbatim by Lord McNally on the occasion quoted above.

30. Workforce planning, sharing opportunities and promoting diversity. The Lord Chief Justice's letter of the 30th July 2010:

"... we are concerned that [raising the retirement age to 75] would have a negative impact on recruitment at all levels of the judiciary. Most judges in fact step down a little before their compulsory retirement date, but changing the date would be bound to have some impact, with the result that some older judges would seek to remain in office in places which would benefit from having a younger judge with new ideas. Reducing the opportunities for appointment would also have a negative impact in relation to judicial diversity, and would delay or discourage the accession to the bench of talented practitioners at all levels".

31. Dr Murrell at paras 15, 16, 18 and 29:

"Operationally, the judiciary needs to be able to resize its workforce in the same way any other business would. Due to the nature of appointment and tenure of salaried office the workforce is inflexible and there are no facilities to reduce the workforce through methods normally deployed by other organisations. Retirement whilst not directly attributable to resizing the workforce makes an inflexible workforce less inflexible in meeting business needs...

In order to maintain a healthy inflow of people to the judiciary, to go some way to meeting the demand for positions and to promote access to appointment to the profession, there is a business need to have a process where the exit of individuals is managed through areas such as retirements (whether selected or compulsory retirement date) and

resignations…

The judiciary play a critical role in the administration of justice and the Government wants to see a judiciary that is diverse and representative of the society that it is serving; however, the pace of progress in increasing the diversity of the judiciary and the age demographic is slow. Reducing the opportunities for appointment and promotion by removing or increasing the compulsory retirement age could slow this progress even further…

In balancing the age of individuals joining the judiciary with the natural outflow of retirements at 65 against the expectation of the judiciary to have a fulfilling second career later in life, the age of 70 is considered to be proportionate to the legitimate aim of maintaining the public interest; retaining the dignity of judicial office holder (sic) and balancing the needs of the judicial office holder in order for them to have a fulfilling second career with time and opportunity to develop their career should they wish to do so and managing the judicial body to ensure its health, capacity and diversity."

32. There are numerous other pronouncements to similar effect. Mr White does not demur from any of that analysis other than to say that it would all be achieved equally well by a retirement age of 75 (but, importantly, not that it is not achieved by a retirement age of 70) and to point out that the deficit in improving judicial diversity is made up, according to the evidence of Mr Shayllar, after about 17 months. That is not quite right. The deficit is never made up. Mr Shayllar's evidence, as I understand it, is that putting the retirement age up to 75 introduces a permanent and irrecoverable delay in improving diversity of 17 months. He justifies his contention that this should be avoided in this way (witness statement para 7):

"This may not seem like a long time but in the context of moving forward on diversity it is significant because changes in diversity take a long time to feed through so any delay is damaging and undesirable."

Mr White also points out that any increase in judicial age diversity by having a retirement age which allows younger judges to be appointed must be at the expense of a decrease in age diversity at the other end of the age spectrum.

- **the law**

33. I am grateful to Mr Bourne for his usual careful and thorough analysis of the law. As Mr White does not dispute any of Mr Bourne's submissions I trust I may be forgiven for dealing with them relatively briefly.

34. Art 6(1) of the Directive provides that direct discrimination on the grounds of age may be objectively justified (see paragraph 3 above). The article also gives three examples of differences in treatment which may be justified. In ***Rosenblat v. Oellerking Gebaudereinigungsges mbH*** [2011] IRLR 51 the CJEU held that the list was not exhaustive and that Art 6(1) does not preclude the automatic termination of an employment contract upon the employee

reaching a certain age. In ***R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v. Secretary of State for Business, Enterprise and Regulatory Reform (Case C-388/07)*** [2009] ICR 1080 CJEU the Court held that Art 6(1) offers the option to derogate from the principle prohibiting discrimination on the grounds of age only in respect of measures justified by legitimate social policy objectives. At paras 50 to 51 of its judgment the Court said:

> *"50. It is also for the national court to ascertain, in the light of all the relevant evidence and taking account of the possibility of achieving by other means such legitimate social policy objectives as may be justified, whether [the measure under scrutiny] as a means intended to achieve that aim, is …. "appropriate and necessary".*
>
> *51. In that connection, it must be observed that, in choosing the means capable of achieving their social policy objectives, the member states enjoy broad discretion…. However, that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on the grounds of age…*
>
> *52. ….article 6(1) offers the option to derogate from [the principle prohibiting discrimination on grounds of age] only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training. It is for the national court to ascertain whether the legislation at issue… is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the member states' discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim."*

35. In ***Seldon v. Clarkson Wright and Jakes*** [2012] UKSC 16 the issue before the Supreme Court concerned a compulsory retirement age of 65 in a partnership agreement of a firm of solicitors. Having extensively reviewed the European jurisprudence at paras 32 - 49 Baroness Hale summed up her analysis at para 50:

> *"What messages, then, can we take from the European case law?*
>
> *(1) …*
>
> *(2) If it is sought to justify direct age discrimination under article 6(1), the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. They are of a public interest nature, which is 'distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction of improving competitiveness'...*
>
> *(3) …*
>
> *(4) A number of legitimate aims, some of which overlap, have been recognised in the context of direct age discrimination claims; (i) promoting access to employment for younger people …(ii) the efficient*

planning of the departure and recruitment of staff…(iii) sharing out employment opportunities between generations … (iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas…(viii) avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job, which may be humiliating for the employee concerned…or (ix) avoiding disputes about the employee's fitness for work over a certain age…

(5) However, the measure in question must be both appropriate to achieve the legitimate aim or aims and necessary in order to do so….

(6) The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen…"

36. In ***Palacios de la Villa v. Cortefiel Servicios SA (Case C-411/05)*** [2009] ICR 1111 at 1120, citing the well-known earlier authority of ***Mangold v. Helm (Case C-144/04)*** the Court (judgment paras 67 and 68) said:

"67. It remains to be determined whether, in accordance with the terms of [Art 6(1)], the means employed to achieve such a legitimate aim are 'appropriate and necessary'.

68. It should be recalled in this context that, as Community law stands at present, the member states …. enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it:…"

37. Mr Bourne submits, and Mr White does not disagree, that these paragraphs mean that it is up to the respondent what aims to pursue so long as they are legitimate aims of social policy. He submits that I must make findings about whether the respondent is indeed pursuing the aims it claims to be pursuing and if I so find and if they are legitimate social policy aims, I cannot go behind them.

38. The judgment continues:

"72. It is, therefore for the competent authorities of the member states to find the right balance between the different interests involved. However, it is important to ensure that the national measures laid down in that context do not go beyond what is appropriate and necessary to achieve the aim pursued by the member state concerned."

39. The correct approach for the tribunal to adopt was also considered in ***Hardy and Hansons Plc v. Lax*** [2005] ICR 1565 CA judgment of Pill LJ at para 32:

"Section 1(2)(b)(ii) [of the Sex Discrimination Act 1975] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justified … and I accept that the word 'necessary' … is to be qualified by the word

> *'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal … is justified objectively notwithstanding its discriminatory impact. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employer's submission… that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."*

40. This was developed further by the EAT in ***Seldon (No. 2*** [2014 IRLR 748] Langstaff P at para 27:

> *"… the effect of the judgments of the superior courts thus far has been that it is entirely appropriate to meet the legitimate aims of the employer that there should be an age [of retirement]. The issue for the tribunal is to determine where the balance lies: the balance between the discriminatory effect of choosing a particular age … and its success in achieving the aim held to be legitimate. That balance, like any balance, will not necessarily show that a particular point can be identified as any more or less appropriate than any other particular point. This is not to accommodate the band of reasonable responses rejected in* ***Hanson*** *but to pay proper and full regard to its approach to what was reasonably necessary given the realities of setting any particular bright line date."*

- **the respondent's submissions**

41. Mr Bourne submits that I have a 'hard edged' factual issue to determine: if the aims which the respondent is pursuing are legitimate aims of social policy is the measure adopted for pursuing them – a compulsory retirement age of 70 – appropriate and reasonably necessary? There is no range of reasonable response and no margin of appreciation but equally no requirement for the employer to show that no other age is possible. The correct approach from the case law is – is the tribunal satisfied from all of the evidence including the judgments of others that the age of 70 is reasonably necessary. It is not permissible for me to substitute my own judgment but I can say that I agree with someone else's judgment (judgment here being used to describe the views of others on the appropriateness of 70, not legal judgments).

42. It is clear from ***Seldon (No. 2)*** that there is seldom if ever going to be only one right answer in a retirement age case and that the answer will probably be a band of time. Therefore even if the tribunal concludes that 72 is an appropriate age, it does not follow that 70 is not reasonably necessary for achieving the policy objectives – the legitimate aim. While ***Seldon*** was about a private 'employer' (the claimant was a former partner in the firm) this case is about a national authority setting a national measure and ***Palacios de la Villa*** makes it

clear that there is a large measure of discretion in setting such policies. It is not the respondent's case that judges over the age of 70 are incapable of sitting, just that there are important reasons for having a retirement age of 70. That disposes of the issue of the Parole Board where life is rather different – a part-time fee paid world as against a full time salaried world in the case of Mr White's role as a circuit judge, and terms of appointment which allow for removal. The age of 70 is high by international standards and higher than the usual retirement age for judges in practice.

43. There are the clearest cross references between the social policy aims identified by Baroness Hale in ***Seldon (No. 1)*** at para 50 of her judgment as being legitimate in this context and the aims relied upon by the respondent. The missing factor is the need to preserve judicial independence which simply did not arise in ***Seldon*** or in earlier European authorities. There can be no doubt that the aims being pursued by MoJ are legitimate aims of social policy and there is no suggestion that those aims are not in fact being pursued.

- the claimant's submissions

44. Mr White has no dispute with the respondent's public policy objectives; he attacks only the means employed to achieve them which attack is now confined to the age of 70 rather than the need for a compulsory retirement age. His argument is that the age of 75 would not fall foul of those stated policy objectives. Such an age would only have minimal impact on the process of diversification and workforce planning would not be particularly undermined. There is no evidence that raising the age to 75 would undermine public confidence in the judiciary and it is clear from the Parole Board example that judges aged 77 are still regarded as being capable of determining whether convicted murderers should be released on parole. The age of 70 is not reasonably necessary because 75 would do just as well and meet the policy objectives just as well.

Conclusions

- a compulsory retirement age

45. In my judgment the arguments in favour of a compulsory retirement age for all members of the judiciary are unanswerable. I could not possibly improve on the arguments advanced by the Lord Chief Justice and the Lord Chancellor in their letters which I have quoted above at paragraphs 24 and 25 nor those in the Position Paper quoted at paragraph 26 and I respectfully adopt all of them. I would however go further than Dr Murrell in paragraph 13 of his witness statement quoted at para 28. The measures that he refers to would not only be distasteful and undignified but potentially damaging to the rule of law. Each time a judge is retired against his or her will under such a scenario, is it not highly likely that that will be the first ground of appeal of any disgruntled litigant who has appeared before them in recent months?

- retirement at 70

46. The primary problem for Mr White is that he does not contend, and seems unable to contend, that there is any significant harm in a retirement age of 70. For him as an individual there is of course a detrimental effect. He was appointed to the salaried judiciary late in life and had yet to acquire any

significant pension entitlement before he was retired. But he does not urge this upon me as a relevant consideration and he would be wrong if he attempted to do so. There is no obligation on the respondent to justify the application of the policy to an individual, only its application as a whole. Mr White concedes, clearly rightly, that the discriminatory impact of the policy is not great, with roughly two-thirds of judges retiring before their 69th year and roughly only one in 10 waiting until their 70th birthday.

47. There can be no doubt both that the aims which the respondent is pursuing in having a retirement age of 70 are legitimate aims of social policy and that those legitimate aims are of the highest importance in a pluralistic democracy under the rule of law. That the same aims could be achieved by setting the age higher at 75 is simply no answer to the claim that setting it at 70 is reasonably necessary for their achievement, at least not in the absence of evidence of any significant discriminatory impact. But I do not accept that those aims could be achieved by setting the bar at 75. A consistent thread running through the arguments in favour of 70 – which, it is not unimportant to note, commands the support of virtually all senior judicial figures since the 1990s (I note that the Lord President is a relatively recent dissenter in the context of the retirement age and pensions) and, on the evidence before me, all of the judge's professional bodies - is that it has been chosen, if I may be forgiven a sporting analogy, to ensure so far as possible that judge's retire while still at the top of their game. It is not suggested that the worry that judges are more likely to start going down-hill after 70 than before it is a fanciful one and the example of the Parole Board does not suggest that that view is either false or misplaced for the reasons given by Mr Bourne. It is of the highest constitutional importance that judges should not be perceived by the public to be 'past it' because of mere antiquity nor to be still in post whilst actually being 'past it' but declining to acknowledge the fact, given the very real difficulty of removing them from salaried office. Seventy-five is therefore not a straightforward alternative to 70.

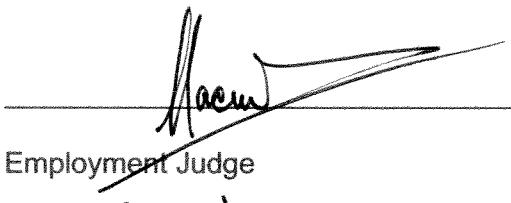
48. As for 72 as an alternative to 70, Mr White made no specific reference to it during his closing submissions. Seventy-two, of course, is the age at which he would have retired if the transitional arrangements of JUPRA had been the same for those holding salaried and fee paid posts on the appointed day. The fact that they were not was to have been the subject of challenge in his abortive Part-time Worker Regulations claim. Whilst retirement at 72 would reduce by an unquantified and possibly unquantifiable, amount the already minimal discriminatory impact of retirement at 70, that effect would be counterbalanced, at least to some extent, by a corresponding impact on improving the diversity of the judiciary, although that impact would be significantly less than if the age of retirement was 75. There would also be some worry that 72 was 'the wrong side' of 70 in the context of that being the age at which judges could, in the great majority of cases still be relied upon to be performing at their best. In short, to put it at its highest, the arguments in favour of 72 as a whole are no better than the arguments in favour of 70 and on balance they are perhaps rather worse. As Mr Bourne rightly submits, there is no question of the respondent having to show that 70 is the only age at which its legitimate social policy aims can be achieved and in a retirement case there is seldom going to be a single age which could be described as reasonably necessary for their achievement.

49. In introducing JUPRA to the House of Lords on second reading Lord Mackay said this (Hansard 16 June 1992 HL Deb c123):

> *"Any retirement age is of course a matter for judgment. Conflicting considerations have to be balanced to achieve what the person seeking to make the judgment believes to be right, both in the interests of the judges and in the interests of the public"*

That is plainly right. On the evidence before me, applying the principles of law which I have set out above I do not believe I could come to any other conclusion than that the retirement age of 70 is reasonably necessary for achieving the legitimate aims of social policy relied upon by the respondent, and I so conclude. In consequence, Mr White's complaint fails. Whether that will be true for the indefinite future is of course another matter. As Lord Hailsham pointed out in the debate on second reading (HL Deb c146):

> *"...the speeches which have already been made make clear that there are two not separate but interrelated problems that we have to face; the age of retirement; and the accrual period for full pension. It is no good regarding those as separate questions because they are related."*



Employment Judge

24th November 2014

Dated

JUDGMENT & REASONS SENT TO THE PARTIES ON

25th November 2014

FOR THE TRIBUNAL OFFICE