Neutral Citation Number: [2017] EWCA Civ 191

Case No: A2/2015/2458/2461/2463/2464/2510

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE LANGSTAFF (PRESIDENT)
UKEAT/0189/14/DA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2017

Before :

LORD JUSTICE ELIAS
LORD JUSTICE UNDERHILL
and
LORD JUSTICE BEAN

- -

Between :

(1) MS DEBORAH HARROD AND OTHERS
(2) MR MICHAEL FOWKES AND OTHERS **Appellants**
- and -
CHIEF CONSTABLE OF WEST MIDLANDS POLICE AND OTHERS **Respondents**

- -

Paul Gilroy QC (instructed by **LHS Solicitors LLP**) for the **Police Superintendents Association Appellants**
Ian Skelt (instructed by **Rebian Solicitors**) for the **Federated Ranks Appellants**
John Cavanagh QC and Mr Christopher Knight (instructed by **the respective Director of Joint Legal Services for Devon & Cornwall Police and Dorset Police; for Nottinghamshire Police and Derbyshire Police; and for Staffordshire Police and West Midlands Police; Force Solicitor for North Wales Police; and Head of Special Legal Casework for South Wales Police**) for the **Respondents**

Hearing dates : 31 January & 01 February 2017

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Approved Judgment

Lord Justice Bean :

1. This is a class action comprising claims of indirect age discrimination on behalf of former police officers against the Chief Constables of five separate police forces (Devon and Cornwall, Nottinghamshire, West Midlands, North Wales, South Wales). The Appellants who are members of the Police Superintendents Association ("PSA"), the body representing Superintendents and Chief Superintendents, brought claims against the Chief Constables of all five forces; the Appellants of ranks from constable to Chief Inspector brought claims against the Chief Constables of Devon and Cornwall and Nottinghamshire only. Officers of ranks from constable to Chief Inspector are known collectively as "the federated ranks" because they are represented by the Police Federation, although we understand that the Federation has not been involved in these proceedings.

2. The case concerns the compulsory retirement of police officers as a result of the application by each of the Chief Constables and the police authorities concerned of Regulation A19 of the Police Pensions Regulations 1987 (1987 SI No. 257; "the 1987 Regulations"). The trigger for the imposition upon each officer concerned of enforced retirement was that he or she had served for 30 years, and thus qualified for a pension of two thirds average pensionable pay ("⅔ APP"). Pensionable service begins at the age of 18. Officers as young as 48 were thus required to retire up to 17 years prior to their normal compulsory retirement age.

3. The Claimants comprised 21 PSA members and 212 from the federated ranks. A number of the claims were selected as test cases. Following a five week hearing in February and March 2013, an Employment Tribunal at Central London (Employment Judge James Tayler and two lay members) upheld the claims, promulgating its

judgment with reasons on 5 February 2014. It held that "the practice of requiring the retirement of nearly all officers in the Forces who could be required to retire under Regulation A19 of the Police Pensions Regulations 1987 was not a proportionate means of achieving a legitimate aim."

4. By a judgment handed down on 8 July 2015 following an oral hearing in March 2015, the President of the Employment Appeal Tribunal, Langstaff J, sitting alone, allowed appeals by the Chief Constables and dismissed the claims. On 23 September 2015 Dame Janet Smith, considering the case on the papers, granted the Claimants permission to appeal to this court.

5. Police officers are not employees but office holders. They have a high degree of security of tenure and their service is subject to statutory regulation. They are subject to a compulsory retirement age of 60 for officers of the rank of Inspector or below and 65 for more senior officers (Regulation A18 of the 1987 Regulations). They may also be compulsorily retired on the grounds of disablement (Regulation A20). Other regulations, not relevant in the present case, permit dismissal for misconduct.

6. Regulation A19 of the 1987 Regulations (which has subsequently been amended) provided at the relevant time as follows:-

> "Compulsory retirement on grounds of efficiency of the force
>
> A19.- (1) This Regulation shall apply to a regular policeman, other than a chief officer of police, deputy chief constable or assistant chief constable, who if required to retire would be entitled to receive a pension of an amount not less than two thirds of his average pensionable pay……
>
> (2) If a Police Authority determine that the retention in the force of a regular policeman to whom this Regulation applies would not be in the general interests of efficiency, he may be required to retire on such date as the police authority determine."

Regulation A19 only applies to police officers, not to civilian employees of the police authority. But Mr Paul Gilroy QC for the PSA Appellants and Mr Ian Skelt for the Appellants of the federated ranks were at pains to point out that it was not their clients' case that savings should have been achieved by making civilian staff bear the entire burden of such job cuts as were required.

7. According to the evidence before the Employment Tribunal the great majority of police officers who complete 30 years' service retire voluntarily. The Tribunal observed that the financial cushion provided to officers retiring in those circumstances is substantial. One of the retiring officers who was a Superintendent received a commutation payment of £227,455 and an annual pension of £35,913. A Detective Chief Inspector received a commutation payment of £180,328 and an annual pension of £28,472. For a Sergeant the respective figures were £127,225 and £21,225. The Appellants in this litigation were among the minority who did not retire voluntarily. Each was required to do so by the Chief Constable of his or her Force "in the general interests of efficiency" pursuant to Regulation A19 (2).

8. The Tribunal found that (at paragraph 12):-

> "A19 has been used very little in the past. It was the common evidence of the Respondents' witnesses that they had not been aware of A19 being used to require retirement en masse. To the limited extent [that] witnesses were aware of its use it had been used in the context of a lack of effectiveness of a particular officer."

9. There is, however, no dispute in the present case that A19 may lawfully be applied in the general interest of the efficiency of a Force, even where a significant number of officers are required to retire. A challenge on public law grounds to the application of A19 to a cohort of officers was rejected by King J sitting in the Administrative Court in *Police Superintendents' Association of England & Wales and others v The Chief*

Constable of Bedfordshire Police and Secretary of State for the Home Department [2013] EWHC 2173 (Admin). The judge held that pure budget saving would not be sufficient to permit the use of A19: there must be some efficiency gain. But that did not limit consideration to the effectiveness of the individual officer concerned. King J held that the phrase "general interests of efficiency" must in principle be capable of extending to the question of how to accommodate the need for a police force to live within its means. It is to be noted that the PSA which represented the Claimants in that matter did not appeal against this decision representing police officers did not appeal against this decision, and counsel for the Appellants accepted that they could not challenge it in the present private law proceedings.

10. The General Election on 6 May 2010 was followed by a Comprehensive Spending Review ("CSR"). Police forces were required to cut 20% from their budgets over four years. The reductions were, to an extent, front loaded into the first two years.

11. The Forces first looked at their estates of buildings, IT equipment and fleets of vehicles. They sought to make such savings from these as were possible. However, the great majority of police authority expenditure was on police officers and civilian staff. Officers account for the substantial majority of staffing costs because of their numbers and the fact that they are generally more expensive than civilian staff.

12. Having reduced other costs the Respondent Forces began to consider staffing costs. They first considered reduction in civilian staff numbers and made such savings as they could. They came to the conclusion that the budget savings required by the CSR made it necessary to reduce the number of police officers.

13. Seven Police Forces made use of A19 in 2010-11 to require almost all officers to retire on becoming entitled to receive a pension of not less than two thirds of their

average pensionable pay ("⅔ APP"). The Tribunal were told that 20 other Forces had used methods other than Regulation A19 to achieve the budget savings required. The Tribunal found that:-

> "30. Generally, the Forces were aware that they were likely to obtain greater savings than required by the budget cuts through the near universal application of A19. A view was taken that to select between Officers who had reached ⅔ APP, and so limit the number that were forced to retire to those that were necessary to achieve the budget reduction, would be risky, because it could lead to some form of discrimination challenge, although what form it might take was not enunciated.
>
> 31. The Forces adopted the approach that all officers who had 2/3APP would be required to retire unless their particular skills could not immediately be replaced, in which case they might be retained for such further period as was necessary to allow other officers to be trained to take over their responsibilities. Police Forces have a high degree of resilience and must be expected to carry on a high degree of operations if they [lose] any particular officer. Accordingly, it was believed, and proved to be the case, that it would be exceptional for any Officer to be retained. The view was that such an Officer would only be retained for a relatively short time.
>
> 32. This near universal application of A19 also meant that it could be predicted that more officers would leave than required so that, despite the substantial budget reduction, most of the Forces recorded under spends in the period during which they operated A19."

14. The Tribunal found (at paragraphs 24-27) that there was little or no consideration of the possibility of asking officers with service that would provide less than ⅔ APP whether they were planning to leave; nor of establishing whether any officers wish to take career breaks; nor of whether any might wish to move to part time working. To the extent that these possibilities were considered by the Respondents, the concern was that they would not provide certainty. Those who said they were willing to volunteer might change their minds. Those who took career breaks could come back early. Those who moved to part time working could give 28 days notice to return to full time.

15. The fact that (with the limited exception of individuals who were temporarily indispensable) the seven Forces applied A19 to all eligible officers did mean that there was no evidence that the way in which A19 was used had any discriminatory impact other than that which was inherent in A19 itself, namely that only officers who had served in the police for 30 years could be required to retire.

16. Section 19 of the Equality Act 2010 provides as follows:

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

17. At paragraph 66-67 the Tribunal held:-

> "We consider the appropriate analysis is as follows. As Mr Cavanagh contends, A19 is a *provision.* It includes within it a *criterion*: namely that retirement can only be enforced where the officer has obtained ⅔ APP. We consider that the Forces have added a ***practice*** that they would require all officers to retire at ⅔APP, subject to the very limited exception that those who could not immediately be replaced would be kept on for a short period while replacements were trained. Put in public law terms, A19 provides a legislative discretion in relation to which the forces have adopted a policy of applying it in all cases

> subject to the limited exceptions. The *Bedford Police* case is authority for the proposition that this is legal in public law. However, that does not preclude an analysis of whether the indirect discrimination that is involved is justified. We do not accept that the discriminatory impact arises only from regulation A19 itself: it also results from the practice that the Forces adopted as to its application.
>
> Regulation A19 has a focus on increasing the efficiency of the force through the enforced retirement of an officer. While the regulation may allow the enforced retirement of a cohort of officers, the regulation places emphasis on whether the retirement of the individual officers will increase the efficiency of the force. To the limited extent that A19 has been applied in the past it has been focused on individual officers. This supports our view that introducing a policy whereby all A19 Officers will be required to retire, save for very limited exceptions, adds substantially to the discriminatory impact of A19 generally, and requires objective justification."

18. The Tribunal went on to hold, at paragraph 72:

> "The determination of whether the application of a PCP is appropriate and necessary is essentially a factual question. The authorities clearly thought that once legitimate aims had been established the matter needed little further consideration. Justification requires more than a search for legitimate aims that can be put forward to support a decision that the Force wishes to make and to protect against legal challenge. When looking at the appropriateness and necessity of the application of a PCP it has to be appreciated that prime facie discrimination has been made out and that such discrimination should be avoided if reasonably possible."

19. The Tribunal criticised the Forces for failing to appreciate that most officers with 30 years' service retire voluntarily and that the additional savings to be obtained from making all such officers retire were limited. They continued:-

> "73. Had the decision-makers had sufficiently in mind that the savings from the enforced retirements were only for the relatively small number of offices who would not retire in any event, that would have focused their minds on the possibility of finding some alternative means of avoiding the detriment to the limited group who planned to stay. …
>
> 75. To the extent that evidence as to the decision making process was put before us we see a failure by the decision makers to grapple with the fact that they were taking a decision that would lead to discrimination if it could not be justified. They did not sufficiently appreciate that not only must there be a legitimate aim but the

> mechanism adopted needed to be both appropriate and necessary. Had they done so this would have turned their mind to the possibility of alternatives. ….While we accept that increasing efficiency is a legitimate aim we do not consider that on the facts of these cases the Forces have established to our satisfaction that its use was appropriate and necessary.
>
> 76. When one takes into account the relatively small number of officers who would not have retired in any event, it focuses the mind on the fact that there were a number of alternatives. To the limited extent they were considered, they were generally disregarded on the ground of certainty."

20. The Tribunal went on to set out at paragraphs 78-80 what they considered to be the alternatives available to avoid the enforced retirement of all A19 officers. These were: asking officers whether they intended to retire at ⅔ APP so as to ascertain whether the enforced use of A19 was necessary; the use of part time working, although as the Tribunal noted officers on part time working had a contractual right to return to full time working on 28 days' notice; and career breaks. At paragraph 83 the Tribunal concluded:-

> "If, after the other alternatives have been exhausted, the Forces had decided that they needed to require a limited number of A19 Officers to retire, we consider that there was no reason why they could not have selected between A19 officers. This might have been done by an analysis of their job skills."

21. Accordingly, as I have already noted, they held that the practice of requiring the retirement of nearly all officers who could be required to retire under Regulation A19 had not been objectively justified as a proportionate means of obtaining a legitimate aim.

The appeal to the Employment Appeal Tribunal

22. On appeal to the EAT the main thrust of the argument put forward by Mr John Cavanagh QC on behalf of the Forces was that the Employment Tribunal had "lost focus on that which was indirectly discriminatory" about Regulation A19, which was

part of the drafting of the Regulations itself. There was nothing, separately, about the way in which the Forces adopted or applied A19 that was itself a further act of discrimination. Langstaff J held that:-

a) There was "factually an overwhelming case" that part of the Forces' aim was to achieve certainty of reduction in budgetary expense;

b) There was no other way of achieving that certainty than by the use of A19;

c) "… it was not for the Tribunal to substitute a scheme other than that adopted by the Forces to achieve that aim, but … rather ... for it to consider whether the application of A19 was reasonably necessary and appropriate to do so, balancing the importance of achieving the aim against the adverse measures adopted had upon those affected";

d) Since the imposition of the condition for the use of A19 that the officer concerned must have reached ⅔ APP was a decision of Parliament, this should have led to a different and less strict standard of scrutiny from that which would have applied had an individual employer adopted an indirectly discriminatory rule: Parliament had made a deliberate choice to restrict compulsory retirement to those who would have a financial cushion to alleviate its worse impact;

e) The Tribunal had focused impermissibly on the decision making process which the Forces adopted in deciding to utilise A19; what has to be shown to be justified in a discrimination case of this kind is the outcome, not the process by which it is achieved;

f) "The evidence before it required the Tribunal to hold that certainty of achieving the necessary efficiencies was an essential part of the aim or means, and that there was no other way in which the aim could be achieved." Langstaff J could see "no tenable argument for holding the use of A19 to be anything other than appropriate and reasonably necessary". He therefore allowed the appeal and dismissed the claims.

Terminology

23. As Langstaff J noted in the EAT, the parties had been at odds before the ET as to whether the use of A19 was the application of a provision, a criterion or a practice. The respective positions reflected the argument of the Forces, who contended for a "provision", that the discriminatory element of the PCP arose from statute, by contrast with the position of the officers, who maintained that the question was one of the practices of the Forces in adopting that provision. Langstaff J observed:-

> "I think it is in general unhelpful to analysis section 19 of the Equality Act 2010 as if it were critical whether that which provides discrimination is a "provision" on one hand, a "criterion" on the other or a "practice" on the next: the question for the Tribunal is whether apparent discrimination results from something which might properly be described by any or all of those labels and if so whether it can be justified."

I agree, and will therefore use the term PCP as an abbreviation of "provision, criterion or practice" which is, of course, the wording used in section 19.

The grounds of appeal

24. The PSA Appellants' substantive grounds of appeal are as follows:

> Ground 1 – Having accepted that Claimant's contention that what the Forces had to justify was more than simply Regulation A19 itself, the EAT erred in law in

overturning the Employment Tribunal's conclusion that the Forces had failed to establish justification.

Ground 2 – The EAT erred in law in holding that the Employment Tribunal "failed to have regard to the fact that the discriminatory element was entirely Parliament's choice".

Ground 3 – The EAT erred in law in holding that the Employment Tribunal "failed to consider whether the means adopted was appropriate and reasonably necessary to the scheme actually adopted by the Forces" and thereby fell into the error of law exposed in the cases of *Land Registry v Benson [2012]* ICR 627 (EAT) and *West Midlands Police v Blackburn* [2008] ICR 505.

Ground 4 - The EAT erred in law in holding that the Employment Tribunal "wrongly took into account and criticised the process by which the Forces had adopted their schemes rather than asking whether to do so was justified objectively".

Ground 5 - The EAT erred in law in holding that the Employment Tribunal "applied too high a standard of scrutiny anyway".

Ground 6 - The EAT erred in law in holding that "the fact that Police Forces are not obliged to use (A19) to require officers to retire but have a discretion whether to do so does not detract from the fact that it is the social policy objectives set out A19 which need to be justified, rather than the use by the Forces of A19 in particular cases."

Ground 7 - The EAT erred in law in holding that the Employment Tribunal "suggested as alternative means of achieving the aim of the Forces matters which

could not provide that certainty of saving which the evidence had established as essential".

Ground 8 - The EAT erred in law in holding by making an impermissible finding that "there was no way in which the Forces could have achieved their aims other than by use of A19".

Ground 9 - The EAT erred in law in placing apparent reliance on a concession made on behalf of the PSA Appellants.

Ground 10 - The EAT erred in law in proceeding on the mistaken assumption that the Forces did not adopt a blanket policy of using A19.

The grounds of appeal by the federated rank Appellants, though not identically worded, are to the same effect.

Land Registry v Benson

25. In *HM Land Registry v Benson* [2012] ICR 627 the employer decided to reduce staffing levels after making a considerable operational loss of £80 million in 2008/9. It also decided to merge some offices and, having obtained Treasury approval for using its reserves for the purpose, devised a scheme offering voluntary early retirement to employees aged over 50 and redundancy to those under 50. The scheme was given a fixed budget and was over-subscribed. A selection process applied whereby preference was given to those whose compensation would cost the least. Accordingly, in contrast with the present case, all but one of the claimants were aged between 50 and 54 whose entitlement under the Civil Service Compensation Scheme would make them more expensive than younger colleagues to select for early

retirement, and were therefore compelled to remain in post. Mr Cavanagh QC wryly described their claim as having been one of unfair non-dismissal.

26. It was common ground in *Benson* that the employers had applied a PCP which put employees between 50 and 54 at a particular disadvantage; but the respondents contended that the criterion applied was a proportionate means of achieving a legitimate aim. The employment tribunal upheld claims of indirect age discrimination. The EAT, in a judgment delivered by the then President, Underhill J, allowed the employers' appeal. The EAT said:-

> "32. The first step in the analysis must be to identify the PCP or PCPs which had the discriminatory effect complained of. As noted above, the Appellant defined the relevant PCP(s) as "all factors taken into account … at the decision-taking meetings"; and the Tribunal accepted that definition. But, as we have said, that seems too general a description. For the purpose of a claim of indirect discrimination the PCP should be defined so as to focus specifically on the measures taken – that is, the thing or things done – by the employer which result in the disparate impact complained of (cf. *Kraft Foods UK Ltd v Hastie* [2010] ICR 1355, at paras. 9-10). In the present case that would appear to mean that the relevant PCP is the cheapness criterion. No doubt other features of the selection process…..potentially affected the outcome; but the only feature which had a disparate impact as between applicants of different ages was the underlying selection on the basis of relative cost of the benefits payable under the CSCS.
>
> 33. The next step must be to identify the aim for the pursuit of which the cheapness criterion constituted the means. Plainly the criterion was a means of selecting between applicants, but it is necessary to identify what aim selection was intended to achieve. This is rather less straightforward. The immediate aim of selection was to bring the number of applicants down to a level the cost of which came within the £12m budgeted for the exercise. But it could be argued that it is necessary to include within the definition of the aim the carrying out of the redundancy/early retirement exercise itself, and perhaps also to ask what the aim of the exercise was. In that case the answer would be that the aim of the exercise was to reduce headcount, which in turn was a means of ensuring that the Appellant's costs did not exceed its revenue. The truth is that the distinction between means and aim is not always easy to draw.
>
> 34. The next question is whether the relevant aim or aims were "legitimate". The uncertainty about how to characterise them discussed

in the preceding paragraph does not, fortunately, matter since in our view all the various potential elements are plainly legitimate. It is (to put it no higher) legitimate for a body such as the Appellant, like any business, to seek to break even year-on-year and to make redundancies in order to help it do so where necessary. It is likewise legitimate to offer voluntary redundancy/early retirement schemes of the kind with which we are here concerned……..Like any business, it was entitled to make decisions about the allocation of its resources…… …….

35. The question then is whether the adoption of the cheapness criterion was a proportionate means of selection in order to meet the £12m limit (and, if this adds anything, the other aims which selection served). As we have said, it was not in principle the only means; and others were in fact considered. But the Tribunal found in terms that it was the only practicable criterion [and] that finding is not challenged. That being so, it is hard to escape the conclusion that its use was justifiable…….

36. The Tribunal's analysis of means and aims was different from ours. It treated the question of the £12m limit as an aspect of the means adopted by the Appellant to achieve more broadly defined aims. We do not think that that is right, and it might have found its conclusions less comfortable if it had asked whether the imposition of the limit was "legitimate" rather than whether it was "proportionate". But we do not think that the outcome of this appeal should turn on nuances of language or on the problems of drawing the distinction between aim and means. ……..

37. The essence of the Tribunal's reasoning was that the Appellant had not demonstrated a "real need" to limit its spending on the Scheme to £12m – or, to put it another way, to limit its spending on all three schemes to £50m. It held that it had not done so because it had not shown that payment of the additional £19.7m was "unaffordable". By that it evidently meant that the Appellant had not shown that the funds were absolutely unavailable, in the sense that they could not be paid without insolvency: it pointed out that the Appellant's reserves far exceeded that amount (albeit that Treasury approval was needed to spend them) and that later in the same year, in the ATP, it contemplated spending a far greater figure. In our view, to apply a test of unaffordability in that sense is to fall into the error of treating the language of "real need", or "reasonable needs", as Balcombe LJ put it in *Hampson*, as connoting a requirement of absolute necessity. It is well established that that is not the case: see the judgments of the Court of Appeal in *Barry v Midland Bank* ([1999] ICR 319, at p. 336 A-B) and in *Cadman v Health and Safety Executive* [2005] ICR 1546……..[where] Maurice Kay LJ said, at para. 31 (p. 1560 B-C):

> "The test does not require the employer to establish that the measure complained of was "necessary" in the sense of being the only course open to him. That is plain from *Barry*. … The

> difference between "necessary" and "reasonably necessary" is a significant one …"
>
> The effect of that principle, applied to a case like the present, seems to us to be that an employer's decision about how to allocate his resources, and specifically his financial resources, should constitute a "real need" – or, to revert to the language of aim and means, a "legitimate aim" – even if it is shown that he could have afforded to make a different allocation with a lesser impact on the class of employee in question. To say that an employer can only establish justification if he shows that he could not make the payment in question without insolvency is to adopt a test of absolute necessity. The task of the employment tribunal is to accept the employer's legitimate decision as to the allocation of his resources as representing a genuine "need" but to balance it against the impact complained of. This is of course essentially the same point, adjusted to the different formulation of the test, as we make at para. 34 above. If the Tribunal had carried out that exercise it would, we believe, inevitably have come to the same conclusion as we have reached, on our approach, at para. 35.
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> 38. We have not in reaching this conclusion lost sight of the fact that the cheapness criterion was indeed disproportionately unfavourable to employees in the Claimants' age group, and we can well understand their disappointment at their non-selection. But it is fundamental that not all measures with a discriminatory impact are unlawful……."

27. I agree with the analysis of the EAT in *Land Registry v Benson.* Moreover, in the present case the Respondents' argument is stronger still. In *Benson* the older staff were placed at a disadvantage because the cost of granting their applications for early retirement would have been greater than in the case of younger colleagues. In the present case the officers who were required to retire pursuant to Regulation A19 were selected because the Regulations made all other officers ineligible. As Baroness Hale of Richmond JSC said in *Seldon v Clarkson Wright and Jakes* [2012] ICR 716 at paragraph 65: "where it is justified to have a general rule, then the existence of that rule will usually justify the treatment that results from it."

The analogy with redundancy

28. Police officers have a high degree of security of tenure, although, since they are not employees, they cannot bring claims for unfair dismissal. But it is instructive to consider how the decision of the Forces would have been analysed if the officers had been employees to whom the unfair dismissal and redundancy provisions of the Employment Rights Act 1996 applied. Suppose that a particular Force had 100 officers in post with 30 years' service, of whom between 80 and 95 might be expected to retire, but the employers, faced with significant budget cuts, decided to require all 100 to do so.

29. In such a case the reasons for the dismissals would be redundancy. The employers' decision to reduce headcount by 100 could not in practice be successfully challenged. It has been established law at the level of this court and below at least since *James W Cook and Co (Withenhoe) Ltd v Tipper* [1990] ICR 716 that it is not open to an employment tribunal to investigate the commercial or economic reasons which prompt the closure of a business or a reduction in the workforce. In the absence of a statutory provision such as Regulation A19, any decision to limit the selection pool for the hundred posts to employees with 30 years' service or more would be vulnerable to challenge on the grounds of age discrimination (and possibly also unfair dismissal or sex discrimination). But if a statutory provision such as A19 made it unlawful to include anyone with less than 30 years' service in the pool, the selection method would be inevitable and a claim whether for unfair dismissal or age discrimination would fail.

30. This case, in my view, is no different. The decision to reduce officer headcount to the fullest extent available was taken in the interests of achieving certainty of costs reduction and it was not for the Tribunal to devise an alternative scheme involving the

loss of fewer posts. The second element of the decision, to confine dismissals to officers with more than 30 years' service, cannot be impugned either, because no other method of selection was lawful. The only possible conclusion from these two propositions, in my view, is that the Respondents' actions were justified and that the Appellants had no valid claim for age discrimination.

31. Mr Gilroy emphasised in his submissions to us that the Tribunal are the statutory fact-finders and that, as many cases of high authority have held, discrimination cases are particularly fact sensitive. But the legal approach – determining the questions to be answered – is not fact sensitive; it is the answers which are fact sensitive. The Tribunal, after a painstaking analysis of the facts, took the view that the Respondents could have managed with fewer compulsory retirements than they did. But that, with respect, was an answer to the wrong question. The Respondents had to justify the selection, which they did by reliance on A19. They did not have to justify the numbers.

Direct or indirect discrimination?

32. At the end of his judgment, Langstaff J noted that the case had been argued both in the Tribunal and before him on the agreed basis that the claims were of indirect age discrimination and said at paragraph 48 that he had "loyally determined the appeal on that basis". He went on, however, to explain in paragraph 49 why in his view the discrimination in this case would properly have been identified as direct discrimination, but added that he advanced that view only tentatively given that two leading counsel and a highly experienced junior had joined in advancing a case of indirect discrimination. For my part I would resist the temptation to say whether I agree with Langstaff J's view. This is firstly because, as he noted, the case has

throughout been conducted on the agreed basis that the allegation was of indirect discrimination. Secondly, it makes no difference to the outcome of this case how the claim is classified. It would be better for this court to leave the issue until it is raised in a case where it will or may make a difference to the result and (preferably) both sides of the argument are presented. I will only add that it is not obvious to me, even after reading *Seldon v Clarkson Wright and Jakes* at paragraphs 50-52, why the question of whether or not a particular PCP is a necessary and proportionate way of achieving a legitimate aim should depend on the legal label attached to the facts.

Equality Act 2010 Schedule 22 paragraph 1

33. Before the start of the hearing in this court we drew the attention of counsel to paragraph 1 of Schedule 22 to the 2010 Act. This states that a person (P) does not contravene the provisions of parts 3-7 of the Act relating to the protected characteristic of age if P does anything P must do pursuant to a requirement of an enactment. We asked whether it might be argued that it is not unlawful age discrimination for the Forces to select officers by reference to their having reached ⅔ APP because the Forces were obliged to do so by Regulation A19.

34. The decision to dismiss the *numbers* of officers which the Forces did cannot be described as something done pursuant to the requirements of an enactment, since Regulation A19 does not require the Forces to dismiss anyone. I have already expressed the view that the decision to confine the *selection* to officers with ⅔ APP was plainly justified since it was unlawful for the Forces to select anyone else. Whether Schedule 22, paragraph 1 is a different basis for reaching the same conclusion is an interesting question. But as with the issue of whether the discrimination was direct, I hesitate before expressing a view on an argument not

raised by any party's legal team before us, the EAT or the ET, and which does not alter the outcome. We were told that there is an appeal pending before the EAT which raises this issue in an age discrimination claim concerning the firefighters' pension scheme.

Conclusion

35. I would dismiss the appeal.

Lord Justice Underhill

36. Because of the importance of this case I will state briefly in my own words my reasons for agreeing that this appeal should be dismissed, though they are, I think, essentially the same as those given by Bean LJ.

37. The necessary starting-point, as in any indirect discrimination case, is to identify the provision criterion or practice ("PCP") which has produced the alleged disparate impact. (I should say in passing that, like Bean LJ, I agree with Langstaff J in the EAT that nice analysis of whether any particular case concerns a provision, a criterion or a practice is unlikely to be helpful.) In the present case the disparate impact was produced by the use of the power under Regulation A19 as the method of achieving the reductions in the numbers of officers that the forces required: that would necessarily have a disparate impact on older officers because the power is only available in the case of those who have achieved entitlement to ⅔ average pensionable pay.

38. It is the choice of that method that has to be justified. The question is whether it was a proportionate means of achieving a legitimate aim. In my view the right way to characterise the forces' aim is that they wished to achieve the maximum practicable

reduction in the numbers of their officers. That is unquestionably a legitimate aim. The essential, and unusual, feature of the present case is that, because of the absence of any general power to dismiss serving officers, the use of the power under regulation A19 was the only way in which that aim could be achieved: there is no other legal way to reduce numbers on a mass basis. In those circumstances, it is hard to see how its use could be said to be disproportionate, notwithstanding that it involved the application of an age-discriminatory criterion.

39. The ET's conclusion to the contrary was based on its finding that there were alternatives to reducing the numbers of officers by the full amount aimed for. These were identified at paras. 78-80 of the judgment as follows:

a) "*Asking officers their intentions"*. This meant asking those who were about to achieve ⅔ pensionable service whether they intended (as the great majority no doubt did) to retire voluntarily, and those who had already done so whether they were likely to be retiring shortly. The thinking is that it would almost certainly then have emerged that there were only a comparatively small number who wished to stay on, or to do so for a significant period, and that it would be unnecessary to dismiss them.

b) *Part-time working.* This meant that some officers, if asked (which they were not), might have been happy to move to part-time working, which would have reduced the amount that their retention cost the force.

c) *Career breaks.* This meant that some officers, if asked (which they were not), might have been happy to take a career break, which again would have reduced the amount that their retention cost the force.

40. The ET criticised the Forces for not considering those alternatives because they wanted "certainty": in other words, they did not feel that they could wait for the results of those enquiries in order to consider whether they really needed to dismiss the comparatively small numbers of officers who wanted to stay, or stay on further, after achieving ⅔ pensionable pay. But what that ultimately comes down to is a finding that the Forces should not have chosen to reduce numbers to the full extent that they did.

41. In adopting that reasoning the ET in my view fell into the error identified in the decisions in *Barry v Midland Bank plc* [1999] ICR 319, *Chief Constable of the West Midlands v Blackburn* [2008] EWCA Civ 1208, [2009] IRLR 135 and *HM Land Registry v Benson* UKEAT/0197/11, [2012] ICR 627. It is not open to an employment tribunal to reject a justification case on the basis that the respondent should have pursued a different aim which would have had a less discriminatory impact. The Forces were entitled to decide how many officers they needed to lose. It is clear that each of these Forces decided that it needed to reduce their forces by a number which was no less than the full number of those who had achieved ⅔ pensionable service: they might indeed have wished to lose a still greater number if they had had the power to do so, but, given the legal constraints, it was their aim to reduce numbers by at least that many. It is not, as both Bean LJ and Elias LJ point out, the decision to make a given level of reductions in the workforce which has a disparate impact but, rather, the means by which the workers affected are selected; and it is those means that require to be justified. Since in this case the use of Regulation A19 was the only option it cannot be said to be disproportionate.

Lord Justice Elias

42. I agree with the judgment of Bean LJ but since the issue raised in the appeal is of some significance, I add a few observations of my own.

43. The PCP which needs to be justified within the meaning of section 19 of the Equality Act is the PCP adopted by A which puts B, and those with whom he shares the relevant characteristic, at a particular disadvantage when compared with persons who do not share that characteristic. What renders the act discriminatory is not subjecting persons to a disadvantage; it is the fact that the disadvantage is suffered by some and not others and that the selection of those to be disadvantaged is based on the adoption of a PCP which is not a proportionate means of achieving a legitimate aim. In this case the disadvantage which the claimants suffer is the act of dismissal. The act of dismissal is not itself an act of discrimination. What potentially renders it discriminatory is the way in which those to be subject to dismissal are chosen. It is the selection process which creates the risk of discrimination, not the decision to dismiss.

44. In this case the selection process undoubtedly gives rise to prima facie discrimination on grounds of age. That is the effect of applying the criteria in Regulation A19. It is not disputed, however, that in the circumstances the adoption of those criteria is a proportionate way of achieving a legitimate aim. The dismissals are on grounds of efficiency – that has not been challenged and it is a legitimate aim; and adopting the selection criteria required by Parliament is a proportionate means of achieving it.

45. The ET considered that the relevant practice was that the Forces would, subject to certain exceptions, "require all officers to retire at ⅔APP". Then in the course of its judgment the ET said this (para.72):

> "When looking at the appropriateness and necessity of the application it has to be appreciated the prima facie discrimination has been made out and that such discrimination should be avoided if reasonably possible."

46. On this basis the tribunal engaged with the question whether dismissals could be reasonably avoided and concluded that the Chief Constables did not need to dismiss as many staff as they did, or at least they did not satisfy the tribunal that they needed to do so. Accordingly, the Appellants suffered the disadvantage of dismissal when they need not have done.

47. I have considerable difficulty with that analysis. Assuming that to be true, why does that render the dismissals discriminatory? The logic is that a claimant will have no discrimination claim if the tribunal is satisfied that an authority has dismissed no more staff than in the tribunal's view it was reasonably necessary to dismiss, but will have a claim if the number is greater than that. But how does it become discrimination on age or any other grounds because more officers are dismissed than the exigencies of the business require? In my judgment this is eliding the disadvantage with the discrimination and wrongly requiring the Chief Constables to justify both the dismissals and the process of selection. It is telling them that they should have adopted a different scheme and made their cuts in some other way.

48. There is another fundamental problem with the tribunal's analysis. The assumption underlying this argument is that the employer should be obliged to minimise dismissals and should take any reasonable steps to avoid them. But as Bean LJ points out, there is no general legal obligation to that effect. It is not the job of tribunals to question management decisions in that way, and they are not equipped to do so. Tribunals do of course have extensive jurisdiction relating to dismissals. For example in unfair dismissal claims they can properly seek to ensure that dismissals are for a good reason; they can enforce obligations to consult before redundancies are effected;

and they can require an employer to show that a dismissal ostensibly for redundancy is genuinely for that reason. But that is a far cry from reviewing the decision of management as to the number of staff required to run their business. That will often involve difficult decisions about how resources should be prioritised. In my judgment discrimination law does not, and was not intended to, open up questions of this kind to scrutiny by tribunals. It is hardly surprising that the hearing before the ET took five weeks given the nature of the inquiry. It was not in my view an inquiry warranted by section 19.

49. I would dismiss the appeals.