Neutral Citation Number: [2023] EAT 12

Case No: EA-2021-0001089-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15th February 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER
MRS G P TODD
MRS E LENEHAN

- -

Between :

MR K COOK	**Appellant**
- and -	
GENTOO GROUP LIMITED	**Respondent**

- -
- -

HARINI IYENGAR (instructed by Samuel Phillips Law) for the **Appellant**
CLAIRE MILLNS (instructed by Muckle LLP) for the **Respondent**

Hearing date: 17 January 2023

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JUDGMENT

SUMMARY

AGE DISCRIMINATION

The respondent dismissed the claimant by reason of redundancy. The respondent failed to comply with its usual policies and hurried through the claimant's dismissal to avoid him obtaining an enhanced redundancy payment should his dismissal occur after he reached 55 years of age. The employment tribunal held that the actual comparators identified by the claimant were inappropriate and did not go on to consider a hypothetical comparator. The employment tribunal held, in the alternative, that "we would have found the detriment to be a proportionate means of achieving a legitimate aim". The employment tribunal was asked by the EAT under the **Burns/Barke** procedure to set out the legitimate aim it had identified and the reasons why the tribunal found that the treatment was a proportionate means of achieving that aim. The further reasons provided by the employment tribunal did not demonstrate a proper application of the relevant legal principles. The issue was remitted to a newly constituted employment tribunal.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of the employment tribunal, Employment Judge S Shore sitting with members. The hearing took place from 8-12 March 2021. The judgment was dated 6 April 2021.

2. The claimant commenced employment with the respondent on 1 March 1992. He was latterly employed as Head of Compliance (Property Services). The respondent is a social housing landlord that has charitable status.

3. In October 2017, the respondent was subject to a Homes and Communities Agency report downgrading it to "non-compliant" in respect of governance. The employment tribunal noted that the regulator was concerned that the board had exercised weak governance and internal control when agreeing executive contracts and severance payments to outgoing executives. The employment tribunal did not make any more specific findings about the circumstances in which severance payments had been made or the respects in which they were inappropriate.

4. At an Executive Team Meeting on 24 April 2019 the respondent decided to undertake a restructure. Slides provided for the meetings showed the claimant's role as "deleted" which the employment tribunal stated was "seemingly in error". Under the respondent's procedures such a reorganisation would require board approval. At a meeting of the respondent's Appointments and Remuneration Committee on 2 May 2019 a decision was taken to forgo such board approval to hurry through the redundancy process to avoid the claimant becoming entitled to an enhanced pension should he be made redundant after he was 55 years of age, because this would require the respondent to make a payment into the Local Government Pension Scheme of approximately £80,000. The next meeting at which board approval could be sought had been fixed for 22 May 2019.

5. On 3 May 2019 an initial "consultation" meeting was held with the claimant at which he was told he was going to be made redundant. On 7 May 2019, the claimant was signed off by his GP for a "stress related problem". A second "consultation" meeting had been fixed for 8 May 2019. The

claimant did not attend. The employment tribunal criticised the claimant for seeking to delay the process. The second "consultation" meeting was re-fixed for 13 May 2019. The claimant did not attend.

6. The claimant was dismissed without notice on 16 May 2019. The employment tribunal found that the principal reason for the dismissal was redundancy. The employment tribunal found that the dismissal was unfair. The employment tribunal considered that the treatment of the claimant was "shoddy", although he had not helped himself by the way he conducted himself in the process. The employment tribunal considered the speed in which the respondent conducted the process was unfair and that there had been "no conscientious attempt by the respondent to seek suitable alternative employment for the claimant" which was described as a "major error". The employment tribunal also found that there were minor errors in respect of the respondent's handing of the claimant's sickness absence and ability to participate in the process.

7. The employment tribunal held that had a fair procedure been operated the restructure would have been considered by the board on 22 May 2019. There would then have been consultation with the claimant. The employment tribunal found that there was a 100% chance that the claimant would have been dismissed had a fair procedure been applied. The claimant was 55 on 11 August 2019. The employment tribunal held that had a fair procedure been operated the claimant's employment would have terminated after he had reached 55. That would have had the consequence that the claimant would have been entitled to an enhanced pension.

8. The employment tribunal held that compensation should be limited to losses up to the date on which the claimant would have been fairly dismissed (in the remedy judgment the employment tribunal clarified that dismissal would have taken place by the respondent giving 12 week's notice starting on 6 June 2019), and compensation further reduced by 90%. Reductions were made of 25% in respect of the claimant's "conduct prior to his dismissal"; 50% because of a failure to report "a regulatory failure at the end of quarter 3 (Q3) of the 2018/2019 financial year"; and 15% because the "claimant attempted to delay the consultation process".

9. The employment tribunal rejected the claimant's claim that the curtailment of the redundancy process to avoid him obtaining an enhanced pension when he reached 55 years of age constituted direct age discrimination. The employment tribunal held that the comparators identified by the claimant were inappropriate. The employment tribunal went on to hold:

> In the alternative, had we found that there were actual comparators, we would have found the detriment to be a proportionate means of achieving a legitimate aim.

10. The employment tribunal did not identify the "legitimate aim" or explain why the treatment of the claimant, that otherwise would constitute direct age discrimination, was a proportionate means of achieving such a legitimate aim.

11. The claimant appeals on two grounds: the first that the employment tribunal had erred in making the 15% reduction in compensation; the second that the employment tribunal erred in holding that dismissing the claimant unfairly was a proportionate means of achieving a legitimate aim.

12. At the sift stage Griffiths J considered that both grounds were arguable.

13. The respondent did not resist the first ground and it was agreed that the 15% reduction in compensation should be revoked so that the total reduction in compensation will be reduced to 75%.

14. In its response to the appeal the respondent sought an order that the employment tribunal be asked questions under the **Burns/Barke** procedure requesting that the employment tribunal set out the aim relied on and the reasons why the tribunal found the detrimental treatment was a proportionate means of achieving that aim. HHJ Auerbach made an order requesting that the employment tribunal answer those questions. The order was sealed on 23 June 2022. The order permitted ether party to make any consequent application to the EAT within 14 days of the EAT sending a copy of the response of the employment tribunal.

15. EJ Shore responded by email on 10 July 2022:

> Thank you for your email of 23 June 2022, which was forwarded to me on 5 July. **My answers** to the questions asked by His Honour Judge Auerbach in his Order dated 22 June 2022 are as follows.
>
> Paragraph 102 of the Judgment and Reasons in this case sent to the parties on 8 April 2021 has to be read in conjunction with paragraphs 94 to 100 of the

> Reasons, in which **the Tribunal found that the comparators cited by the claimant were not proper comparators. At that point, his claim of age discrimination failed.**
>
> With regard to paragraph 102 of the written reasons:
>
> a) The **aim** to which the Tribunal was referring was the **aim of saving costs which would have been incurred in making the additional payment into the pension fund** to meet the additional entitlement of the claimant **and the disapproval of the regulator for making such generous redundancy arrangements**. The Tribunal **would have found this to be the aim** because the respondent would have incurred an additional cost of approximately £80,000 if the claimant was paid the additional entitlement. The respondent's argument was correctly identified by counsel for the claimant as a "costs plus" argument with **the "plus" element being the prior disapproval of the Regulator of Social Housing of the practice of windfall pension enhancements.** We would have found that the Regulator had stated such disapproval in October 2017 when commenting on the restructure of the respondent in 2015/16.
>
> **The Tribunal would have found the above to be the aim** because we preferred the respondent's evidence and submissions to those of the claimant, as set out in his counsel's skeleton argument, which sought to differentiate between the claimant and "Board level employees". The Tribunal would have found that the same principle applied to both.
>
> **The Tribunal would have found that the aim was legitimate**, as the respondent is a public sector employer and the funds to pay the claimant an enhanced redundancy entitlement would come from the public purse.
>
> b) **The Tribunal would have found the detriment to be proportionate**, as in a balancing exercise that always has to be undertaken in matters of proportionality, **the balance would have fallen in favour of the respondent**. **The claimant was paid more than £47,000.00 in redundancy and notice pay and had access to a pension scheme that he chose to freeze** when he had been demoted on 11 November 2011 following a disciplinary process. He retained access to that scheme and the second scheme he had joined in 2011. [**emphasis added**]

16. We have some concerns about the response. It appears to set out what the employment tribunal "would" have concluded, rather than what it did conclude but failed to express. Generally, the **Burns/Barke** procedure is used to elucidate reasons that the employment tribunal had at the time it made the decision rather than to give an opportunity to make a determination that it failed to make at the time. In **Barke v Seetec Business Technology Centre Ltd** [2005] EWCA Civ 578, [2005] I.C.R. 1373 Dyson LJ, while rejecting the submission that the procedure should be applied cautiously or only in restricted circumstances, noted:

> 46. As Burton J recognised in *Burns* [2004] ICR 1103 , para 13, there are dangers in asking the original tribunal for further reasons where the ground of appeal is inadequacy of reasoning. It will not be appropriate where the inadequacy of reasoning is on its face so fundamental that there is a real risk that supplementary reasons will be reconstructions of proper reasons, rather than the unexpressed actual reasons

17. The wording of the email suggests that the response is that of the employment judge rather than the full panel. Generally, where there is a panel decision we would expect some explanation of how the panel considered the application and a statement that the response is that of the panel. Generally, some joint consideration of the request will be necessary, although there might possibly be occasions on which the employment judge already has sufficient information to respond on behalf of the panel without any further discussion.

18. The claimant did not take up the opportunity to make any consequential application on receipt of the response from the employment tribunal, as was provided for in the order of HHJ Auerbach, which could have included seeking an order that the employment judge be asked to confirm that the response was that of the full panel and to state whether the reasoning was that of the panel before making its judgment or whether it had considered the matter further in response to the request. In the circumstances, we proceed on the assumption that the reasons set out in EJ Shore's email are those of the panel at the time it made the original determination.

19. Age is a protected characteristic for the purposes of the **Equality Act 2010** ("**EQA**"). Direct discrimination is prohibited by section 13 **EQA**:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) 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.

20. Age is unique amongst the protected characteristics in that direct discrimination can be justified whereas for most protected characteristics only indirect discrimination can be justified. I shall use the term justified as shorthand for establishing that treatment is a proportionate means of achieving a legitimate aim.

21. The grounds upon which direct age discrimination can be justified are not the same as for other forms of justification permitted by the **EQA**, such as indirect discrimination. While section 13(2) **EQA** uses the wording "proportionate means of achieving a legitimate aim" that is used generally in the **EQA**, it must be construed so as to give effect to Art 6(1) of the Equal Treatment Framework Directive that provides that treatment will not constitute direct age discrimination if it is:

> 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.

22. It was not suggested that any difference of approach should be adopted post the withdrawal of the UK from the EU; presumably because it is accepted that Art 6(1) of the Equal Treatment Framework Directive sets out a retained general principle of EU law: **European Union (Withdrawal Agreement) Act 2020**.

23. The special nature of justification of direct age discrimination was considered by Baroness Hale in **Seldon v Clarkson Wright & Jakes (Secretary of State for Business, Innovation and Skills and another intervening)** [2012] UKSC 16, [2012] I.C.R. 716:

> 2. Age is a relative newcomer to the list of characteristics protected against discrimination. Laws against discrimination are designed to secure equal treatment for people who are seen by society to be in essentially the same situation. The Aristotelian injunction that like cases be treated alike depends upon which characteristics are seen as relevant for the particular purpose. For most of history it was assumed that the differences between men and women were relevant for a whole host of purposes. Now the general rule is that they are not. But as Advocate General Sharpston commented in her opinion in *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (Case C-427/06) [2009] All ER (EC) 113 , para 47, until comparatively recently differentiating on the basis of age was considered obviously relevant for the purpose of termination of employment. And it is still thought that age may be a relevant consideration for many more purposes than is so with the other protected characteristics. Hence recital 25 to the Directive, after recognising that the "prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce", continued:
>
> > "However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in member states. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour

> market and vocational training objectives, and discrimination which must be prohibited."

> 3. The reasons why age may be relevant in more circumstances than the other characteristics may seem obvious, at least where this has to do with the comparative capabilities of people of different ages. A younger person may not have the same training and experience as an older person. An older person may have lost the mental or physical strength which once she had. But it will be seen from recital 25 above that the European legislators considered that age discrimination might be justified by factors which had nothing to do with the characteristics of the individual but had to do with broader social and economic policy. These factors would not justify direct discrimination on the ground of any of the other protected characteristics, so why should age be different?

> 4. The answer must be that age is different. As Ms Rose put it on behalf of the Secretary of State, age is not "binary" in nature (man or woman, black or white, gay or straight) but a continuum which changes over time. As Lord Walker of Gestingthorpe pointed out in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 , para 60: "Every human being starts life as a tiny infant, and none of us can do anything to stop the passage of the years." This means that younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefited from a provision which favours younger people, such as a mandatory retirement age.

> 5. The critical issues in this case are what sort of policy considerations can justify such discrimination, who decides upon them, and how they are to be applied to any individual person. I turn, therefore, to the facts of this case.

24. Baroness Hale identified the principles to be derived from EU law:

> 50. What messages, then, can we take from the European case law?

> (1) All the references to the European Court discussed above have concerned national laws or provisions in collective agreements authorised by national laws. They have not concerned provisions in individual contracts of employment or partnership, as this case does. However, *Bartsch* [2009] All ER (EC) 113 , mentioned at para 2 above, did concern the rules of a particular employers' pension fund; and *Prigge*, para 49 above, concerned a collective agreement governing the employees of a single employer, Deutsche Lufthansa.
>
> (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. These are of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness" (*Age Concern* [2009] ICR 1080 and Fuchs [2012] ICR 93).
>
> (3) It would appear from that, as Advocate General Bot pointed out in *Kücükdeveci* [2011] 2 CMLR 703 , that flexibility for employers is not in itself a legitimate aim; but a certain degree of flexibility may be permitted to

> employers in the pursuit of legitimate social policy objectives.
>
> (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 (Palacios de la Villa , Hütter and Kücükdeveci); (ii) the efficient planning of the departure and recruitment of staff (Fuchs); (iii) sharing out employment opportunities fairly between the generations (*Petersen, Rosenbladt and Fuchs*); (iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (*Georgiev and Fuchs*); (v) rewarding experience (*Hütter and Hennigs*); (vi) cushioning the blow for long serving employees who may find it hard to find new employment if dismissed (*Ingeniørforeningen i Danmark*); (vii) facilitating the participation of older workers in the workforce (*Fuchs*; see also *Mangold v Helm* (Case C-144/04) [2006] All ER (EC) 383); (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 (*Rosenbladt*); or (ix) avoiding disputes about the employee's fitness for work over a certain age (*Fuchs*).
>
> (5) However, the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so. Measures based on age may not be appropriate to the aims of rewarding experience or protecting long service (*Hütter , Kücükdeveci and Ingeniørforeningen i Danmark*).
>
> (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 (Fuchs).
>
> (7) The scope of the tests for justifying indirect discrimination under article 2(2)(b) and for justifying any age discrimination under article 6(1) is not identical. It is for the member states, rather than the individual employer, to establish the legitimacy of the aim pursued (*Age Concern*).

25. Baroness Hale went on to consider the approach the UK had taken to implementation:

> 55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it.

26. **Seldon** concerned the application of a general retirement age to all employees, rather than departing from a general policy as in this case. Baroness Hale noted of the justification of general policies:

> 65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. In the particular context of inter-generational fairness, it must be relevant that, at an earlier stage in his life, a partner or employee may well have benefited from a rule which obliged his seniors to retire at a particular age. Nor can it be entirely irrelevant that the rule in question was re-negotiated comparatively recently between the partners. It is true that they did not then appreciate that

> the forthcoming Age Regulations would apply to them. But it is some indication that at the time they thought that it was fair to have such a rule. Luxembourg has drawn a distinction between laws and regulations which are unilaterally imposed and collective agreements which are the product of bargaining between the social partners on a presumably more equal basis (*Rosenbladt* [2011] 1 CMLR 1011 and *Hennigs* [2012] CMLR 484).
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> 66. There is therefore a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of the business. All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified.

27. It has long been established that justification for all purposes in the **EQA** requires careful consideration: **Hardy & Hansons Plc v Lax** [2005] EWCA Civ 846, [2005] I.C.R. 1565:

> 32. Section 1(2)(b)(ii) 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 justifiable (*Barry v Midland Bank plc* [1999] ICR 859) and I accept that the word "necessary" used in *Bilka-Kaufaus* [1987] ICR 110 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, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. 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 employers' submission (apparently accepted by the appeal tribunal) 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.

28. The dismissal of an employee involving a limited curtailment of the appropriate procedural requirements to avoid an enhanced pension entitlement has been found to be justified, but in very specific circumstances: **Woodcock v Cumbria Primary Care Trust** [2012] EWCA Civ 330, [2012] I.C.R. 1126. The dismissal was found to have been unfair because of a failure to comply with statutory requirement then in place, but Rimer LJ concluded there was no substantive unfairness:

> 54. Considerations of age discrimination apart, I would therefore conclude that, contrary to the thrust of a material part of Mr Gilroy's submissions, the trust treated the claimant with a proper degree of fairness. The only reason that his unfair dismissal claim succeeded was because of the trust's failure to go through the, now repealed, formal ritual prescribed by Schedule 2 to the

Employment Act 2002.

29. The employer could have dismissed fairly in accordance with its procedures before the claimant reached 50 [68]:

> The claimant had, by 2007, no right, entitlement or expectation to the enjoyment of the enhanced benefits that he would have enjoyed had he remained in the trust's employment until he was 50. Had he in fact so remained so as to enjoy them, he would have been the beneficiary of a pure windfall. He could and would not have had any reasonable hope or chance of doing so if (a) he had been given notice to expire at the end of (or shortly after) June 2007, as ought to have happened in accordance with the guidance of the NW SHA; (b) he had been able to attend the meeting on 10 April 2007, as the trust had originally intended, and he had been given notice at or after that meeting; (c) it had been possible to arrange a subsequent meeting before June 2007, and he had been given notice after it; or (d) he had been given notice on or shortly after the meeting that was eventually fixed for 6 June 2007. If any of these things had happened, he could have had no possible grounds for complaint on age discrimination grounds.

30. Rimer LJ accepted that in the "very particular circumstances of the case" the employment tribunal had been entitled to conclude that justification was made out. The Trust had established a legitimate aim that was more than cost alone, which could not provide justification:

> 67. If the trust's treatment of the claimant is correctly characterised as no more than treatment aimed at saving or avoiding costs, I would accept that it was not a means of achieving a "legitimate aim" and that it was therefore incapable of justification. It would fall foul of the limitations upon justification explained in cases such as *Hill v Revenue Comrs* [1999] ICR 48. On the unusual facts of this case, I would not, however, regard that as a correct characterisation. The dismissal notice of 23 May 2007 was not served with the aim, pure and simple, of dismissing the claimant before his 49th birthday in order to save the trust the expense it would incur if was still in its employ at 50. It was served, and genuinely served, with the aim of giving effect to the trust's genuine decision to terminate his employment on the grounds of his redundancy. The appeal tribunal had no doubt that the dismissal of an employee on such grounds is a legitimate aim: "It is an entirely legitimate aim for an employer to dismiss an employee who has become redundant." I agree; and it cannot in my view cease to be a "legitimate aim" simply because, if there is no dismissal, the employer will continue to incur costs that such dismissal is directed at saving.
>
> 68. I also agree with both the employment tribunal and the appeal tribunal that it was a legitimate part of that aim for the trust to ensure that, in giving effect to it, the dismissal also saved the trust the additional element of costs that, had it not timed the dismissal as it did, it would be likely to have incurred. In considering the timing of the steps it needed to take towards dismissing the claimant for redundancy it was obviously legitimate for the trust to have that consideration in mind, as it clearly did as early as March 2007. It would, in

my view, have been irresponsible of the trust not to have done so.

31. The circumstances in which an aim may be legitimate despite involving an element of cost saving was considered by Underhill LJ in **Heskett v Secretary of State for Justice** [2020] EWCA Civ 1487, [2021] ICR 110:

> 78 I start with two preliminary points.
>
> 79 The first is the point which I have noted at para 53 above, and which I have picked up in relation to O'Brien at para 73 above. In expressing the applicable principle the CJEU authorities distinguish between cases where the discrimination is the result of a measure taken by central government, where they use the *De Weerd* "budgetary considerations" formulation, and cases where it results from the decision of the employer, where they use the *Hill* "solely [to avoid] increased costs" formulation. Although Burton J attached importance to the distinction in *Cross* [2005] IRLR423, I have noted that the Supreme Court assumed that the principles applying in both kinds of case were the same. I do not in fact believe that the distinction is significant, at least in this appeal, but the CJEU's use of different language was clearly deliberate, and in what follows I will use the language of *Hill* [1999] ICR 48.
>
> 80 The second point is that in the CJEU cases the employer, where proceeded against, was in each case a public authority (though not always an emanation of central government). However, I think it is clear that that fact was not of the essence: see *Kutz-Bauer* [2003] ECRI-2741, para 61—"whether as a public authority or as an employer".
>
> 81 I turn to the fundamental question, which is what is meant by the phrase "solely [to avoid] increased costs", and more particularly what is the effect of the word "solely". On this, it seems to me that we are bound by the guidance given by Rimer LJ at paras 66–67 of his judgment in *Woodcock* [2012] ICR1126; but even if we were not, I would respectfully agree with it. He says in para 66 that the CJEU's language "cannot mean more than that the saving or avoidance of costs will not, without more"—my emphasis—"amount to the achieving of a 'legitimate aim'". In other words, to take the paradigm case of discriminatory pay, an employer cannot "justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B."
>
> 82 That might seem too trite to need saying—"unsurprising", as Rimer LJ puts it—but it is not difficult to understand why the CJEU thought it important to spell it out. It is the same obvious but important point that the Supreme Court makes at several points in *O'Brien* [2013] ICR499: see para 67 of its judgment ("very different from deliberately discriminating against part-time workers in order to save money"), para 69 ("a legitimate aim other than the simple saving of cost") and the example given at the end of para 74 ("it would not be legitimate to pay women judges less than men judges on the basis that this would cost less").
>
> 83 It follows that the essential question is whether the employer's aim in

> acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle (to adopt the Supreme Court's language in *O'Brien*) but it is real. The nature of the distinction can be illustrated by reference to some of the cases.
>
> 84 I start with *Woodcock* [2012] ICR1126 itself. In one sense the trust's aim could indeed be said to be to avoid the cost of having to pay the claimant the enhanced benefits to which he would become entitled if he were still employed when he reached 50. But that was not the whole story because it omitted the fact that those were benefits which he had no legitimate entitlement to expect. It was for that reason that Rimer LJ held at para 67 that it would not be correct to characterise the trust's aim as being "no more than treatment aimed at saving or avoiding costs".

32. In **Woodcock** Rimer LJ accepted that the employer had established that the dismissal of the claimant was a proportionate means of achieving its legitimate aim:

> 69. The only difficulty generated by the case is that, on the employment tribunal's findings, the dismissal was tainted with discriminatory treatment on the grounds of age. That was because the difficulties in arranging an earlier consultation meeting with the claimant resulted in the trust taking the view in May 2007 that, because his 49th birthday was fast approaching, it needed to cut a procedural consultation corner in order to ensure that the notice expired before his 50th birthday. (In fact it was wrong about this: it could have given its dismissal notice immediately after the meeting of 6 June 2007; had it done so, it is difficult to see what complaint the claimant could have had.)
>
> 70. In my view that consideration goes, however, only to the proportionality of the treatment adopted by the trust. That required the striking of an objective balance between the discriminatory effect of the treatment of the claimant and the needs of the trust. The employment tribunal found that, in the circumstances, the treatment was proportionate (paras 83 and 84 of its reasons). It was ground 2 of the claimant's appeal to the appeal tribunal that focused exclusively on proportionality, and it relied upon the fact that the trust's procedure deprived him of his right to consultation in advance of the dismissal notice. Underhill J explained why, in what he described (and I agree) as the "very particular" circumstances of the case, the Employment Appeal Tribunal agreed that that consideration did not undermine the proportionality of the trust's treatment. I have explained the appeal tribunal's reasoning at paras 35 and 36 above.
>
> 71. Mr Gilroy submitted that the trust's action in removing the claimant's right of consultation so as to save costs was so patently a disproportionate action that the trust cannot get home on the proportionality element of the exercise. I am not persuaded by that. Both the employment tribunal and appeal tribunal explained why, in the very particular circumstances to which Underhill J referred, the trust's treatment was proportionate to the effect upon the claimant. The issue for us is whether, in making the proportionality

> assessment that it did, the employment tribunal erred in law. I agree with the appeal tribunal that it did not. On the contrary, I regard its decision as a well judged one. Ultimately, the essence of the case is (a) that the trust was fully entitled, and had effectively resolved, to terminate the claimant's employment prior to his 50th birthday; (b) the implementation of that intention was delayed through no fault of its own but through a chapter of accidents; and (c) whilst the consultation "corner cutting" in theory deprived the claimant of an opportunity, in fact it deprived him of nothing of value, because, as the employment tribunal found, consultation would have achieved nothing.

33. The tests for the fairness of a dismissal and justification are different: **City of York Council v Grosset** [2018] EWCA Civ 1105, [2018] I.C.R. 1492. A fair dismissal could be discriminatory and an unfair dismissal might be justified; although the former is probably more common than the latter.

34. The respondent has not sought to support the decision of the employment tribunal that the comparators chosen by the claimant were not appropriate, presumably accepting that the employment tribunal should have gone on to consider a hypothetical comparator.

35. EJ Shore stated in response to the **Burns/Barke** questions that the respondent had established a legitimate aim. The aim was identified as being "saving costs which would have been incurred in making the additional payment into the pension fund" with "the "plus" element being the prior disapproval of the Regulator of Social Housing of the practice of windfall pension enhancements".

36. Ms Iyengar, for the claimant, accepted in her skeleton argument that she could not argue that the respondent did not have a legitimate aim but that the "social policy" aspect of that legitimate aim should be taken into account in considering whether the dismissal of the claimant was a proportionate means of achieving that legitimate aim:

> 41.Before the Tribunal, the Claimant did not challenge the Respondent's proposition that the disapproval of the Regulator could constitute the "plus" element within a so-called "costs plus" argument as to whether an employer's reasons for directly discriminating against an employee because of his age were a legitimate aim within the meaning of section 13(2) of the Equality Act 2010. The argument between the parties focused on whether the Regulator's disapproval concerned Board-level employees or all employees, including in more junior roles like the Claimant's.
>
> 42.In light of the position which he took before the Tribunal, Judge Shore's answers to the EAT and the evidence before the Tribunal, the Claimant does not raise an argument that the Respondent lacked a legitimate aim for the direct age discrimination which it imposed on the Claimant (see *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487, paras 17, 81-83, and

47-104).

> 43.The Claimant's position is that when it comes to justification of direct age discrimination, the legitimate aims of the treatment of the employee by the employer must be social policy objectives, such as those related to employment policy, the labour market or vocational training (see *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16). The disapproval of the Regulator in regard to proper governance of a charitable community benefit society responsible for social housing, combined with the aim of saving money by paying out as little as possible to redundant employees, is a type of social policy objective which is capable of constituting a legitimate aim which can justify direct age discrimination.

37. EJ Shore explained why the employment tribunal considered that the dismissal of the claimant was a proportionate means of achieving the legitimate aim:

> the balance would have fallen in favour of the respondent. The claimant was paid more than £47,000.00 in redundancy and notice pay and had access to a pension scheme that he chose to freeze

38. We have concluded that this terse analysis is insufficient to support the determination reached:

38.1. the employment tribunal did not consider the specific nature of justification in a direct age discrimination claim. There was no consideration of any "social policy objectives" or reference to **Seldon**

38.2. the employment tribunal gave no consideration to the fact that this case involved departing from the respondent's usual policies rather than justifying a general policy

38.3. the employment tribunal did not consider the circumstances in which the regulator had criticised previous severance payments and whether they were comparable to the enhancement of the claimant's pension or whether the regulator would consider that failing to comply with the respondent's usual policies itself constituted poor governance

38.4. the employment tribunal did not consider **Woodcock** although it was referred to in argument. Proper consideration of **Woodcock** would have required some analysis of the "very particular circumstances" of that case and comparison with the circumstances of this case. The employment tribunal should have considered, in particular, that in **Woodcock** had the employer acted fairly and complied with its

procedures the employer could have dismissed the employee before he reached the age when he would obtain enhanced pension benefits unlike in this case where proper application of the respondent's procedures would have meant that the claimant would have been dismissed after reaching 55 years of age

38.5. the employment tribunal did not consider the discriminatory impact of the claimant losing his right to the application of the respondent's procedures and the infringement of his protection against unfair dismissal

38.6. there was no consideration of the discriminatory impact of the claimant losing what was a general enhancement of pension that was provided for any employee who was dismissed by reason of redundancy having reached 55 years of age and, presumably, is considered to constitute justified direct age discrimination under the terms of the Local Government Pension Scheme

38.7. it appears that the employment tribunal regarded the enhanced pension as a windfall, but there was no explanation of in what sense the receipt of an enhanced pension would have been a windfall. The term "windfall" suggests a financial advantage that is come upon in a manner that is unexpected and/or undeserved. In **Woodcock** the enhanced pension would have been undeserved in the sense that had the employer operated its procedure properly he could have been fairly dismissed before he reached the age at which he would gain a pension enhancement

38.8. perhaps most importantly the employment tribunal did not carry out the detailed analysis required by cases such as **Hardy & Hansons** and **Seldon** and carefully balance the gravity of the discriminatory effect of the dismissal in breach of the respondent's procedures on the claimant against the legitimate aim of the respondent and consider whether early dismissal was appropriate and reasonably necessary to achieve that aim.

39. We do not consider that there could only be one answer if this exercise is carried out properly.

Accordingly, the matter must be remitted to the employment tribunal. We have concluded that the error of the employment tribunal was fundamental and that if the matter was remitted to the same tribunal the claimant would necessarily be concerned that the employment tribunal was being given the opportunity to take a third bite of the cherry. The matter shall be remitted to a differently constituted employment tribunal.

40. By consent, the decision that there should be a 15% reduction in compensation shall be revoked. Paragraph 3.1 of the judgment is quashed and paragraph 3.4 is amended to read: “the compensatory award made to the claimant is reduced by a total of 75%”.