Neutral Citation Number: [2024] EWCA Civ 355

Case Nos: CA-2023-000756
and CA-2023-000676

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION (CO/4351/2021 and CO/4288/2021)
ADMINISTRATIVE COURT
Mr Justice Choudhury
[2023] EWHC 527 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 April 2024

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE NUGEE
and
LADY JUSTICE ELISABETH LAING

- -

Between:

THE KING **on the application of** **THE BRITISH MEDICAL ASSOCIATION**	**Appellant**
- and -	
(1) HIS MAJESTY'S TREASURY **(2) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE**	**Respondents**

THE KING **on the application of** **(1) THE FIRE BRIGADES UNION** **(2) JOSHUA DUNN** **(3) CHLOE REID**	**Appellants**
- and -	
(1) HIS MAJESTY'S TREASURY **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Respondents**

- -
- -

Fenella Morris KC and Jennifer Thelen (instructed by **Capital Law**) for the **Appellant** in **BMA**
Andrew Short KC and Martina Murphy (instructed by **Thompsons Solicitors**) for the **Appellants** in **FBU**
Nigel Giffin KC and Richard O'Brien (instructed by **The Treasury Solicitor**) for the **Respondents** in **BMA and FBU**

Hearing dates: 20 - 22 February 2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 17 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This is an appeal against an order made by Choudhury J ('the Judge') after hearing two applications for judicial review of the Public Service Pensions (Valuations and Employer Cost Cap) (Amendment) Directions ('the Directions'). The Directions were made by one of the Respondents, His Majesty's Treasury ('HMT'). The claimants below, the appellants in this appeal, are the Fire Brigades Union ('the FBU') and the British Medical Association ('the BMA'). The members of the FBU and of the BMA are members of different, unfunded, public sector pension schemes.

2. The context of the applications for judicial review was that, as a result of the Public Service Pensions Act 2013 ('the 2013 Act'), the former public sector schemes ('the legacy schemes') were replaced by new schemes. The Government had decided to give some older members of the legacy schemes transitional protection against the effects of that change. In *Lord Chancellor v McCloud* [2018] EWCA Civ 2844; [2019] ICR 1489 this court held that that transitional protection discriminated, on the grounds of their age, against the younger members of the legacy schemes. The Government then had to remedy that discrimination. It decided to do so by giving affected scheme members what has been called 'the McCloud Remedy'. The effect of the Directions, in sum, is that the costs of the McCloud Remedy were classified, for the purposes of the cost control mechanism ('the CCM'), as 'member costs' and not 'employer costs'. That, in turn, meant that the members of the FBU and the BMA who were also members of the new schemes would not, for a limited period in the future, benefit from a reduction in their contributions (or an increase in their accrual rates) which they would otherwise have expected as a result of the operation of the CCM under an actuarial valuation as at 2016.

3. In a careful and thorough judgment, the Judge dismissed those applications for judicial review. Not all aspects of his reasoning are the subject of grounds of appeal. In particular, neither the FBU nor the BMA have appealed against his decision that their members did not have (different) legitimate expectations in relation to the CCM. This is significant for some of the arguments in this appeal.

4. Simler LJ gave the FBU permission to appeal against the Judge's decision that the Directions were not made for an improper purpose in the light of the correct construction of statutory powers, and (on three grounds) against his decision that the Directions did not discriminate unlawfully against the FBU's members on the ground of any relevant protected characteristic. She gave the BMA permission to appeal against the Judge's decision that the Respondent did not have an obligation to consult before making the Directions and against his decision that, in making the Directions, the Government did not breach the duty imposed by section 149 of the Equality Act 2010 ('the 2010 Act'). I will refer to that duty as 'the section 149 duty'.

5. On this appeal, Ms Morris KC and Ms Thelen represented the BMA. The FBU was represented by Mr Short KC and Ms Murphy. Mr Giffin KC and Mr O'Brien represented the Respondents. I thank counsel for their written and oral submissions which meant that, by the end of the hearing, the issues which this court has to decide were clear.

6. For the reasons given in this judgment, I would dismiss both appeals. The Directions were not made for an improper purpose, and it was open to HMT to include the McCloud Remedy costs in the CCM as 'member costs'. Two broad points support my conclusion that that is the correct approach to the statute. First, none of the relevant pension schemes is or was a funded scheme. It follows that one of their intrinsic features is and has always been that the present contributions of current members are used to pay, not for their benefits, but for the benefits of current pensioners. Second, the McCloud Remedy can be described in many ways. One description is that it is compensation for a civil wrong, but at the same time it is, in substance, the recognition of rights to which those who benefit from it were legally entitled. It follows that it is, or is in the nature of, a member cost. Finally it was open to the Judge, on the evidence, to reach the conclusions which he reached about the discrimination claim, and on the claims about consultation and the section 149 duty.

7. My reasons for dismissing the FBU's first ground are in paragraphs 150-153, below, and my reasons for dismissing the discrimination grounds are in paragraphs 154-158. My reasons for dismissing the BMA's first ground are in paragraphs 159-161, and my reasons for dismissing its second ground are in paragraphs 162-163. I briefly consider an argument about section 31(2A) of the Senior Courts Act 1981 in paragraph 164.

The factual background

8. As the Judge explained, the background to the 2013 Act was the report made by the Independent Public Service Pensions Commission chaired by Lord Hutton ('the Hutton Report'). The legacy schemes considered in the Hutton Report were public sector schemes with defined benefits. In common with the new schemes which replaced them, (including the two schemes which are the subject of this appeal), their members were/are employed in a wide range of public sector jobs. They had/have several million active members, and large numbers of deferred and pensioner members. They were/are mainly unfunded or 'pay as you go' schemes. There are two features of such schemes, one of which I have already described in the fourth and fifth sentences of paragraph 6, above. The second is that if the contributions paid by employers and employees are not enough to pay the benefits conferred by the schemes, the shortfall must be met by the Exchequer and therefore by increasing Government borrowing or by increasing taxation. The rate of employee contributions is fixed as a given percentage of their pay. The rate of employer's contributions is set on the basis of periodic valuations. The total cost of the schemes is, in the Judge's word, 'huge'. As he said, 'Total employer contributions, even in a single year, run into the tens of billions of pounds'.

9. The conclusion of the Hutton Report was that reforms were necessary to 'balance the legitimate concerns of taxpayers about the present and future cost of pension commitments in the public sector as well as the wider need to ensure decent levels of retirement income for millions of people who have devoted their working lives in the service of the public'. It recommended that ministers should set a 'clear cost ceiling' for new public sector schemes for the future 'with automatic stabilisers to…keep costs under more effective control'. That would make public sector schemes more resilient and 'provide confidence to taxpayers there will be firm limits set on how much they can be expected to contribute to public sector pensions'.

10. The Hutton Report recommended a mechanism for controlling costs with a fixed cost ceiling 'to share cost and risk fairly'. It made some suggestions about how costs and risks should be shared between employers and employees. It was reasonable for employers to share salary and longevity risk (before retirement), and for employers to bear the risks of uncertain asset returns or higher inflation. The Hutton Report recommended a 'cost ceiling' to manage future spending if costs in the new schemes increased because of factors which were not taken into account in the way the schemes were designed, as 'an additional safety valve'. That ceiling would be based on 'the proportion of their total pensionable pay bill…in case costs within the new schemes increase due to factors not taken into account in the scheme design' to ensure that the public sector schemes continued to be 'affordable and sustainable'.

11. The Hutton Report considered the potential impact of the creation of reformed schemes on active members who were close to retirement. It explained why its authors considered that special protection for members over a certain age would not be necessary. It added that 'Age discrimination legislation also means that it is not possible in practice to provide protection from change for members who are already above a certain age'.

12. The Government then consulted the relevant trade unions on the recommendations in the Hutton Report. It decided to introduce a 'cost floor' to match the cost ceiling. On 30 June 2011 an internal submission recommended that taxpayer contributions should be capped by a 'fixed cost ceiling based on employer contribution rates'. The submission proposed that costs could be classified as 'member costs' or 'financial costs'. The former were 'changes in actual or assumed longevity, earnings, careers or the age and sex mix of the membership'. The latter were 'changes in the actual or assumed inflation and the discount rate'. Significant costs might come from any transitional protection. Those might be temporary and 'as such difficult to include in any ongoing cost cap'.

13. On 2 November 2011, HMT published a policy paper to inform further scheme-specific consultation. A mechanism for controlling cost was proposed (called an 'employer contribution cap'). It also proposed transitional protection for members who were within ten years of retirement on 1 April 2012. Such protection would be the subject of further discussion, in the Judge's words, 'taking full account of equalities impacts and legislation'.

14. On 14 December 2011, the then Chief Secretary to the Treasury ('the CST') wrote to the General Secretary of the Trades Union Congress ('the TUC'). That letter referred to the proposed cap on employers' costs, to guard against 'highly exceptional and unanticipated events which very significantly increase scheme costs'. The CST said that he intended that only changes to scheme costs due to 'member costs', such as a dramatic change in longevity and as defined by the previous cap and share arrangements, would be controlled by the cap. 'Financial cost pressures, including changes to the discount rate, would be met by employers'.

15. The Bill which would be enacted as the 2013 Act was published in September 2012. In November 2012, HMT published two policy documents about the proposed cost cap.

16. In the first, HMT said that it intended to enact the proposal for an 'employer cost cap' which had been made in the Hutton Report as a backstop protection for the taxpayer and as a way of ensuring that the risks associated with active members with service in the legacy schemes (including those with transitional protection) would be controlled. Changes in 'costs which arise from technical or financial changes' would not affect that cost cap. 'Only those which directly relate to members – such as changing expectations about life expectancy, salary growth, or career paths – will be included in the cap mechanism'. It would control all costs risks associated with the new schemes, and the risks associated with active members who had service in the legacy schemes.

17. The second policy document concerned actuarial valuations of public sector schemes. It said more about the CCM and about the distinction between 'member costs' and 'employer costs', that is, the costs which had been described earlier as 'financial costs'. The initial level of the employer cost cap would be set by reference to the 2012 scheme valuation. Later valuations would measure future costs against that cap. Steps would be taken to mitigate any unexpected changes shown by later valuations, either by adjusting the accrual of benefits, or members' contribution rates, or by some other means. In the light of the potential impact on members, the approach taken to valuations of the schemes should be 'transparent and consistent between schemes'. Directions would achieve those objectives. The Bill provided for the Government Actuary ('GA') to be 'consulted'. HMT would 'also involve other stakeholders, such as…trade unions, when considering the overall approach to valuations' to ensure that 'directions reflect individual scheme circumstances and economic and demographic changes'.

18. Paragraph 1.16 referred to 'member costs' and 'employer costs'. Many assumptions in valuations related to 'the profile of scheme members', such as expectations about life expectancy, growth in salaries, or career paths. Those would be defined as 'member costs'. Other decisions and assumptions made for the purposes of valuations were 'financial or technical in nature', such as the discount rate used to assess the current cost of future benefits, or the actuarial methods to be used. Those were to be 'defined as employer costs'. The 'cost cap mechanism' would only be used to make adjustments if member costs have changed. Changes arising solely from changes in employer costs would not be controlled by the CCM and would not give rise to changes in members' contributions or benefits. Employers and ultimately the Exchequer would bear the risk of changes in those costs (paragraph 1.17).

19. Paragraph 1.19 said that the employer cost cap would control the past and future cost risks associated with active members of the new schemes, including any service they had in the existing schemes, deferred and pensioner members of the new schemes and transitionally protected members of the old schemes.

20. The 2013 Act received Royal Assent in April 2013. It provided for creation of new schemes which, in the Judge's word, were 'reformed', and for the legacy schemes to be closed (but for any accrued rights to be protected).

21. In paragraph 24, the Judge explained how the CCM was designed to work. Regulations made under the 2013 Act would set a percentage rate of pensionable earnings against which changes in the cost of the scheme (as measured in periodic valuations done in accordance with directions from HMT) would be assessed. Regulations would set permissible margins on either side of that rate. There would be a 'floor breach' if the cost was lower than the margin, and a 'ceiling breach' if it was higher. In either case, steps would be taken to bring the cost back to the target cost, either by a change in benefits or in member contributions. The separate sets of regulations made for each new scheme in 2015 set an 'employer cost cap' expressed as a percentage of pensionable earnings. The Public Service Pensions (Employer Cost Cap) Regulations 2014 ('the 2014 Regulations') set the relevant range as 2% above or below the employer cost cap. If that range was exceeded, the costs of the scheme should be brought back to the target cost (regulation 3 of the 2014 Regulations). In the case of the new firefighters' scheme, the employer cost cap was 16.8% of members' pensionable earnings. For the NHS scheme, it was 11.6%. If after a valuation, the costs of a scheme were outside the 2% margin, the Secretary of State should be told. He should then ask the Scheme Advisory Board ('the SAB') to give advice about how to achieve the target cost. The Secretary of State should consider the advice, and should 'seek to reach agreement' with the SAB about how to achieve the target cost. If no agreement is reached the Secretary of State should change the accrual rate in order to achieve the target cost.

22. In 2013, the Government consulted GA on the first directions to be made under section 11 of the 2013 Act, and with the TUC and other employee representatives. The 2014 Directions were made on 11 March 2014. Their 'essential function' was described in the witness statement of Mr Elks for HMT. It was 'to specify which inputs are to be used in the valuation of the public service schemes and the actuarial methodology which is to be used to combine these inputs so as to determine the costs of the scheme'.

23. The Judge summarised the guidance published in March 2014, 'Public Service Pensions: Actuarial valuations and the cost cap mechanism' ('the 2014 Guidance') in paragraph 27. He referred to four features of the 2014 Guidance.

24. First, it stated that the calculation of future service costs would ignore the effect of members' accruals in the legacy schemes and the cost of any transitional protection. The cost of their accruals would be calculated on the assumption that they were accruing benefits in the new scheme. This assumption was necessary to avoid distorting the cap with transitional effects (paragraphs 2.19 and 4.67).

25. It explained, second (paragraphs 2.31-2.32), the distinction between 'member costs' and 'employer costs', in terms similar to those used in paragraph 1.16 of the second policy document (see paragraphs 17 and 18, above).

26. Third, it recognised that there could be future unexpected costs which would have to be factored into the CCM (paragraph 2.37). Any decisions about whether and, if so, how, such changes would feed into the CCM, and therefore to scheme members, 'will need to be taken on a case-by-case basis'. In making any such decision, the government would need to 'balance the interests of scheme members against the need to protect the taxpayer and ensure that the costs to employers remain sustainable. If any adjustments

are made, these may be via an adjustment to the level of the cap, to the valuation process, or by some other means' (paragraph 2.38). The Directions would also need to be updated if any valuation assumptions specified in them became 'out of date'. It might also become necessary to amend the Directions to cover 'any specific circumstances relating to the valuations of the new schemes' as the reform of public sector schemes went on (paragraph 2.39). HMT would therefore keep the Directions under review, to ensure that they continued to reflect HMT's policy and that they took into account 'any future developments that are relevant to public service pension scheme cost measurement and control, such as the release of new data, or changes in assumptions'. Such reviews were likely to be 'before each round of scheme valuations' (paragraph 2.40).

27. The 2014 Guidance also recognised, the Judge said (judgment, paragraph 27.d.), that changes to scheme regulations to adjust the benefits accruing in respect of future service, and/or adjustments to member contributions might have an impact on particular groups. Paragraph 1.14 of the 2014 Guidance said that 'Any potential impacts will be considered at a scheme level when decisions are taken about those outcomes'.

28. Paragraphs 28-32 of the judgment are headed 'Implementation'. The new schemes came into effect on 1 April 2015, the date when provisions of the 2013 Act came into force, including the CCM. The CCM depended on the process by which the schemes were to be valued. The valuations were also the basis for setting of the employer contribution rate for the next four years (judgment, paragraph 28).

29. The 2014 Directions provided for an initial 'preliminary valuation' of each scheme, on which the calculation of the employer cost cap would be based. There would then be a 'first' scheme valuation with an effective or 'as at' date of 31 March 2016. After that, the schemes would be valued every four years. The 2014 Directions dealt with 'required inputs and assumptions', the way in which scheme cost would be calculated, and 'process'. The Directions anticipated that the 2012 and 2016 valuations would be used both for the purpose of the CCM and to calculate employer contributions (judgment, paragraph 29).

30. The 2012 valuations of the schemes were done in 2014 and 2015, with an 'as at' date of 31 March 2012, 'so that the scheme regulations establishing the reformed schemes could specify an employer cost cap percentage rate as required' (judgment, paragraph 30). Work on the 2016 valuations (that is to say, the 'first' valuations for the purposes of the CCM) began in 2016. By October 2017, it was clear that there would be 'floor breaches' in the schemes, mostly because of wage restraint, but also because anticipated increases in life expectancy had not materialised and because more people had commuted more pension than had been expected. GA asked HMT whether, given those floor breaches at the first valuation, the CCM was working as intended. On 5 December 2017, a submission to the CST recommended consultation on excluding past service costs because the current design of the CCM 'risks creating intergenerational unfairness and undesirable volatility in pension scheme benefits for active members'. There was a further similar submission on 19 December 2017. A submission on 24 January 'confirmed that the CST did not want to proceed with fundamental changes to the CCM' (judgment, paragraph 32).

31. The Judge explained the background to the McCloud Remedy in paragraphs 33-39 of the judgment. Despite the concerns in the Hutton Report about the risks of giving transitional protection for older members of the legacy schemes, the 2013 Act had permitted such protection when those schemes closed on 1 April 2015. Those members who, on 1 April 2012, had less than a particular period of service left before their normal pension age ('NPA') were allowed to continue as active members of the legacy schemes. Members who were further away from their NPA, and, therefore, typically, younger, and sometimes also with other protected characteristics, challenged that transitional protection on the grounds that it was discriminatory. Decisions in the Employment Tribunal went both ways, but the claimants were largely successful in the Employment Appeal Tribunal and succeeded more emphatically in this court, which held, in essence, that the aim of protecting older members, or of giving them more protection, was not, on the evidence, a legitimate aim.

32. Officials' initial response was to recommend, on 26 February 2018, that the 2016 valuations be suspended pending the outcome of the litigation because of the uncertainty caused by it. The Chancellor instead recommended that the CCM be implemented as it stood so as to give effect to the floor breaches, while reform to the CCM was considered at the same time. In essence, it would be politically difficult to do anything else when the initial application of the CCM showed that members were due significant improvements 'due to the generosity of their pensions under the Framework'. A written ministerial statement ('WMS') on 6 September 2018 confirmed that initial results showed a floor breach of the CCM. On the same day, draft directions, the Public Service Pensions (Valuations and Employer Cost Cap) (Amendment) Directions were published, telling scheme administrators how to complete the CCM part of the 2016 valuations. The Public Service Pensions (Valuations and Employer Cost Cap) (Amendment) Directions 2018 were finally published on 23 November 2018.

33. Over the next few weeks, provisional floor breaches were confirmed in most schemes. In the NHS scheme, the cost cap would be 3.2% lower than the cap set in 2012 valuation, and would therefore exceed the 2% margin. In the Firefighters' scheme, the gap was 5.2% of pensionable payroll. This court's judgment in the McCloud litigation was handed down on 20 December 2018. A submission to the Chancellor and the CST dated 11 January 2019 recommended that the valuations of public service pension schemes be suspended because of the uncertainty caused by the McCloud litigation. That submission referred to a 'steer' which had been given previously that the costs of complying with this court's decision should be borne by employees (through less generous pension arrangements in the future) rather than by taxpayers. There were different ways of doing that, which would be explored.

34. A further WMS on 30 January 2019 announced that the Government was pausing the CCM element (but not the employer contribution rate element) of the 2016 valuation. The Public Service (Valuations and Employer Cost Cap) (Amendment and Savings) Directions 2019 ('the 2019 Pause Directions') were made. At that stage, the Government thought that it was impossible to work out the cost of remedying the discrimination identified in the McCloud litigation. The Judge referred to those costs as 'the McCloud Remedy costs' and so will I. That difficulty in turn affected the reliability and utility of calculating the CCM. The valuation reports were signed off a little later.

35. In paragraphs 40-45, the Judge described the thinking behind the McCloud Remedy and its funding. Various options were considered. On 27 June 2019, the Supreme Court refused permission to appeal against the decision of this court in the McCloud litigation. On 17 April 2020 a submission to the CST considered who should bear the £4bn cost of the McCloud Remedy. Officials recommended that it should be scheme members rather than taxpayers. There was a 'strong case' for that. The past service costs of the transitionally protected members had initially been included in the CCM as 'member costs'. The future service costs of transitional protection had not been, 'on the assumption that these members would rapidly diminish in proportion. The McCloud judgment disproves that'. The submission referred to a policy statement in 2014 (I think this might be a reference to the 2014 Guidance) which noted the possibility of unforeseen future changes, and had said that whether those should be reflected in the CCM would be decided case by case, by balancing the interests of members and taxpayers and ensuring that the costs to employers were sustainable. The submission said that the McCloud Remedy 'clearly fits into the category of member costs'. The balance between the relevant interests led officials to recommend that members bear the McCloud Remedy costs.

36. On 23 April 2020, the CST agreed with the recommendation and, in the Judge's words, 'reached what has been described by [HMT] as an "in principle" decision to include [the McCloud Remedy] as a member cost'. The CST also 'thought that there was an [intergenerational] fairness aspect that needs consideration'.

37. On 20 April 2020 the FBU had applied for judicial review of HMT's failure to lift the pause on the CCM the CCM element of the 2016 valuation. The Judge referred to that claim as 'the First JR' and so will I. The BMA was an Interested Party in the First JR. When the pause was lifted in July 2020, the First JR was stayed by a consent order, until the publication of new directions providing for the treatment of the McCloud Remedy costs in the CCM. The First JR is still stayed.

38. On 16 July 2020 HMT announced that it would lift the pause on the CCM element of valuations. The relevant WMS said that 'As the proposals in consultation today will increase the value of schemes to members, this falls into the "member cost" category'. That consultation was published on the same day. Two ways of addressing the discrimination were proposed: an 'immediate choice' and a 'deferred choice underpin'. Both would have enabled affected members, whether they had transitional protection or not, to decide whether to take benefits from the legacy scheme or from the new scheme for the period 1 April 2015 to 31 March 2022. Under the second option, the relevant members would, for the remedy period, and until they made the deferred choice, be deemed to have accrued benefits in the legacy scheme, rather than in the new scheme. The Government also wanted to deal with the position after 1 April 2022. The proposal was to move everyone into the new schemes on that date.

39. An equality impact assessment was published in July 2020, entitled 'Public Service Pensions: changes to transitional arrangements to the 2015 schemes - Central equality impact assessment'. I will refer to this as 'EIA 1'. EIA 1 dealt with the McCloud Remedy, with the choice of remedy which it was proposed to offer to those affected by the discriminatory transitional provision, and with what should happen after 1 April

2022. We were shown EIA 1 during the hearing. It is true, as the Judge observed, that EIA 1 did not consider the impact of including the McCloud Remedy costs in the CCM. EIA 1 contains a great deal of detailed information based on an extensive review of relevant data. Paragraph 2.7 pointed out that the proposals only related to those in service on or before 31 March 2012. Annex A contained ten pages of public service workforce data, including a detailed breakdown by protected characteristics, and Annex B, three pages of data for each scheme, analysing members by age and protective status (that is whether they had no protection, tapered protection, or full protection).

40. On 27 July the CST accepted the recommendation in a submission that the 2014 Directions should be amended so as to 'capture the majority of the remedy costs', in other words, to include the costs for all the years of the remedy period, that those costs be spread over four years, and that valuation assumptions only be revisited in limited circumstances. The McCloud judgment was unforeseen, and the design could never have considered it. By its nature, 'it falls into the category of "member cost" and it is reasonable to therefore take it into account in this way'.

41. The Government then consulted on the form of the McCloud Remedy. The treatment of the cost was not part of the consultation. As the Judge put it, 'Nonetheless, this continued to be raised by the unions as a "key concern" and featured in discussions' (judgment, paragraph 53). In paragraph 54, the Judge quoted a statement from the BMA that the cost was 'a direct result of age discrimination imposed by the government and was not the fault of the scheme members. It is essential therefore that the costs of this remedy are borne directly by the government, and that employee contribution rates, accrual rates and overall pension benefits are not adversely impacted by your proposed remedy'. Consultees, including the GMB, also made the point that a sector-wide approach was flawed as the proportion of employees with various protected characteristics differed from scheme to scheme. The consultation closed on 11 October 2020.

42. On 3 December 2020, the CST accepted the recommendations in a submission dated 19 November 2020 that any ceiling breaches arising from the 2016 valuations be waived but that any floor breaches be rectified. On 4 February 2021, the Government announced that the McCloud Remedy would be the deferred choice underpin. All those who were or were eligible to be members of a legacy scheme immediately before 1 April 2012 and had a period of service after 31 March 2015 during which they were members of a legacy scheme or of a new scheme would be given such a choice if the periods of service were continuous (subject to one exception). The Government also published its response to the consultation. The changes were to be enacted in primary legislation.

43. In paragraph 59, the Judge referred to a response to the consultation on the CCM, published on 4 October 2021. I have helpfully been told that the witness statement of Mr Elks refers to this consultation. The response announced, among other things, that a wider margin against the target of +/- 3% would be introduced for the CCM.

44. An equality impact assessment of the proposed amending directions, entitled 'PSED Assessment to unpause the cost control mechanism and reflect the increased value of

public service pensions as a result of the *McCloud* and *Sergeant* judgments in the completion of the cost control element of the 2016 valuations' was submitted to the CST on 5 October 2021. I will refer to this as 'EIA 2'.

45. The Judge summarised EIA 2 in paragraphs 60-62. EIA 2 considered the impact of including the McCloud Remedy costs in the CCM. It was not scheme-specific. It recognised that members' benefits would either not be affected, or would be lower than their benefits would have been if the 2016 CCM valuations had not included those costs, or any subsequent rectification had been done in that way. The members who would be adversely affected, because their benefits would be lower, included those who would not be eligible for the McCloud Remedy. They were likely to be younger, were more likely to be women, and/or to have other protected characteristics. EIA 2 concluded that this approach was 'fair and proportionate' because the Government was required to provide the remedy, and because it was necessary, in order to protect taxpayers, to ensure that the cost of the consequent improvements to benefits was controlled and because 'all cost-sharing mechanisms will entail the possibility that members' benefits will be affected by costs associated with other cohorts'.

46. On the same date, as required by section 11(4) of the 2013 Act, HMT asked GA for a professional opinion on the proposed directions. Paragraph 4 of that letter described the Government's policy intentions. One aim was that changes to the CCM in the 2016 valuation which were required 'should not unduly reduce intergenerational fairness'. GA replied to that request in a letter dated 6 October 2021, which was published. On the same date, GA separately provided HMT officials with a report entitled 'Actuarial Analysis of Equality Impacts', which considered the effect of the proposed directions on members' benefits.

47. The Directions were made on 7 October 2021. The Judge summarised their effect in paragraphs 65 and 66 of the judgment. They lifted the pause on the CCM. Schemes could therefore finish the 2016 valuations. The prescribed valuation method included the McCloud Remedy costs in the CCM. Schemes were to use the costs which had been calculated before the *McCloud* litigation and before the pause of the 2016 CCM valuations, and also the expected costs of the McCloud Remedy. That meant that there were no longer any floor breaches and that the accrual rate from 1 April 2019 onwards was not increased; nor were members' contributions reduced.

48. The BMA and the FBU sent pre-action protocol letters. The FBU issued its claim on 15 December 2021, and the BMA, on 21 December 2021.

The legislative framework

The Senior Courts Act 1981

49. Section 31 of the Senior Courts Act 1981 ('the 1981 Act') is headed 'Application for judicial review'. Section 31(1) lists the relief which can be claimed on such an application. Section 31(2) makes further provision about declarations and injunctions. Section 31(2A)-(2C) and (3C)-(3F) were inserted by the Criminal Justice and Courts Act 2015. Section 31(2A) requires the High Court to refuse to give any relief on an application for judicial review if 'it appears to the court highly likely that the outcome for the applicant would not have been substantially different if the conduct complained

of had not occurred'. That requirement is subject to an exception which is not argued to apply in this case (section 31(2B)). The rule stated in section 31(2A) dilutes the approach of the common law which was that the High Court would only refuse relief if it was satisfied that that it was 'inevitable' the outcome would have been the same.

The Equality Act 2010

50. Part 2 of the Equality Act 2010 ('the 2010 Act') is headed 'Equality: key concepts'. Chapter 1 (sections 4-12) provides for the 'protected characteristics'. They include age, race and sex. Chapter 2 is headed 'Prohibited conduct'. The conduct prohibited by the 2010 Act includes direct discrimination and indirect discrimination (sections 13 and 19).

51. Section 13 is headed 'Direct Discrimination'. A discriminates against B if, 'because of a protected characteristic, A treats B less favourably than he treats or would treat others' (section 13(1)). Section 13(2) provides that 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'.

52. Section 19 is headed 'Indirect Discrimination'. A also discriminates against B if A applies to B a provision criterion or practice ('PCP') which is discriminatory in relation to a relevant protected characteristic of B's (section 19(1)). Section 19(2) explains that that is so if four conditions are met. First, A applies or would apply the PCP to others who do not share the protected characteristic. Second, the PCP puts or would put people with whom B shares the protected characteristic at 'a particular disadvantage' when compared with people with whom B does not share the protected characteristic. Third, the PCP puts or would put B at that disadvantage. Fourth, A cannot show that the PCP is a proportionate means of achieving a legitimate aim. Section 19(3) lists the relevant protected characteristics. They include age, race and sex.

53. Part 5 is headed 'Work'. Chapter 2 of Part 5 is headed 'Occupational Pension Schemes'. Section 61 is headed 'Equality Clause' and section 62, 'Non-discrimination alterations'. Section 61(1) provides that such a scheme 'must be taken to include a non-discrimination rule'. Section 61 explains what a non-discrimination rule is, and how it takes effect. A minister of the crown may, by order, specify descriptions of rules, practices, actions, or decisions relating to age the maintenance or use of which do not breach a non-discrimination rule (section 61(8)). The relevant order is the Equality Act (Age Exceptions for Pension Schemes) Order 2010 SI No 2133 ('the 2010 Order'). In short, article 3 of the 2010 Order specifies the rules, practices, actions, or decisions set out in Schedule 1 to the 2010 Order.

54. Part 11 is headed 'Advancement of Equality'. Chapter 1 (section 149-157) is headed 'Public Sector Equality Duty'. Section 149(1) requires a public authority 'in the exercise of its functions' to 'have due regard' to three listed needs. HMT is a public authority within the meaning of section 149(1) (see section 150(1) and Part 1 of Schedule 19 to the 2010 Act). The three needs are:
    a. to eliminate discrimination and 'any other form of conduct that is prohibited by or under' the 2010 Act,

b. to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, and
c. to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

55. Section 149(3) expands the meaning of section 149(1)(b) in three specific ways. Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it includes 'having due regard, in particular, to the need to…take steps to meet the needs of persons who share the relevant protected characteristic that are different from the needs of persons who do not share it' (section 149(3(b)). While compliance with section 149(1) 'may involve treating some persons more favourably than others…that is not to be taken as permitting conduct that would otherwise be prohibited under this Act' (section 149(6)). I think that this is a reference to section 149(4), which makes special provision about meeting the needs of people with disabilities. Section 149(8) explains that the reference to conduct which is prohibited under the 2010 Act includes a reference to a breach of an equality clause or rule (see section 127(1)) and to a breach of a non-discrimination rule (see section 61: see paragraph 53, above). It clearly also includes all the conduct prohibited by Chapter 2 of Part 2.

The Public Service Pensions Act 2013 ('the 2013 Act')

56. Section 1(1) of the 2013 Act provides that regulations may establish schemes for the payment of pensions to the people listed in section 1(2). They include health service workers and fire and rescue workers. Regulations made under section 1 are called 'scheme regulations' (section 1(4)). Section 2(1) introduces Schedule 2 which lists the 'responsible authorities' that is, the people who may make scheme regulations. They include the Secretary of State for Health and Social Care and Secretary of State for the Home Department. In the 2013 Act, that person is called the 'responsible authority' for each scheme (section 2(2)). Subject to the 2013 Act and to Part 1 of the Public Service Pensions and Judicial Offices Act 2022 ('the 2022 Act'), scheme regulations may make such provision as the responsible authority considers appropriate (section 3(1)).

57. Section 4(1) requires scheme regulations to provide for a person to be responsible for managing or administering the scheme, and any statutory pension scheme which is connected with it. Section 4(6) provides that 'For the purposes of this Act, a scheme under section 1 and another statutory pension scheme are connected if and to the extent that the schemes make provision in relation to person of the same description.' That definition is repeated in section 37 ('General interpretation').

58. Section 5(1) requires scheme regulations to establish a board with responsibility for helping the scheme manager (or each scheme manager) in relation to two matters concerning the scheme and any scheme connected with it, and 'such other matters as the scheme regulations may specify' (section 5(2)). In making regulations 'the responsible authority must have regard to the desirability of securing the effective and efficient governance of and administration of the scheme and any connected scheme' (section 5(3)). There are three other references in section 5 to 'any connected scheme'.

59. Section 6(1) requires the scheme manager for a scheme under section 1 and any statutory pension scheme which is connected with it to publish certain information. Scheme regulations must provide for the establishment of a board with responsibility for giving advice about the desirability of changes to the scheme or to any other scheme which is connected with it and is not an injury or compensation scheme (section 7(1)). There are four other references to connected schemes in section 7.

60. Scheme regulations may establish a scheme under section 1 as a defined benefits scheme, a defined contributions scheme, or a scheme of any other description (section 8(1)). The effect of sections 8(2) and (3) is that a defined benefits scheme must be a 'career average revalued earnings scheme' or a defined benefit scheme of a description specified in regulations by HMT; but HMT may not specify a final salary scheme in regulations. Section 10 makes provision for the normal pension age for a person under a section 1 scheme.

61. Section 11 is headed 'Valuations'. Scheme regulations for a scheme which is a defined benefits scheme must provide for actuarial valuations to be made 'of (a) the scheme and (b) any statutory pension scheme that is connected with it' (section 11(1)). That valuation 'must be carried out in accordance with Treasury directions' (section 11(2)). Section 11(3) gives a non-exhaustive list of six things which can be specified in such directions. They include 'the data, methodology and assumptions' to be used in a valuation, 'what matters are to be covered by the valuation', and where a scheme under section 1 and another scheme are 'connected', whether the schemes are to be valued separately or together, and, if together, how (section 11(3)(c), (d) and (e)). Before making any directions under section 11(2), HMT must consult with GA. Section 11 refers to a 'connected' scheme in section 11(1)(b), 11(3)(d) and 11(5).

62. Section 12 is headed 'Employer Cost Cap'. Section 12(1) requires, in the case of a defined benefits scheme, that scheme regulations 'set a rate, expressed as a percentage of pensionable earnings, of members of the scheme, to be used for the purpose of measuring changes in the cost of the scheme'. That rate is called the 'employer cost cap' (section 12(2)).

63. The employer cost cap is to be set in accordance with Treasury directions (section 12(2)). Section 12(4) is a non-exhaustive list of the things which may be specified in Treasury directions. Directions may specify (1) how the first valuation under section 11 of a scheme under section 1 is to be taken into account in setting the cap, (2) the costs or changes in costs that are to be taken into account on subsequent valuations of a scheme under section 1 for the purposes of measuring changes in the cost of the scheme against the cap, and (3) the extent to which costs or changes in the costs of any statutory pension scheme which is connected with a scheme are to be taken into account for the purposes of section 12.

64. Section 12(5) requires Treasury regulations to do two things. First, they must make provision requiring 'the cost of a scheme' (and of any connected scheme) to remain within specified margins either side of the employer cost cap. Second, 'For cases where the cost of a scheme would otherwise go beyond either of those margins' they must make 'provision specifying a target cost within the margin'. In the second such case,

scheme regulations may, but are not required to, provide for a process by which the responsible authority, the scheme manager (if different), employers and members (or representatives of employers and members) are 'to reach agreement on the steps required to achieve the target cost for the scheme', and what should happen if agreement is not reached (section 12(6)). The steps referred to in section 12(6) may include increasing or decreasing members' benefits or contributions (section 12(7)). Section 12 refers to a 'connected' scheme in section 12(4)(c) and 12(5)(a).

65. Section 18 is headed 'Restriction of existing pension schemes'. Section 18(1) enacts the general rule that no benefits are to be provided under an existing scheme to or in respect of a person in relation to his or her service after the closing date. The 'closing date' is defined in section 18(4). With one irrelevant exception, it is 31 March 2015. Section 18(1) does not apply to a scheme which is a defined contributions scheme or to benefits excepted by Schedule 5 to the 2013 Act (section 18(3)). The rule in section 18(1) is subject to the exceptions specified in section 18(5). Scheme regulations may make an exception in the case of members of an existing scheme, or those who were eligible to be such members immediately before 1 April 2012, and people who had ceased to be, or to be eligible to be, such members before that date. Such exceptions could be framed by reference to the satisfaction of a specified condition (such as the attainment of normal pension age, or another specified age) before a specified date. Section 18(7) enables scheme regulations to extend the specified date by up to four years.

66. Section 20, headed 'Final salary link' introduces Schedule 7 which 'contains provision for a "final salary link" in relation to schemes to which section 18(1) applies (and see section 31(14))'. Section 31 is headed 'Restriction of certain existing public body pension schemes'. Those are schemes relating to staff of a body, or office holders, listed in Schedule 10. Section 31(14) also introduces Schedule 7, providing for a final salary link for those schemes.

67. The effect of paragraph 1 of Schedule 7, where it applies, is that if a person is a member of an old scheme by virtue of his pensionable service in that scheme, and is also a member of a new scheme, by virtue of his pensionable service in the new scheme, and his service in the schemes is continuous, and his employer is the same, then in determining his final salary for the purposes of the old scheme, the old scheme service is to be regarded as ending when the service in the new scheme ends, and such earnings as the new scheme regulations may specify, which are earned from his service in the new scheme, are to be regarded as derived from the old scheme service, subject to paragraph 1(3). Paragraph 2 of Schedule 7 makes similar provision for cases in which a person has service, successively, in two existing schemes and moves into a new scheme.

68. Sections 21-24 are procedural provisions which apply when scheme regulations are made by the responsible authority. The responsible authority must consult the people described in section 21(1) before making scheme regulations.

69. Section 22 is headed 'Procedure for protected elements'. It applies where, after regulations establishing a new scheme come into force, the responsible authority

proposes to make further regulations which change 'the protected elements of the scheme during the protected period' (section 22(1)). In such a case, section 22(2) imposes a duty on the responsible authority to 'consult' specified people 'with a view to reaching agreement' with them, and to lay a report before Parliament. That report must explain why the responsible authority wishes to make those regulations 'having regard to the desirability of not making changes to the protected element of a scheme… within the protected period' (section 22(4)). 'Protected elements' and 'protected period' are defined in section 22(5)). Protected elements include members' contribution rates, and benefit accrual rates, but, by section 22(6), references to the protected elements 'do not include a change appearing to the responsible authority to be required by or consequential upon section 12 (employer cost cap)'.

70. Section 23(1) requires the responsible authority, if it proposes to make scheme regulations with retrospective provision 'which appears to the authority to have significant adverse effects in relation to the pension payable to or in respect of members of the scheme', to get the consent of the people referred to in section 23(3). Where it appears to the responsible authority that its proposal will have significant adverse effects in any other way, it must first consult the people referred to in section 23(3) 'with a view to reaching agreement with them' (section 23(2)).

The Public Service Pensions and Judicial Offices Act 2022

71. The provisions of the Public Service Pensions and Judicial Offices Act 2022 ('the 2022 Act') came into force in accordance with the terms of section 131 of the 2022 Act. Some came into force on Royal Assent, and others on 23 October 2023. The rest came into force in accordance with commencement orders. However, as will be seen, some of its provisions have retrospective effect.

72. Chapter 1 of Part 1 of the 2022 Act applies to schemes other than judicial schemes and local government schemes. Section 33 defines 'Chapter 1 scheme', and section 34, 'new scheme' benefits. Other terms are defined in sections 35 and 36. Section 1(1) defines 'remediable service'. There are four relevant conditions in the definition. The first is that the service takes place between the day after the closing date and 31 March 2022. For the purposes of the schemes in this case, the closing date is 31 March 2015 (section 1(8)(a)). The second is that the service was, or would have been, pensionable service 'under a new Chapter 1 scheme but for the person's failure to meet a condition relating to the person's attainment of normal pension age, or another specified age by a specified date' (section 1(4)). The third is that, on or before 31 March 2012, the person was in service that is pensionable service under a scheme listed in section 1(5)(a) or (b). The fourth condition is that there is no relevant 'disqualifying gap in service', a phrase which is defined in section 1(7).

73. Sections 2-5 are headed 'Retrospective provision about remediable service'. Section 2(1) provides that if a person's remediable service would, apart from section 2(1), be service under a new scheme, it 'is not and is treated as never having been, pensionable service under that scheme, and… is treated as being and as always having been, pensionable service under the relevant Chapter 1 legacy scheme'. Section 2(1) has effect, among other things, for determining which new scheme is or was required to pay benefits to or in respect of a member, and for the purpose of determining the amount of

any benefits which are, or at any time were, payable under a Chapter 1 scheme to or in respect of a member (section 2(3)). Section 4 defines various terms including 'the relevant Chapter 1 legacy scheme'. Section 2(1) has effect subject to any election made under section 6 (section 6(4)(a)).

74. Sections 6-9 provide mechanisms for an immediate choice of new scheme benefits to be made by pensioner, and on behalf of deceased, members. Section 6(1) requires scheme regulations for a Chapter 1 legacy scheme to make provision so as to secure that a person can choose new scheme benefits in relation to remediable service. Any benefits under such an election are new scheme benefits (section 6(5)). Section 6(7) provides for the effect of such an election. Section 7 makes procedural provision about such elections. Any such election must be made 'before the end of the section 6 election period', which is defined in section 7(2). In the circumstances described in section 8, scheme regulations may provide for an election to be deemed to have been made. Section 10 requires scheme regulations for a legacy scheme to provide that an election may be made for new scheme benefits in relation to the remediable service in an employment of a relevant member which is pensionable service under the scheme, whether or not by virtue of section 2(1).

75. Sections 10-13 make provision for active and deferred members to make a deferred choice to have new scheme benefits. Section 10(1) requires the scheme regulations of a Chapter 1 legacy scheme to make provision so as to secure that an election for new scheme benefits may be made in relation to the remediable service of a relevant member that is pensionable service under the scheme (whether or not by section 2(1)). 'Relevant member' is defined in section 10(2), in relation to a legacy scheme, as an active or deferred member of the legacy scheme, or of a Chapter 1 new scheme, in relation to an employment or office, and who is not a pensioner member of a Chapter 1 scheme in relation to the employment or office (section 10(2)). Such an election has effect in relation to all of the member's remediable service in the employment or office in question which is pensionable service under the scheme (section 10(5)). Section 11 requires scheme regulations to provide for the procedure which applies to, and for the time limits for making, such an election, in a way which complies with section 11.

76. Section 30(1) provides that in determining for the purposes of Chapter 1 of the 2022 Act whether any service is pensionable service under a particular pension scheme, section 61 of the 2010 Act (non-discrimination rule) (see paragraph 53, above) is to be disregarded. To the extent that section 61 has the effect, apart from section 30(2) of the 2022 Act, that any remediable service of a person is not pensionable service under a Chapter 1 new scheme, or is pensionable service under a Chapter 1 legacy scheme, it ceases to have effect (to that extent) immediately before section 2(1) comes into force.

77. Chapter 4 of Part 1 is headed 'General'. Section 92 is headed 'Amendments relating to the employer cost cap', and section 93, 'Operation of the employer cost cap in relation to 2016/17 valuation'. Section 93(1) of the 2022 Act provides that 'The requirement in provision made under section 12(5)(a) of [the 2013 Act] that the cost of a section 1 scheme must remain within a margin above the employer cost cap of the scheme does not apply, and is treated as never having applied, in relation to the cost of the scheme that is calculated by reference to the scheme's 2016/17 valuation'. Accordingly,

provision made under section 12(6) of the 2013 Act 'does not apply, and is treated as never having applied, in relation to the cost of the scheme that is calculated by reference to the scheme's 2016/17 valuation'.

The relevant scheme regulations

The Public Service Pensions (Employer Cost Cap) Regulations 2014, 2014 SI No 575

78. The regulations made under section 12(5) of the 2013 Act are the Public Service Pensions (Employer Cost Cap) Regulations 2014 ('the Cost Cap Regulations'). Regulation 2 defines 'a relevant scheme' as 'a defined benefits scheme (and any connected scheme) to which section 12 …applies'. Regulation 3 provides that the cost of a relevant scheme must stay within an upper margin which is a rate of 3 percentage points above the employer cost cap of the scheme, and a lower margin, which is a rate of 3 percentage points below the scheme's cost cap. Before 2 August 2022, both figures were 2 percentage points. Where the cost of a relevant scheme is greater than the upper margin, or is lower than the lower margin set in regulation 3, the target cost is the same as the employer cost cap of the scheme (regulation 4).

The Firefighters Pension Scheme (England) Regulations 2014, 2014 SI No 2848

79. Regulation 150A is headed 'Employer cost cap'. It was inserted in the Firefighters Pension Scheme (England) Regulations 2014 with effect from 1 April 2015. Regulation 150A(1) provides that the employer cost cap is 16.85 per cent of pensionable earnings of members of that scheme. Where the cost of that scheme calculated in accordance with Treasury directions under section 11 is more than the margins specified in regulations made under section 12(5) ('the Cost Cap Regulations') above or below the employer cost cap, the Secretary of State must follow the procedure specified in regulation 150A(3) for reaching agreement as to the steps required to achieve the target cost specified in the Cost Cap Regulations (regulation 150A(2)). If agreement is not reached within three months after the end of the consultation period, the Secretary of State must take steps to adjust the rate at which benefits accrue under regulation 34 so that the target cost for the scheme is achieved (regulation 150A(4)).

The National Health Service Pension Scheme Regulations 2015, 2015 SI No 94

80. Regulation 8 of the National Health Service Pension Scheme Regulations 2015 ('the new NHS regulations') is also headed 'Employer cost cap'. Regulation 8(1) provides that it is 11.6% of the pensionable earnings of the members of that scheme. By regulation 11(2), 'Employer cost cap' has the same meaning as in section 12 of the 2013 Act. Regulation 10 prescribes a procedure, involving the Secretary of State and the SAB, for seeking to agree steps to achieve a target cost. If no agreement is reached, and the costs of the scheme are outside the margins set out in Treasury regulations, the Secretary of State must adjust the fraction specified in paragraph 13(3) of Schedule 9 to the new NHS regulations so as to achieve the target cost (regulation 8(2)).

The relevant Directions

The 2014 Directions

81. The first Directions made under sections 11(2) and 12(3) of the 2013 Act were the Public Service Pensions (Valuations and Employer Cost Cap Directions) 2014 ('the 2014 Directions'). Part 1 contains directions 1 and 2. Some terms are defined in direction 2. Part 2 is headed 'Valuations' and Part 3, 'Employer Cost Cap'. Schedule 1

contains a list of connected schemes, Schedule 2 a list of 'Notional Assets for First Valuation' and Schedule 3 a list of the then existing schemes, their corresponding new schemes and the relevant date for the preliminary valuation (see direction 48(3)).

82. By direction 3(1), in Part 2 of the 2014 Directions, a reference to a scheme means a scheme made under section 1 of the 2013 Act 'and any connected scheme, valued together as if they were a single scheme'.

83. It is logical to begin with Part 3 of the Directions. The first direction in Part 3 is direction 48, headed 'Setting the employer cost cap'. It provides that the rate of the employer cost cap in scheme regulations 'must be equal to the proposed employer cost cap calculated in a preliminary valuation of the relevant old scheme, carried out in accordance with directions 50-53'.

84. Direction 50 provides for a preliminary valuation for the purposes of the Directions, and explains what that is. It is a valuation of the relevant old scheme which assumes that the benefit structures and transitional arrangements which are proposed for the new scheme will come into force on the date which is the relevant date for each new scheme. It is to be based on the data, method and assumptions in Part 2 of the Directions which apply for the purposes of valuing the new scheme, and otherwise complies with the procedure for valuing the new scheme in Part 2, with the changes described in direction 50(f). One such change is that the 'effective date' for schemes like the schemes in this case is 31 March 2012 (direction 50(f)(ii)).

85. Direction 51 makes further provision modifying the provisions of Part 2 in their application to a preliminary valuation. Direction 53 requires the valuation report for the preliminary valuation to state the proposed employer cost cap, to the nearest 0.1% of pensionable payroll, in accordance with the formula *A-B*. *A* is 'the contribution rate required to cover the expected cost of benefits accrued by members of the old relevant scheme during the implementation period'. *B* is the contribution yield 'expected from normal member contributions to the relevant old scheme during the implementation period'. Direction 53 is headed 'Proposed employer cost cap'. It makes further detailed provision about that calculation. Direction 53(6) requires the calculation of the expected accrued benefits of the members of the old scheme in the implementation period to be made on the assumption that no members of that scheme have any entitlement to exceptions made under sections 18(5)-(7) of the 2013 Act; that is, that they have no entitlement to transitional protection.

86. Part 2 of the Directions provides for first and subsequent valuations of the new schemes. Direction 6(1) provides that the first valuation of schemes like the schemes in this case must have an effective date of 31 March 2016. Subsequent valuations must have effective dates four years later than the preceding valuation (direction 6(2)). Directions 7 and 8 provide for the implementation date and implementation period. Directions 10-20 are headed 'Methodology and assumptions'. Directions 21-29 are headed 'The valuation report'. Direction 27 makes provision about contribution rates, direction 28 about contribution yields and direction 29 about the employer contribution rate.

87. Directions 30-43 are headed 'The valuation report: cost cap cost of the scheme'. They make detailed provision about the calculation of the cost cap in first and subsequent valuations of the new schemes. The opening balance of the cost cap fund must be set equal to the liabilities of the scheme as at the closing date of the connected scheme in respect of scheme members in pensionable service at that date (direction 30(1)). For the second and each subsequent valuation, the prior value of the cost cap fund must be the value of the cost cap fund as calculated at the previous valuation (direction 30(2)). It is clear from, for example, direction 35(1), that the relevant calculations require both the calculation of liabilities from the old scheme, and a comparison between values calculated for the old and for the new schemes.

88. Direction 40 is headed 'Cost cap future service cost'. Direction 40(1) requires the calculation of that cost, expressed as a percentage of pensionable pay, as the contribution rate required to cover the expected costs of benefits accrued by the members of the scheme during the implementation period. Direction 40(4) requires the assumptions specified in directions 18(e), 18(f) and some which are specified in direction 19 to be adjusted 'as if no members of the relevant old scheme have any benefits accrued in any connected scheme or entitlement to exceptions made under sections 18(5)-18(7) of the 2013 Act'. Direction 40(5) also requires the rate in direction 40(1) to be calculated by determining the expected cost of benefits accrued by members of the scheme during the implementation period 'as if no members of the scheme have any entitlement to exceptions made under sections 18(5)-(7) of the 2013 Act'.

The Public Service Pensions (Valuations and Employer Cost Cap) (Amendment) Directions 2021

89. In paragraph 47, above, I have referred to the Judge's description of the effect of the Directions (that is, the Public Service Pensions (Valuations and Employer Cost Cap) (Amendment) Directions 2021). The FBU's challenge to the Directions does not depend on a detailed analysis of the Directions, so such an analysis is not necessary here. Briefly, the Directions insert many new definitions in direction 2, most of which stem, in one way or another, from the McCloud Remedy and the decision to treat it as a member cost. Direction 4 amends the meaning of 'a scheme' in direction 3 and by inserting 'or deemed to be made' after 'made' and, after 'single scheme', '(unless otherwise indicated in these Directions)'.

90. A new Part 3 is substituted for Part 3 of the 2014 Directions. It contains one relevant direction, direction 59. This requires the scheme actuary to compare the cost cap cost of the scheme identified in the cost cap valuation report with the employer cost cap, and where the cost cap cost of the scheme has gone beyond the margins on either side of the employer cost cap specified in regulations made under section 12(5) of the 2013 Act, to notify the responsible authority.

91. Directions 48-58 make provision for the contents of a new document, the cost cap valuation report, which the scheme actuary must prepare. The report must include several different sums, calculated in accordance with directions 42, 50, 51, 52, 53, 54, 56, 57 and 59. In broad terms, these are all consequences of, and give effect to, the decision to include the McCloud Remedy in the employer cost cap. Direction 48(g) requires the scheme actuary, 'where the cost cap has gone beyond the relevant margins'

(see paragraph 90, above) 'to make a statement to that effect to notify the responsible authority'.

92. A new direction 21 is substituted for the former direction 21, although many of its provisions are unchanged. There is a wholly new direction, 22A, headed 'Contents of the valuation report: employer contribution correction cost'.

A summary of the principal authorities
Indirect discrimination and justification
De Weerd v Bestuur van de Bedrijfsvereniging voor de Gesondheid, Geestilijke en Maatschappelijke Belangen

93. In *De Weerd v Bestuur van de Bedrijfsvereniging voor de Gesondheid, Geestilijke en Maatschappelijke Belangen* (Case C-343/92) [1994] ECR I-571 (ECJ) ('*De Weerd'*) the national court referred questions in a claim brought by women who argued that a requirement for earnings in the year preceding an application for an incapacity benefit, which applied equally to men, discriminated indirectly against them on the grounds of their sex because women were less likely to be able to satisfy such a requirement than men, even if the requirement was justified on budgetary grounds. The Court accepted that budgetary considerations could influence a member state's choice of social policy, and affect the scope of the measures for social protection which it adopted, 'but they cannot themselves constitute the aim pursued by that policy, and cannot, therefore justify discrimination against one of the sexes'. If such considerations could justify what would otherwise amount to indirect discrimination, that would mean that 'the application and scope of equal treatment …might vary in time and place according to the state of the public finances of the Member States' (paragraphs 35 and 36). The Court nevertheless recognised that member states could take budgetary constraints into account 'when making the continuance of entitlement to social security benefit dependent on conditions the effect of which is to withdraw the benefit from certain categories of persons, provided that when they do so they do not infringe the rule of equal treatment between men and women…'

O'Brien v Ministry of Justice

94. The claim in *O'Brien v Ministry of Justice* [2013] UKSC 6; [2013] ICR 499 was brought in 2005, by a part-time judge (a Recorder). He argued that by denying him any pension when he retired, the Ministry of Justice had discriminated against him on the grounds that he was a part-time worker. After a reference to the Court of Justice and a further hearing in 2012, the Supreme Court upheld the claim. In paragraph 43, the court noted that the relevant Directives were 'unusual' in permitting direct discrimination against part-time workers to be justified. The court also noted, in paragraph 47, that a problem for the Ministry of Justice was that it had not 'until now articulated a justification for their policy', because it had argued throughout that Mr O'Brien was not a 'worker'. It was difficult for the Ministry of Justice 'to justify the proportionality of the means chosen to carry out their aims if they did not …examin[e] the alternatives or gather the necessary evidence to inform the choice at the time' (paragraph 48). The pleaded case was that there were three aims: fairness in the distribution of the resources available to fund judicial pensions, the need to attract good candidates for full-time judicial office and keeping the costs of judicial pensions within affordable limits. The first aim relied on the fact that part-timers could make other provision for their retirement and that the full-timers made a bigger contribution to the justice system. The

court rejected the Ministry of Justice's argument that that the case should be remitted to the Employment Tribunal for evidence on the question of justification, because a decision on the factual issues would not decide the issue of objective justification (paragraph 50).

95. In paragraphs 51-62, the court rejected the Ministry of Justice's arguments. It noted, in paragraph 63, that the Ministry of Justice accepted 'that cost alone cannot justify discriminating against part-time workers'. The court referred to *De Weerd* and observed, at paragraph 64, 'It is one thing to set benefits at a particular level for budgetary reasons. It is another to pay women less than men because it is cheaper to do so. Sex discrimination is wrong whether the state (or employer) is rich or poor'. The court referred to *Jorgensen v Foreiningen af Speciallaeger and Sygesikringens Forhandlingsudvalg* (Case C-226/98) [2000] ECR I-2447 in paragraphs 65-67. In that case, the Court of Justice accepted that while budgetary considerations 'in themselves' cannot justify discrimination on grounds of sex, 'measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care may be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end'. The Supreme Court commented that 'Sound management of the public finances may be a legitimate aim, but that is very different from deliberately discriminating against part-time workers in order to save money' (paragraph 67).

96. The Supreme Court summarised the EU cases in paragraph 69. A member state could decide how much to spend on any area of social policy. Its choices 'within that system' had to be consistent with the principles of equal treatment and non-discrimination. 'A discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost'. The potential legitimate aims relied on by the Ministry of Justice were not supported by 'the existence of precise, concrete factors, characterising the employment condition concerned in its specific context, and on the basis of objective and transparent criteria'. There were no precise and transparent criteria. Instead, there was 'blanket discrimination'. Fundamental principles of equal treatment could not 'depend on how much money happens to be available in the public coffers at any one particular time or upon how the state chooses to allocate the funds available between the various responsibilities it undertakes' (paragraph 74).

Heskett

97. *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487; [2021] ICR 110 concerned a decision to curtail a system of annual pay increases, described in paragraph 8 of the judgment, which rewarded, and by that means, encouraged, long service. That decision discriminated indirectly against younger employees. The issue was whether it could be justified. The claimant was employed by the National Offender Management Scheme ('NOMS'). The annual budget for NOMS was set by the Ministry of Justice.

98. In paragraph 83 of *Heskett*, Underhill LJ said that the 'essential question' was whether the employer's aim could 'fairly be described as no more than a wish to save costs'. If so, the defence of justification could not succeed. If not, it was necessary fairly to characterise the employer's aim as a whole, which could involve a 'subtle', but nevertheless real, distinction. There was some support in domestic cases for the proposition that 'an employer's need to reduce its expenditure, and, specifically, its

costs, in order to balance its books can constitute a legitimate aim for the purpose of a justification defence' (paragraph 98). That proposition was also correct in principle. Underhill LJ could see no principled basis for 'ignoring the constraints under which an employer is in fact having to operate'. It was also necessary to 'bear in mind that because age, unlike other protected factors is not binary, it is difficult…for an employer to make decisions affecting employees that will have a precisely equal impact on every age group, however defined. This makes it particularly important for them to be able to justify such disparate impacts as may occur by reference to the real world financial pressures which they face' (paragraph 99). In paragraph 103, Underhill LJ distinguished paragraph 74 of *O'Brien*. That case was about 'overt and deliberate discrimination' against part-timers, which the Supreme Court expressly equated with direct pay discrimination against women. *Heskett* was not about direct discrimination. *Heskett* was a case in which the employer changed its pay arrangements in a way which had 'a disparate impact on employees of different ages (as such changes are very liable to do) …'. Leaving aside a case like *O'Brien*, Underhill LJ was not convinced that it was illegitimate for a government department to try to keep its pay budget within limits set by the Treasury (paragraph 104). He concluded that the ET had not misdirected itself, and was 'entitled to treat NOMS's need to observe the constraints imposed by the pay freeze as a legitimate aim'.

Consultation

Plantagenet Alliance

99. *R (Plantagenet Alliance Limited) v Secretary of State for Justice* [2014] EWHC 1662 (QB); [2015] 3 All ER 261 is a decision of the Divisional Court on an application for judicial review of the four decisions described in paragraph 75 of the judgment of the court. Those decisions concerned the exhumation and reinterment of the remains of King Richard III. In paragraphs 84-94, the Divisional Court summarised the common law about fairness. In paragraph 96, the Divisional Court noted that the claimant relied on a duty to consult. It summarised the law about consultation in paragraphs 97 and 98.

100. In paragraph 98, the Divisional Court listed 11 general propositions, of which one in paragraph 98(1) and six in paragraph 98(2) are relevant.

i. There is no general duty to consult at common law.
ii. There are four main circumstances in which such a duty may arise:
    1. if it is imposed by statute;
    2. if there has been a promise to consult;
    3. if there is an established practice of consultation; and
    4. 'where, in exceptional cases, a failure to consult would lead to conspicuous unfairness'.
iii. If those factors are missing, there will be no such duty (paragraph 98(2)).

Moseley

101. In *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56; [2014] 1 WLR 3947 the issue was what was required by the express statutory duty of consultation imposed by paragraph 3(c) of Schedule 1A to the Local Government Finance Act 1992 ('the 1992 Act'). A local billing authority was obliged, before it made a council tax reduction scheme, to consult 'such other persons as it considers are likely to have an interest in the operation of the scheme'. The billing authority published and consulted

on a draft scheme. The claimant challenged the scheme, once made, arguing that the consultation was unfair and unlawful because consultees had not been told that there were alternatives to the draft scheme and that they should have been told about the availability of such an alternative. The challenge was dismissed by the Divisional Court and by this court.

102. The Supreme Court allowed the appeal. Lord Wilson gave a judgment with which Lord Kerr agreed. Lord Reed gave a judgment with which Baroness Hale and Lord Clarke agreed (see further, paragraph 107, below). In paragraphs 23-28 Lord Wilson summarised the legal position. In paragraph 23, he said 'a duty to consult those interested before taking a decision can arise in a variety of ways'. It can be imposed by statute, or by a common law duty 'to act fairly'. No matter what its source was, 'the duty to consult…that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted'.

103. In paragraph 25, he referred to the submissions of Mr Sedley QC (as he then was) in *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168. Mr Sedley had submitted that consultation must be at a time when proposals are still at a formative stage; the proposer must give sufficient reasons for any proposal 'to permit of intelligent consideration and response'; enough time must be given for consideration and response; and the product of the consultation 'must be conscientiously taken into account'. Those criteria had been expressly endorsed by this court in two cases. Lord Wilson endorsed 'the Sedley criteria'. They were 'a prescription of fairness'. He held, in paragraph 29, that in the council tax context 'fairness demanded' the consultation document to refer briefly to 'other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England…) [the authority] had concluded that they were unacceptable'. In paragraph 30 he explained why that would not be onerous. The authority had not acted unlawfully, however, in not referring to the alternative (paragraph 32).

104. Lord Reed said that he agreed generally with Lord Wilson, but that he would emphasise fairness less, and emphasise more the statutory context and purpose of the duty to consult in that case (paragraph 34). There was a general common law duty of fairness, but no general common law duty to consult. There is such a duty usually only where an authority has created a legitimate expectation of consultation (paragraph 35). The current case concerned a statutory duty of consultation. Such duties vary a great deal (paragraph 36). He did not consider that the current case was about fairness at all (paragraph 37).

105. A wide-ranging consultation of all the people who live in an authority's area was 'far removed' from the situations in which the common law had recognised a duty of procedural fairness. The purpose of the current duty to consult was not to 'ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected...' It 'must…be to ensure public participation in the local authority's decision-making process' (paragraph 38). In order to achieve that objective in a field with which the public were not familiar, the authority had to give consultees not only information about the draft scheme, but an outline of realistic alternatives, 'and an indication of the main reasons for the authority's adoption of the draft scheme' (paragraph 39).

106. In paragraph 40 he said that an authority was not always required to provide information about rejected options. If the statutory provision did not give the answer, the question would usually be whether 'the provision of such information is necessary in order for the consultees to express meaningful views on the proposal'. An authority was not required to discuss the alternatives or the reasons for their rejection in any detail. Public consultation documents should be 'clear and understandable…not unduly complex or lengthy' (paragraph 41).

107. Baroness Hale and Lord Clarke agreed with both judgments. They thought that there was 'very little between them as to the correct approach'. They agreed with Lord Reed that the statutory context was important and that in the current context, 'the duty of the local authority was to ensure public participation in the decision-making process'. To do that, it had to act fairly, by taking the steps described by Lord Reed in paragraph 39. In 'those circumstances' they thought that they could 'safely agree' with both judgments (paragraph 44).

The authorities about section 149

108. There are many authorities about section 149, and about its statutory precursors. There are many examples of descriptive reasoning about its implications: for instance *Hotak v Southwark London Borough Council* [2015] UKSC 92; [2016] AC 811, paragraph 73, citing among other cases, *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] Eq L R 60. Often, as in *Hotak* and *Bracking* (see paragraphs 73 and 25 of those decisions, respectively) 'the principles' which the court enunciated were not in dispute on the appeal with which the court was concerned. This court must be careful not to substitute these examples of descriptive reasoning for the words of the statute.

109. As Lord Neuberger said in paragraph 74 of *Hotak* 'the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment' (see also paragraph 75 in which he approved a statement by Elias LJ that the 'court cannot interfere…simply because it would have given greater weight to the equality implications of the decision'). In the same paragraph, he endorsed a statement in paragraph 31 of *Baker v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809 by Dyson LJ (as he then was) that one of section 149's precursors did not impose a duty to achieve a result. In paragraph 79, Lord Neuberger accepted a submission that, 'in many cases, a conscientious reviewing officer who was investigating and reporting on a potentially vulnerable applicant for housing and who was unaware that the equality duty was engaged, could, despite his ignorance, very often comply with that duty' (and see paragraph 82, in which he specifically considered the appeal of Mr Kanu).

A summary of the reasoning in the judgment

Construction

110. The BMA argued that 'cost(s)' meant member costs, and that that phrase itself had a limited meaning. That argument was not based on the language of the 2013 Act, but on pre-legislative materials such as the Hutton Report. The Judge considered and rejected that argument in paragraphs 118-124. There is no appeal against that part of the Judge's conclusions.

111. The FBU submitted that the relevant statutory purpose was 'to control the long-term costs of the new scheme', but not to allow any pension-related costs to limit the accrual of benefits or to increase the rates of members' contributions. The purpose was not to measure the overall cost of a scheme, but to measure changes in the costs of the new scheme. The CCM was not intended to control the value of new benefits not known at the time, and certainly not to enable the Government to pass on to members the costs of its own discrimination. The Judge held that section 12(1) and (2) imposed a duty to set an employer cost cap to be used for the purposes of measuring changes in the cost of scheme, but that section 12(4) conferred broad discretions about the content of any directions 'as to the "costs or changes in costs" which may be taken into account for both new and legacy schemes for the purposes of measuring changes in costs' (paragraph 106).

112. He added that the term 'costs' was not defined. As a matter of ordinary language, which was 'the natural starting point', 'cost(s)' was a broad term. The McCloud Remedy costs were, 'on the face of it, such a cost; the litigation has resulted in certain additional benefits having to be paid to some members in the affected schemes in order to remedy the discrimination that was found…' (paragraph 107). He recorded that it was not in dispute that the McCloud Remedy costs were, in principle, costs of the scheme. The argument, rather, was that, as a matter of construction, they were excluded from the CCM. In the Judge's view, costs, including, where appropriate, costs arising from past service in legacy schemes, could be taken into account in so far as 'they result in a change in the costs of the new scheme' (paragraph 109).

113. Mr Short was right that the overall purpose of section 12 is to measure changes in costs of the new scheme. It did not follow that the McCloud Remedy costs were to be excluded. The extra cost was initially estimated at some £4bn per year, and later at some £19bn in total. That cost, on its face, gave rise to 'a substantial change in the costs of the scheme'. Read as a whole, section 12 supported the view that the costs of the legacy schemes could be taken into account. Section 11 also referred to connected schemes. Section 11(3) did not limit the purposes for which valuations of the new and of the legacy schemes were to be done (paragraph 111). In paragraph 112, he noted the express references to the legacy schemes in section 12(4)(c) and 12(5). The 'purpose of measuring changes in the cost of the scheme is to enable the CCM to operate: if changes in costs were not measured, then deviations from the target cost would not be apparent' (paragraph 112).

114. The fact that the 2014 directions excluded the costs of transitional protection, or required assumptions to be made about those costs, reflected the exercise of a wide discretion by HMT. That exercise could not inform the interpretation of, or limit the scope of, the statutory provisions (paragraph 114). Mr Short accepted that some costs of the legacy schemes could be taken into account but could not say where the line, which, he submitted, must exist, and which excluded the McCloud Remedy costs, should be drawn. Mr Short's inability to say where the line should be drawn was 'telling' (paragraph 115). In paragraphs 116-117, the Judge rejected an argument that section 22 would be circumvented if HMT's construction of sections 11 and 12 of the 2013 Act were accepted.

Discrimination

115. The Judge noted that the FBU argued that the inclusion of the McCloud Remedy cost in the CCM discriminated indirectly against younger members of the scheme who were more likely to be women or from an ethnic minority. They were put at a particular disadvantage compared with the older members of the scheme who did not share those protected characteristics. The PCP for the purposes of section 19 of the 2010 Act was the inclusion of the McCloud Remedy in the CCM. The PCP applied to all members of the scheme, so the pool for the purposes of assessing disparate impact was all members of the scheme. The PCP had an obvious and substantial adverse impact on those who will take their benefits from the new scheme for the 2019-2023 implementation period; that is, those were not in service at the cut-off date of 31 March 2012 and would not be able to opt to take benefits in the legacy scheme for that period. That disparate impact was the result of a desire to save costs and could not be justified.

116. HMT argued that any disparate impact was the result of the McCloud Remedy and not of the PCP. The inclusion of the McCloud Remedy cost in the CCM did not put anyone at a disadvantage. Any disadvantage came from the characteristics of the McCloud Remedy, which had not been challenged.

117. The Judge considered the authorities. It was necessary to show a causal link between the PCP and the particular disadvantage suffered by the group and by the individual. It was important not to elide disadvantages caused by other factors and attribute them to the PCP. The inclusion of the McCloud Remedy in the CCM negated the floor breaches (which would have led to increases in benefits, or to reductions in member contributions). Those floor breaches would have benefitted all members. The effect of the PCP was therefore indiscriminate and age-neutral. There was thus no disparate impact and the claim failed.

118. The FBU argued that there was a disparate impact, nonetheless. The members who were not in service on 31 March 2012 suffered a particular disadvantage compared with those who were in service on that date. ‘However, that disparity, is a direct consequence of the McCloud Remedy itself, which was based around a cut-off date of 31 March 2012. It is a disparity that was inherent in the design of the remedy and which was, critically, not causally linked to the PCP. Whilst the PCP might have exposed the inherent disparate impact of the McCloud Remedy (which might itself be a PCP), it would not be the cause’ (paragraph 181). There was no challenge to the McCloud Remedy or to the cut-off date. The FBU accepted that the rationale for that was sensible: among other things, it was to ensure that the remedy applied only to those who were subject to the discrimination which gave rise to the *McCloud* litigation.

119. The Judge accepted that the differential impact was caused by a measure which was not, and could not, be challenged (because it was in primary legislation). The indirect discrimination claim failed for that reason.

120. In paragraph 184, the Judge added that even if there had been a disparate impact which was causally linked to the PCP, the pensions context ‘provides a weak starting point for a claim of age-related discrimination’. He gave, as an example, *R (Harvey) v Haringey London Borough* Council [2018] EWHC 2871 (Admin); [2019] ICR 1059, an

unsuccessful challenge to a cut-off date, based on active membership at a particular date, for the introduction of a survivor's pension for unmarried cohabiting members of the local government pension scheme. The Judge acknowledged that the challenge in that case was not based on section 19 of the 2010 Act, but on article 14 of the European Convention on Human Rights. He quoted paragraphs 186-189 of the judgment of Julian Knowles J. In paragraph 188, that judge summarised paragraph 74 of the judgment of Ouseley J in *R (Gurung) v Secretary of State for Defence* [2008] EWHC (Admin) 1496 (Admin): '…this type of differentiation between one group and another, based upon a particular cut-off date, was inevitable whenever there was a transition from one welfare scheme to another; and this could not form a strong basis for challenging a decision based on social or economic policy'.

121. The Judge said that much of that analysis applied in this case. The fact that the PCP applied to all active members of the legacy schemes and of the new schemes whereas there were two different schemes in *(Harvey)* was a distinction without a difference, because the disparate impact came from the cut-off date which draws a line between those who can, and those who cannot, continue to benefit from the legacy schemes for a period. It was the drawing of lines in pension schemes, whether 'because of the introduction of new schemes, or because of a remedy to correct a past wrong, that inevitably gives rise to different benefits as between different members of different ages and lengths of service.' That was 'a weak starting point for a claim of age-based discrimination'. The position might be different in the case of direct discrimination or if the cut-off point were irrational. But the choice of 31 March 2012, it was accepted, was 'sensible' (paragraph 186).

122. That being so, the question of justification did not arise, or, if it did, it was 'readily made out' (paragraph 187). If the question of justification did arise, the question was whether the PCP was a proportionate means of pursuing a legitimate aim. Mr Short submitted that the aim was 'purely to save costs' which was not a legitimate aim and could never justify discrimination. The Judge observed (in paragraph 189) that he had already considered that 'under the previous ground'. By that, I think he meant that he had already considered justification in paragraph 187, by reference to his reasoning in paragraphs 185-186.

123. In paragraphs 189 and 190, the Judge quoted paragraphs 83, 88 and 98-104 of the judgment of Underhill LJ in *Heskett* which are part of a longer passage (paragraphs 45-90) in which this court considered and applied the authorities about whether or not cost pressures can justify indirect discrimination.

124. In paragraph 191, the Judge noted that, this case, like *Heskett*, was a claim for indirect discrimination. 6 October 2021. There was no direct discrimination because there had been no attempt 'simply to curtail the benefits of younger members'. The decisions to implement the McCloud Remedy and to include it in the CCM affected younger members to a greater extent 'because of the operation of the cut-off date for eligibility for accruing, or continuing for a period to accrue, benefits under the legacy schemes'. Those decisions were made because of legitimate concerns 'about keeping within certain financial constraints, and, in particular with a view to ensuring that, in the longer term, pension provision for public sector workers remains affordable and sustainable

with the burden being shared fairly between members and taxpayers'. It was not accurate 'to characterise that aim as being "solely about costs"'. Such questions went 'well beyond costs alone, and were clearly identified in the Hutton Report…'. That aim transcended concerns about payments to a particular group and extended to broader concerns in society about how to fund public sector pensions when life expectancy was increasing. They were decisions in 'the sphere of social and economic policy that are for government and in respect of which there will be a broad margin of appreciation. The limited role of the Court in reviewing such decisions is obvious' (paragraph 192).

125. The aim was legitimate. The next question was whether the means used to achieve it were proportionate. The measure was not targeted at younger members because the negation of the floor breaches affected all members. The ceiling breaches were also waived 'which meant that members (irrespective of age or date of membership) were not required to forego any accrual of benefits or suffer increased contributions that might otherwise have resulted. The Defendant's choice when faced with the additional [McCloud Remedy costs] was whether those costs should fall on public sector employers (which would mean either an additional burden on taxpayers or the diversion of finite resources from elsewhere, or both) or whether they should be met by withholding from scheme members the benefits that they might otherwise have enjoyed because of the floor breaches and if [the McCloud Remedy costs] were excluded from the CCM'. There were no other options and none had been suggested by the claimants. The Judge quoted paragraphs 176 and 177 of the witness statement of Mr Elks. The discrimination identified in the *McCloud* litigation had to be remedied, and any solution would be very expensive. The choice-based remedy meant that many members would receive better benefits than they would have otherwise. Those benefits had to be paid for. To let those costs fall on employers, and, thus, to a large extent, on the taxpayer, would undermine the purpose of the CCM. Some people who would not benefit from the McCloud Remedy would have benefitted from the rectification of the floor breaches if the McCloud Remedy costs had been excluded from the 2016 valuations. Almost any change to pension scheme benefits will be better for some members than for others. 'But it is in the nature of the CCM that it operates on a collective basis, so that changes in the collective cost of providing member benefits may have an impact upon future benefit and contribution structures for everyone, regardless of the relevance of that changed cost to themselves' (paragraph 193).

126. In the context of social and economic policy, and in the light of the broad margin of appreciation which applied, 'the choice made by the Defendants was proportionate. The fact that some members will be affected more adversely than others is a consequence of the design of the McCloud Remedy and does not render that choice disproportionate' (paragraph 194). The Judge dismissed the discrimination claim.

Legitimate expectation

127. The Judge rejected, in paragraphs 125-151, the BMA's argument that the inclusion of the McCloud Remedy cost in the CCM breached a legitimate expectation of the BMA's members about how such costs should be treated. There is no appeal against those conclusions.

128. In paragraph 136, he observed that the transitional protection remedy costs referred to in the Directions were not the same as costs of the transitional protection remedy which

led to the claims in *McCloud*. The original transitional protection (the cost of which was effectively excluded from the CCM in the 2014 Directions) was intended to protect those closest to retirement. It was the distorting effect of including that temporary cost which led to the assumption, when the cost cap was originally set, that there was no such cost. By contrast, those entitled to the McCloud Remedy were younger members of the legacy schemes who were in service on 31 March 2012. They were likely to have 'in most cases a good many years before retiring or leaving the scheme'. The McCloud Remedy costs 'may therefore be said to be part of the longer term costs of the scheme and not such as to give rise to the same sort of distorting effect' that led to the exclusion from the original cost cap of the first type of transitional cost. If, contrary to his view, there had been a clear promise about the treatment of the first type of transitional cost, any such promise did not cover the second type of transitional cost, which was different.

129. In paragraphs 152-157, he considered the FBU's different legitimate expectation argument. The FBU argued that its members had a legitimate expectation that the accrual rate would increase (or the rate of member contributions would fall) if there was a floor breach in the new scheme. There were many statements to that effect from 2011 onwards. Yet when a floor breach materialised, that legitimate expectation was breached without proper justification. The effect of the Directions was that, after the McCloud Remedy was taken into account, the floor breaches became ceiling breaches instead. The Judge rejected that argument. There is no appeal against that conclusion.

Submissions

Statutory construction

130. Mr Short submitted that references to the legacy schemes in the legislation tended to be express (for example, section 11(1) and 11(3)(e)). He accepted that section 11(3) set no limit to the purposes for which that power might be used, and that the Judge was right to say so. He also submitted, however, that the reference in section 12(1) to changes in the cost of the scheme was a reference to the new scheme, only. A similar purpose was identified in section 12(4)(b). The purposes identified in section 12(4)(b) and 12(4)(c) were different; 'for the purposes of measuring changes in the cost of the scheme against the cap' and 'for the purposes of this section'. The costs of the legacy schemes were relevant for the calculation of the cost cap in the valuation as a starting point, but would not identify changes in the cost of a new scheme, which was the broader purpose of section 12. Section 12(5)(a) did, and section 12(5)(b) did not, refer to the cost of a connected scheme. Not all the members of the legacy schemes moved into the new schemes, and others who moved retained a final salary link in the new schemes.

131. He submitted that there must be an implied limit on the effect of section 22(6), because, otherwise, the protection conferred by section 22 could be sidestepped. 'There must be some fetter', he argued, and the easiest limitation was that the costs must be the costs of the new scheme, even if the costs of a connected scheme were within 'the broad definition'. The difficulty about what costs could be included was a difficulty for both sides. Section 22 could not have been intended to be 'illusory'. He apparently accepted, in answer to a question from the court, that the definition of 'relevant scheme' in regulation 2 of the Cost Cap Regulations (see paragraph 78, above) was intra vires.

132. Mr Short argued that directions 40(4) and (5) (see paragraph 88, above) were consistent with the statutory purpose which he had identified in section 12(1). He submitted that

the effect achieved by the Directions was inconsistent with that purpose. The McCloud Remedy costs were costs of the old scheme. He agreed with Asplin LJ's summary of one of his points: the McCloud Remedy costs were the result of a civil wrong and were of a different nature from the costs which could properly be included. The costs were passed on to people in the new scheme who could not benefit from the remedy, but had to pay for it. The McCloud Remedy costs did not amount to a change in the cost of the scheme. The remedy did not previously exist but the rights to transitional protection had always existed. The people entitled to that protection had been unfairly excluded from it. The costs related to the younger members of the old schemes and should have been allocated to those schemes. They did not represent a change in the cost of the new schemes.

133. Mr Giffin argued that the starting point is the statutory words. 'Cost' is a wide general word. There was no express sign in the statute that that wide word was to be restricted in the way in which Mr Short had suggested that it should be. Nor was there any basis for implying any such limitation. It was wrong in principle to use directions 40(4) and (5) as a guide to the construction of the statute. Section 12 is expressed at a high level of generality. The statutory context showed that Parliament was aware of the complex interactions between the legacy schemes and the new schemes. Mr Short's case was 'a skilful attempt to make bricks with a few wisps of straw'. He supported that argument with detailed references to the statutory language.

Discrimination

134. Mr Short accepted that the Judge had rightly identified the PCP and that he had been right to say that there had to be a causal link between the PCP and the disadvantage. The relevant protected characteristic was age: race and sex did 'not add much except complexity'. The particular disadvantage was the negation of the floor breaches, with the consequent adverse effects on member's contribution or accrual rates. The PCP caused that disadvantage. He accepted that the reason for the disparity was that to benefit from the McCloud Remedy, a person had to have been a member of a legacy scheme on 31 March 2012. The Judge's error was to focus on the reason for the disparity rather than on the cause of the disadvantage. The younger members did not benefit from the McCloud Remedy which related to the legacy schemes, but they would have benefitted from the floor breaches in 2016, other things being equal. He submitted that, as a result of the EIA, the Government knew that there would be a disparate impact on younger and more diverse members of the new schemes. The cut-off date for the McCloud Remedy explained why the loss of an increase in their accrual rates had a disparate impact on younger members but it did not explain why that increase in the accrual rate was lost. That was caused by the inclusion of the McCloud Remedy in the CCM; that was the basis of the complaint.

135. The decision of the Supreme Court in *Essop v Home Office* [2017] UKSC 27; [2017] ICR 640 made that clear. In her judgment Baroness Hale described six 'salient features' of all the successive versions of the definition of indirect discrimination. The third such feature was that there are many reasons why one group may find it harder than another to comply with a PCP. They could be described as 'context factors'. There could be another PCP working in combination with the relevant PCP. The other PCP could be lawful, and might not be under the control of the employer. Both 'the PCP and the

reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem' (paragraph 26).

136. Mr Short submitted that that was 'exactly the position here'. The cut-off date worked with the PCP and both were causes of the disadvantage. If one or the other were removed, there would be no problem. He also relied on paragraph 33. The respondent in *Essop* had argued that the claimants had to show the reason why they were put at a particular disadvantage by a core skills assessment test which civil servants had to pass in order to be promoted. Baroness Hale said that success in an indirect discrimination claim does not depend on showing the reason for the particular disadvantage to which the group is put. 'The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual'.

137. Mr Giffin's response was that in this case two PCPs are 'logically and legally independent'. Both were causes of the disadvantage. If either was missing, there would be no case, as Mr Short accepted. The cut-off date for the McCloud Remedy was, as Mr Short also accepted, sensible, and had not been, and could not be, challenged, because it was in primary legislation. The challenged PCP had to be the thing which 'put' the claimants at a disadvantage. He accepted that there was a 'range of differential age impacts'. But what they all had in common was that they were caused, not by the PCP which is the subject of this challenge, a PCP which is, on its face, and in practice, neutral as between protected characteristics, but by a different PCP, that is, the cut-off date.

138. Mr Short argued, on ground 3, that the fact that, in the context of pensions, it was easy to justify rules based on age did not entail the conclusion that all rules based on age were easy to justify. This was not a case in which a new benefit had been introduced, or a new set of rules.

139. Mr Short argued, on ground 4, that the principle that indirect discrimination could not be justified on grounds of cost has been well established for 30 years. HMT's case throughout had been that 'We do not want to bear this cost: someone else should bear it', or that the cost of the schemes to the taxpayer should be limited. It did not matter how that justification was described; whether by reference to 'affordability' or 'budgetary constraints', or whether it was described as the 'allocation' of costs. In support of that argument he referred to *De Weerd* and to *O'Brien*. He distinguished *Heskett* on the basis that, in that case, NOMS's budget was set by the Ministry of Justice, which was 'the higher power', whereas in this case, HMT was, itself, the higher power. This case, like *O'Brien*, involved a deliberate decision to impose a burden on a particular group in the knowledge that that group would mostly not benefit from the McCloud Remedy.

140. Mr Giffin submitted that *Heskett* is an authoritative interpretation of the relevant authorities and that it is binding on this court. The issue was whether the reason for the PCP was fairly to be characterised as 'just to avoid costs'. That was a qualitative assessment for the first instance Judge. He supported those submissions by referring to several passages in *Heskett*. HMT was compelled by law to restrict the costs of the scheme. The McCloud Remedy cost was a cost, and the issue, from the moment the

McCloud litigation was decided, was how that cost should be allocated as between the taxpayers and employees. Common sense dictated that HMT's justification defence should succeed.

The BMA's submissions: consultation

141. I should explain that what the BMA means by a duty to consult is a duty to comply with the *Gunning* criteria. I explained what those are in paragraph 103, above. Ms Morris rightly did not suggest that there was a statutory duty to consult in this case. It was therefore necessary for the BMA to point to a different source of the duty to consult on which it relied. The conventional wisdom on this subject is summarised pithily in paragraph 98 of *Plantagenet* (see paragraph 100, above). Ms Morris submitted, however, that that summary is too prescriptive.

142. On paper, the BMA's submissions were somewhat elusive. Two alternatives were articulated. The first was, in Mr Giffin's submission, 'heretical'. The second features in the *Plantagenet* list. It was not clear on which of those alternatives the BMA relied. The first alternative was that some statements in Lord Wilson's judgment in *Moseley* amounted to authority, binding on this court, that a duty to consult is a component of a general duty to act fairly and that a duty to consult is imposed on all public authorities. This argument was certainly relied on at first instance (see paragraph 196 of the judgment). The second alternative was that the BMA submitted that, in this case, there was a duty to consult because it was conspicuously unfair not to do so.

143. In her oral argument, Ms Morris did not resile from the submission that it was conspicuously unfair not to consult, but she also submitted that she did not need to go that far. She relied on a number of contextual factors, including pre-legislative promises, as the foundation of a duty to consult in this case. Those factors included the number of people affected, and the importance of the change made by the Direction, and the fact that the Government was passing on the costs of its own wrongdoing to members. That argument was also considered by the Judge (at paragraph 196). That mixture of factors did not fit neatly into the general statements in the *Plantagenet* case; but the categories described in those statements should be 'a guide and not a cage'. The law was wider than those statements allowed. She accepted that no authority supported her eclectic approach. She nevertheless drew from *R(Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, a general proposition that there will be a duty to consult when 'good administration' requires it. The Judge had approached this issue in 'silos' and had erred in law in not looking at all the factors in combination.

144. She relied on two broad statements made in documents published in 2012, before the enactment of the 2013 Act. The first related to the directions which would make the approach to valuations transparent and consistent between schemes. The Treasury would consult GA before making directions and would 'also involve other stakeholders, such as…trade unions'. This, she submitted, showed what was 'expected' about cost control. She also relied on a statement in paragraph 2.35 of the non-statutory guidance published in March 2014, which said that the Treasury would 'engage with stakeholders'. The Judge quoted two of these in paragraphs 21.b.1.9 (in paragraph 204 he described one statement as 'typical of the statements relied upon'; he referred to one in paragraph 27.c. 2.41). She submitted that the contextual factors, when added to those

promises of involvement, converted those into promises of consultation. She accepted no authority directly supports that approach.

145. She further submitted that such meetings and discussions as there were in September 2021 did not amount to a fulfilment of the duty to consult because 'their minds had been made up'. Nothing fitted the picture of 'proper decision-making'. The discussions fell 'very far short of conscientious consideration'. The *Gunning* criteria were not met. There was a duty to consult, not merely a duty to act fairly. She expressly accepted that there was no express promise of consultation. In her reply, she seemed to advance, albeit faintly, an argument that the BMA's members had a substantive legitimate expectation that they would benefit from the floor breaches. They were a relevant part of the background.

The BMA's submissions: section 149

146. Ms Morris submitted that section 149 imposes a 'must duty' and a 'longitudinal duty'. No decision maker looked at EIA2 until the last minute. The mind of the decision-maker was only 'ajar' when EIA2 was considered. The Judge had failed to apply 'the principles' in the authorities to the facts. In oral argument Nugee LJ referred to Mr Short's submission that it was perfectly obvious that the Directions would have an impact on younger members and that they tended to be more diverse. Nugee LJ then asked her what more was needed. I do not think that Ms Morris satisfactorily answered that question, although she said that the EIA was 'superficial' and 'inadequate'. A 'level of precise analysis' was 'required by the caselaw'.

147. She submitted that the real decision was made long before the Directions, but acknowledged that the decision which was challenged in this case was not some earlier decision, but the Directions. Her argument was that no decision should have been made in principle without an EIA.

The BMA's submissions: section 31 of the Senior Courts Act 1981

148. The 'highly likely' threshold is high, Ms Morris submitted. The Judge was wrong to put the burden on the BMA to show what different decision might have been made if the BMA had been consulted, or if section 149 had been complied with. It was significant that in some schemes breaches had been waived. It emerged, however, from a note dated 22 February 2024 from Ms Morris and Ms Thelen that all the breaches which were waived were ceiling breaches. Their submission was that 'If a sufficient PSED analysis had identified a particular unfairness, HMT could have considered meeting it by, eg honouring the floor breach in some respect'.

Discussion

149. I have summarised the judgment and the relevant law, and the arguments at some length. I can state my conclusions relatively briefly.

Statutory interpretation

150. The main question of statutory interpretation is a short one. It is whether there is an implied limit on the 'costs' which can be taken into account for the purposes of the CCM. Are they just the costs of the new scheme, or can they include the costs of a

connected legacy scheme? Section 1 of the 2013 Act conferred powers which enabled regulations to be made to establish the new schemes. The background, known to Parliament, was that there were existing schemes, and that those were, in the statutory phrase, 'connected' with the new schemes. The relevant provisions of the 2013 Act recognise that connection in many ways, for example, by permitting a new scheme and a connected scheme to be valued together. There are many factual and legal connections between the new schemes and the legacy schemes.

151. It is also significant for the interpretation of the relevant provisions that neither type of scheme is a funded scheme, that is, with a defined pot of money built up over time from the contributions of employees and employers, money which would be invested, and would grow over time. On the contrary, what all the schemes have in common is that they are 'pay as you go' schemes. In other words, the current contributions of employees and employers have always been, and are still, used to fund the schemes' current outgoings on benefits to current pensioner members. After the establishment of the new schemes, the reality is that the benefits which are paid to pensioner members of the legacy schemes will be funded, in part, by the current contributions of active members of the new schemes, who are likely to be younger than the members of the legacy schemes. The cost of the McCloud Remedy, which their contributions will partly meet, is no different in principle from the costs of the other benefits due to current pensioner members of the legacy schemes, which their contributions also partly meet. In neither case will the current active members of the new schemes get any benefit from those uses of their contributions.

152. Mr Short rightly acknowledged in his submissions that there was slender linguistic support in the 2013 Act for his argument. The background I have just described makes it unlikely that, if the relevant provisions do not explicitly identify the 'costs' which are material for the purposes of the CCM as only the costs of a new scheme (and they do not), it is necessary to read in or imply words which restrict the scope of 'costs' in that way. On the contrary, that background means that a wide general word like 'costs', which is not otherwise defined, should be given the widest possible meaning. I will assume that it might be useful to distinguish, in a particular decision, between the costs of a new scheme and the costs of a connected scheme. If it is or might be, I nevertheless reject Mr Short's primary argument about statutory construction. 'Costs' can include both the costs of a new scheme, and where (subject to *Wednesbury*) HMT decides that it is appropriate, the costs of a connected legacy scheme.

153. Mr Short's secondary argument was described by Mr Giffin as a 'jury point'. There are also several ways, some more and some less disparaging, of describing the McCloud Remedy. It can, of course, be described as 'compensation for a civil wrong'. That description does not exclude other descriptions, however. It is also accurate to say, as I think Mr Short accepted in his submissions, that the McCloud Remedy recognises rights to which, absent unlawful discrimination on the grounds of their age, the younger members of the legacy schemes were entitled as soon as a decision was made to give transitional protection to the older members of those schemes. If it is accepted, as I consider that it must be, that the word 'costs' is wide enough to include costs of a connected scheme (see the previous paragraph), the fact that the McCloud Remedy is compensation for a civil wrong does not mean that HMT was using the CCM for an improper purpose. For, as well as being compensation for a civil wrong, the cost of the

McCloud Remedy was also the cost of providing benefits to members to which they were entitled, albeit that that entitlement had not been recognised initially, with the result that that cost was unexpected. HMT was entitled to conclude that the cost of recognising that entitlement was a member cost, or, if not, a cost in the nature of a member cost.

Discrimination

154. Mr Short accepted that the Judge had rightly identified the PCP. It was the inclusion of the McCloud Remedy in the CCM. The first issue is whether the PCP 'put' or 'would put' younger members at 'a particular disadvantage' when compared with older members, and whether it 'put or would put' the younger members of the FBU at 'substantively the same disadvantage' as those members. Mr Short and Mr Giffin agreed that this was a question of causation.

155. I have not found this issue easy. I was initially attracted by Mr Short's submission that the causal role of the statutory cut-off point, and the fact that it could not be challenged, were a distraction. I was persuaded that the statutory cut-off point was the legal background against which the PCP operated, and that it was, in the words of Mr Jones, in the submissions which were recorded by Baroness Hale in *Essop*, a 'context factor'. It was a reason why the PCP put younger members at a particular disadvantage, in a similar way to the way in which a height requirement affects women. Against that background, I was minded to accept Mr Short's submission that the PCP was a 'but-for' cause of the disadvantage, and that that was enough, for the reasons which he gave.

156. After considering comments on the first draft of my judgment from Nugee LJ, I have reminded myself of the Judge's reasoning on this issue. There is no suggestion that he misdirected himself about the key issue (see paragraphs 117 and 134, above). He reasoned that the effect of the PCP was to negate, for all members, the effect of the floor breaches, which would have benefitted all members. That means that the PCP was indiscriminate, and age-neutral. It did not, therefore, have a disparate impact. It was true that members who were not in service on 31 March 2012 suffered a particular disadvantage when compared with those who were in service on that date. But that disparate impact was inherent in the design of the McCloud Remedy. It was, 'critically, not causally linked to the PCP'. Having reflected further on this issue, I consider that the Judge's reasoning on it is correct.

157. Mr Short did not press his ground 3 in oral argument, rightly in my judgment. This part of the Judge's reasoning is a staging post in his analysis, and if his conclusion on justification was open to him, it adds very little or nothing to this part of the case. As it happens, I consider that, for the reasons he gave, the Judge did not err in concluding that a provision about pensions (of the kind which is at issue in this case) is a weak starting point for a discrimination claim. Contrary to Mr Short's submissions, the background to the McCloud Remedy was the introduction of a new scheme to replace the legacy schemes, and the McCloud Remedy was entailed by the partial transitional protection which was conferred by the 2013 Act.

158. I accept Mr Giffin's submission that the analysis of the relevant authorities in *Heskett* binds us. I also agree with it, for what that is worth. That means that the mere fact that costs are relevant, or even central, to the justification relied on by HMT does not rule

out that justification. It is, in any event, an oversimplification to say that the reason why HMT included the McCloud Remedy in the CCM as a member cost was simply because it did not want to spend the money necessitated by the McCloud Remedy. I consider that this case is on the right side of the line identified by Baroness Hale in paragraph 64 of *O'Brien* (see paragraph 95, above). I also accept Mr Giffin's submission that HMT was not free simply to decide that taxpayers should bear that cost. The scheme enacted by Parliament as a response to the Hutton Report requires HMT actively to keep the costs of scheme to taxpayers within limits, and to ensure that the costs of the schemes are fairly allocated between members and members/taxpayers. I consider that the costs of the McCloud Remedy were either a member cost, in the narrow sense of that phrase, or that they were in the nature of a member cost. That being so, the statutory scheme required HMT to include them in the CCM as a member cost. I therefore consider that the indirect discrimination against younger members of the new schemes was justified. I also fully endorse the more detailed reasoning of the Judge on this question.

Consultation

159. The starting point is that this is a legislative scheme in which Parliament, or the maker of the relevant secondary legislation, has imposed substantial express duties of consultation (see paragraphs 64, 69, 70, 79 and 80, above). Those duties are unusual, in that they require the parties to attempt to reach an agreement with each other; and in one instance, consent is required. The technique of imposing an express and unusual duty of consultation was therefore known to Parliament, and to the executive. Where in a statutory scheme Parliament has expressly addressed the exact nature and precise incidence of a duty to consult, this court should be very reluctant to supplement that scheme with extra consultation obligations unless there is a clear legal basis for their imposition.

160. *Moseley* is a fragile basis for a non-statutory obligation to consult, because there was an express statutory duty to consult in that case. So Lord Wilson's observations about the relationship between fairness and consultation would not be binding on this court even if the other members of the court had adopted them; but it is not clear that they did. I accept Mr Giffin's submission that paragraph 98 of *Plantagenet Alliance* is an accurate statement of the circumstances in which a duty to consult will be imposed by the common law. I also accept his submission that there were no such circumstances in this case, as there was, the Judge found, no express and unambiguous promise of consultation, and no relevant legitimate expectation, procedural or substantive. Ms Morris was not able to articulate an argument which explained why not consulting was 'conspicuously unfair'.

161. I reject Ms Morris's submission that the range of factors on which she relied could, as a matter of law, convert imprecise promises, for example, to 'involve stakeholders' into a duty to comply with the *Gunning* criteria before making the Directions. There is no authority which supports that approach. Flexible as the common law may be, it does not permit a court to invent a new rule for which there is no foundation of principle in the decided cases. But if I suppose, for a moment, that that submission was correct, the question whether or not such a duty arose on the facts would be a question for the Judge to evaluate, having regard to the various factors which were in play and on which the BMA relied. The Judge did precisely that. On the hypothesis that this theory is correct, this court cannot interfere with his evaluative judgment.

Section 149 of the Equality Act 2010

162. The touchstone is the statutory language. A decision maker must simply give 'due regard' to the listed equality needs whenever it exercises a function. What regard to those needs is due in any particular context is a question, in the first instance, for the decision maker. On an application for judicial review, the question whether the duty has been complied with by the decision maker is a question of evaluation for the first instance judge. On an appeal, this court cannot interfere with that evaluation unless a challenge to that assessment shows that it is 'wrong'. That is a high hurdle (see, for example, *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48).

163. On the facts of this case, the main issue for the Judge was whether, by not considering EIA 2 until very soon before making the Directions, the decision maker had 'due regard' to the listed needs. As Mr Short rightly submitted, and as Nugee LJ pointed out in argument, the main effect of the Directions on the listed equality needs was obvious. It had been identified earlier in the process, and was squarely identified in EIA 2. It could not usefully have been elaborated by further analysis. The most powerful argument in the section 149 challenge was that EIA 2 was too late to influence the decision maker. The Judge confronted that argument head-on, and rejected it, against the background that the issue of fairness between different age groups was recognised by the HMT at the same time as the decision 'in principle' was reached (see paragraph 36, above). That was an assessment for the Judge to make. The BMA have not persuaded me that that evaluation was wrong. I would dismiss this ground of appeal.

Section 31 of the Senior Courts Act 1981

164. This issue does not arise unless my conclusions about consultation and/or section 149 are wrong. It is true that it is for the defendant to satisfy the court that the test in section 31(2A) is met. There is nothing wrong, however, with asking a claimant to help the court to make that assessment. If the claimant cannot identify what would have happened if the conduct complained of had not occurred, that is, obviously, not decisive, but it is difficult to see how it could be irrelevant. I do not understand the submission that HMT's approach to ceiling breaches is relevant to this question. Ceiling breaches are different in kind from floor breaches. The fact that ceiling breaches were waived does not, in my judgment, cast any light on whether, if they had been consulted as Ms Morris submits they should have been, or if some still hidden equality impact had been identified by a different EIA, the BMA might have persuaded HMT to take an approach which would have led to floor breaches being confirmed in the CCM valuations. The decision on this issue was also a question for the Judge to evaluate. I can see no error in his evaluation or conclusion.

Conclusion

165. For those reasons I can see no material error in the approach of the Judge. I would dismiss both appeals.

Lord Justice Nugee

166. I agree.

Lady Justice Asplin

167. I also agree.