THE INDUSTRIAL TRIBUNALS

CASE REF: 924/15

CLAIMANT: **Bernard Barlow**

RESPONDENT: **Gallaher Limited**

DECISION

The unanimous decision of the tribunal is that the claimant's claims of direct age discrimination and indirect age discrimination against the respondent company are well-founded.

The amount of compensation payable to him will be dealt with in accordance with Paragraph 24 of this decision.

Constitution of Tribunal:

Employment Judge: **Employment Judge Buchanan**

Members: **Mr I Atcheson**
Mrs L Gilmartin

Appearances:

The claimant was represented by Mr G Grainger, Barrister-at-Law, instructed by The Equality Commission for Northern Ireland.

The respondent was represented by Mr B Mulqueen, Barrister-at-Law, instructed by Elliott Duffy Garrett, Solicitors.

Introduction

1(i) The claimant, Mr Bernard Barlow, by a claim form presented to the tribunal on 12 May 2015, alleged that the respondent company had discriminated against him on the ground of age (both direct and indirect age discrimination) in the terms of an enhanced severance package which it implemented on the closure of its factory at Lisnafillan, Ballymena. (We refer to it as the Ballymena factory.)

(ii) He further alleged that the respondent company, through its managers, had harassed and victimised him in their dealings with him following the closure announcement. On 21 January 2016 these latter claims were dismissed by another Employment Judge following their withdrawal by the claimant.

(iii) At a Case Management Discussion, held on 18 September 2015, it was directed that a list of the agreed legal and factual issues in the case should be submitted by 6 November 2015. This was in fact done on 25 November 2015, and the list of issues is attached as an Appendix to this decision.

(iv) In brief, the claimant, Mr Barlow, contended that he was excluded from the staff redundancy scheme and the full benefits associated with it because he had reached the age of 65, and that this was both directly and indirectly discriminatory on the ground of his age. It was not in dispute that the scheme adversely affected employees over 65, including the claimant.

The respondent company effectively contested the case on the ground of objective justification, that is to say that the acts or omissions by them which were relied upon by the claimant in support of his claims were a proportionate means of achieving legitimate aims.

(v) One issue raised by the respondent company which must be specifically mentioned at this stage is the contention put forward on its behalf that the claimant had brought these proceedings prematurely, and that the tribunal did not therefore have jurisdiction to hear them. At the Case Management Discussion on 18 September 2015 the Employment Judge who presided was of the view that a pre-hearing review on that issue might not provide either a 'knockout blow', or shorten the proceedings, and it seemed to him that one should not be ordered.

The issue of prematurity ultimately fell to be dealt with at the outset of these proceedings, and our ruling on it is set out at Paragraph 3 below.

2(i) In order to determine the substantive claims we heard evidence from:-

(i) Mr Barlow, the claimant; and

(ii) Mr Robson Tait, a fellow employee, on his behalf.

Evidence for the respondent company was given by:-

(i) Mr Malachy Kearney (Cigarette Production and Quality Director, Ballymena);

(ii) Mr Jason Melling (HR Director, UK and a Board member who sits on the company's Executive Committee with other senior managers);

(iii) Mrs Reshma Gray (HR Operations Director UK); and

(iv) Ms Catriona McBride (HR Director at Ballymena).

In relation to one particular conflict in the evidence of the claimant and Mr Tait on the one hand and Mr Kearney on the other – an allegation that at a meeting in February 2015 relating to the redundancy package the latter told the former that so far as the scheme was concerned they did not exist – we have not considered it necessary to resolve this conflict for the purpose of our decision. We had indicated to the parties at the hearing that this was likely to be our approach to this issue.

(ii) We have also considered the fairly extensive documentary evidence submitted by the parties. In reaching our decision we have been greatly assisted by the written submissions and supplementary written submissions made on behalf of the parties. (This exchange of submissions closed on 21 October 2015.) We express our gratitude to Mr Grainger BL and Mr Mulqueen BL in this respect, and more generally to them and their instructing solicitors for the way this case has been prepared and conducted.

3 Before moving to the substantive issue, we set out our ruling (which we gave orally at the hearing) on the preliminary point. This was dealt with by way of submissions.

(i) We find that the claims were not premature and as a consequence of this, we have jurisdiction to hear them. We reject the respondent company's contention that because the claimant's employment had not terminated at the time he lodged the complaint, his cause of action had not crystallised.

(ii) At the time he lodged his claim the claimant was still working, and had not been given any formal notice of redundancy. It had been made clear to him, however, that he was going to be excluded from the company scheme which provided for enhanced redundancy payments. This was apparent from the documentary evidence, including correspondence from the company. His grievance had been submitted on 12 March 2015 and had been rejected on 26 March 2015. He appealed against the outcome of his grievance on 31 March 2015. The appeal was heard on 22 April 2015. It too was rejected on 5 May 2015. There was an element of finality about this decision, and there was no suggestion that it could be further reviewed and changed. He was treated differently from other workers, who got the pay rise and bonuses which were part of the enhanced redundancy scheme.

(iii) We are satisfied that by the time he lodged his claims, he had been subjected to acts which potentially constituted unlawful discrimination by the respondent company and that he had suffered a detriment.

(iv) In the following paragraphs, we set out the facts which we have found in relation to the claimant's substantive claims.

The claimant, his employment history, and the closure of the Ballymena factory

4(i) The claimant, Mr Barlow, was employed at the respondent company's Ballymena factory. The respondent company was owned by JTI (Japan Tobacco International Limited). This group of companies is a leading international manufacturer of tobacco products.

(ii) The claimant was born on 4 February 1951. He had been employed by the respondent company since 3 October 1998. He had started working for them at

their plant at Hyde, outside Manchester. He moved to Northern Ireland when the Hyde plant closed.

He had always been employed as a machine operator, doing shift work (12 hour shift/36 hour week). His most recent earnings were £732.00 gross (£550.00 net) weekly. Additionally, since 2014, he had worked substantial overtime, earning £675.00 per month.

(iii) On 21 May 2014 he had signed a Retirement Option form, notifying the respondent company that he wished to work after he had reached 65 (ie on 4 February 2016). This wish was consistent with the claimant's strong employment record. He had previously worked for Oldham Council and Plessey, served in the Royal Marines and, as indicated, had moved to Northern Ireland when previously made redundant on the mainland.

(iv) Any ambition which the claimant had to work on was frustrated when the respondent company announced on 6 October 2014 that it intended to close the Ballymena factory, with the loss of 850 jobs. This decision arose from a global review of its manufacturing operations, which led to the closure of three of its factories.

This decision was clearly a devastating blow to the claimant and his fellow workers on a personal basis, and was something which had ongoing wider implications for the local economy.

(v) Attempts were made to put together a package which would save 500 jobs. This was not successful and in January 2015 the decision to close the factory was confirmed.

The company pension scheme, its redundancy scheme, the background to them, and the 2015 closure negotiations

5(i) In early 2015 discussions took place between Unite (which was the recognised trade union at Ballymena – the claimant was a member) and management to negotiate a redundancy package. Negotiations ended in February 2015 and the final proposals, to which we refer at Paragraph 9 below, were published.

(ii) The respondent company had operated a redundancy scheme since the 1980s. The main aim of the scheme was, of course, to compensate employees who had been made redundant for the loss of their jobs.

The current scheme had been in place from 1 January 2009, having been agreed with recognised trade unions and employee representatives in December 2008. It is a feature of this case, and one on which the respondent company and its witnesses placed great emphasis in the course of the proceedings, that the company at all relevant times consulted with recognised trade unions and employee representatives, and that it was committed to, and endeavoured to maintain, good relations with them.

The scheme in its present form had been generally accepted by the unions, and has been used in various redundancy exercises by the company throughout the United Kingdom.

(iii) Employees such as the claimant were members of a final salary, non-contributory pension scheme. Under the scheme there was a normal retirement age of 60, ie that was the age at which employees could take an unreduced pension. The scheme provided for employees to take their pensions from the age of 50, but taking one's pension early led to a significant reduction in the amount which was payable.

An employee's salary was uplifted by 3% for the purpose of calculating his or her final salary for pension purposes.

(iv) The retirement provisions were flexible, in that an employee who took an unreduced pension at 60 could continue to work, accruing pension benefits on a final salary basis.

(v) It cannot be disputed that these provisions were generous, providing redundancy payments well in excess of the statutory scheme. It was also generous when compared with schemes operated by other private employers.

6(i) In the summer of 2007, the respondent commenced a review of its redundancy payments scheme as a result of the introduction of the Age Discrimination Regulations.

Various aspects of the scheme were reviewed, including service related pay, holiday entitlement and enhanced redundancy pay. While other matters were discussed, the focus was on the redundancy payments scheme.

(ii) It was the company's consistent position during discussions that any changes to the scheme would have to be on a 'cost neutral' basis. The scheme was one of the most generous and expensive in Northern Ireland. The company recognised the risk of potential challenge to it but they wanted 'to continue to offer a very generous scheme that provided for funds to reach those who would arguably have the greatest need for them'.

(iii) The trade unions expressed some concern about the position of employees, aged 60 – 65, but otherwise wanted the scheme to remain unchanged. By July 2008, the negotiations had reached a conclusion which the National Officer of Unite described as the best possible position that could have been reached, and one which he went on to say could be publicly supported.

7(i) A further review of the redundancy payments scheme was carried out from 2010 to 2012. This followed a government's decision to remove the Default Retirement Age ('DRA') with effect from October 2011. The main impact of the abolition of the statutory DRA on a redundancy scheme was a financial one.

The company took legal advice, both internal and external, and again consulted with recognised trade unions and employee representatives.

(ii) The main focus of these discussions was on the position of workers over 65 in the light of the removal of the statutory DRA. It seems to us that the trade unions did not have any dogmatic view on the retention of a company DRA, but the discussion floundered on their insistence on a demand for a 'headcount' agreement, ie an

agreement whereby if a worker retired, another would generally be recruited in his place (unless there was a redundancy situation, or a workplace reduction plan in existence). The company could not agree to this – they did not consider it to be commercially flexible and proposed adopting the government's position, ie not to have a DRA.

(iii) Discussions also focussed on the 'Net Pay Limitation' in the redundancy scheme.

Employees over 65 only received statutory redundancy pay. The net pay limitation meant that there was a 'tapering' effect for employees approaching age 65. An employee to whom it applied would, on redundancy, receive the lower of a payment calculated under the scheme formula, or a figure equivalent to his/her net salary up to age 65.

Mr Melling accepted in cross-examination that the majority of those caught by the net pay limitation were between 60 and 65. Options considered were:-

(i) keeping the redundancy payments scheme as it was, with tapering to 65;

(ii) removing tapering until 65 (this was considered difficult because of the cost implication); or

(iii) Considering some other cap to ensure people were treated equally.

(iv) The company decided to keep the net pay limitation because they considered it to be fair and reasonable. Its view was that in any redundancy situation there was a finite amount of money available for redundancies. The redundancy scheme was generous and any redundancy situation would inevitably lead to the company incurring substantial costs. The net pay limitation meant that it could effectively target significant funds towards those employees who needed them the most.

(v) In the context of the closure of the Ballymena factory there was an assumption that the vast majority of employees there had aimed to retire at 65 or under. This was consistent with official figures at the time of abolition of the DRA. Following its abolition, only a small number of employees in the company would have worked beyond 65. Notwithstanding this, Mr Mason accepted in cross-examination that there was now a trend for people to work longer.

At Ballymena the difference between applying the net pay limitation up to age 65 and not applying it amounted to approximately £8 million. That sum would be allocated to those under 65 most in need of enhanced redundancy pay. If the net pay limitation were abolished, there would be a reduction in payments to a large number of workers (645 or 83% of those in group 4).

(vi) The effect of the redundancy scheme in its current form was that it would generally be employees in their mid-50s to early-60s who would receive the largest payments because they were likely to have the longest service. In the company's view this group of employees was also likely to find it more difficult to find alternative employment and it would be some time until their full pension benefits became available.

Their position was to be contrasted with workers in the claimant's position who had had the opportunity to work until 65, who had accrued substantial pension benefits, had access to a state pension and who on redundancy would still receive substantial benefits. The company's position wanted to avoid 'windfall' payments to over 65s at the expense of what it saw as less well off workers.

8(i) Following the decision to close the factory, discussions took place in early 2015 between management and unions to discuss the redundancy package.

The issue of removal of the net pay limitation was again raised by the unions, but management maintained its position, again emphasising that any changes would have to be case neutral.

(ii) At a meeting on 24 February 2015 the Regional Officer of Unite stated that while the union did not agree with the company's position on this issue, they would accept it. The union did not raise the possibility of extending the net pay limitation beyond 65, nor did they suggest any additional payments for those over 65. Notwithstanding this, they had expressed in the course of negotiations that the net earnings provisions might contravene age discrimination legislation. They also stated during the consultation process that the redundancy scheme might breach age discrimination legislation by virtue of the fact that those over 65 would only receive statutory redundancy pay.

(iii) The views of the over 65s were not specifically canvassed by either side, nor did management ever undertake an equality audit to ascertain whether the redundancy scheme might potentially discriminate against that group of workers.

(iv) The final cost to the respondent company of the enhanced redundancy scheme was around £93 million. This was the respondent's maximum budget for the redundancy exercise and included making use of a 10% contingency fund approved at group level. These additional funds were applied equally across the workforce (including those over 65) in the form of various bonuses and pay rises.

The redundancy scheme applying on closure, its acceptance by a ballot of the workforce, and its application to Mr Barlow, the claimant

9(i) In February 2015, at the conclusion of the negotiations between unions and management the final severance package was published. On a general level, a comprehensive support and advice package was to be available covering matters such as pensions, finances, advice, training, help with future job applications, etc.

(ii) The key financial elements of the proposed redundancy scheme were as follows:-

- All employees, including those over 65, would receive a fully front loaded 4% pay rise for two years with effect from March 2015.

- All employees, including those over 65, would be entitled to a total bonus of £15,000 comprising:-

    (i) an immediate one-off payment of £3,000.00, subject to agreement of the package by the end of March 2015;

(ii) a performance basis of up to £7,000.00 per person (subject to the achievement of certain performance targets);

(iii) a retention bonus of up to £5,000.00, or a pension contribution of up to £7,000.00, to be paid subject to the employee remaining employed and maintaining attendance levels up to his redundancy date.

(iii) Where applicable, an enhanced redundancy payment would be paid under the company's contractual redundancy scheme. Under that scheme employees would get 6.25 weeks' pay for each year of service (for that calculation basis pay was to be increased by 5%) and those employees who were paid shift allowance would be compensated by the use of a 'Shift Buy-out' formula). Employees over 65 did not receive the shift run down bonus.

(iv) The contractual redundancy scheme which applied when the claimant had been made redundant had been negotiated with the trade union, Unite, in 2008. It had been used at Ballymena since 2009, replacing a similar scheme which had operated for many years.

The scheme stated that:-

"Entitlement … only applies up to age 65 (subject to 'net pay limitations')."

As indicated, the net pay limitation provided a cap on redundancy payments for employees under 65.

(v) The overall enhanced severance package, which included the application of the contractual redundancy scheme, was put to a ballot by the trade union. In that ballot, which closed on 20 March 2015, the package was approved by a clear majority of those voting. In effect most employees and trade unionists wanted little, if any, change in the scheme as it had largely operated to date.

(vi) The effect of the scheme was that all employees (irrespective of their age) were eligible to receive the bonus payment of up to £15,000.00 and the 4% two year pay rise. Those under 65 would receive a payment under the contractual redundancy scheme, while those over 65 at the date of redundancy would receive the appropriate statutory redundancy payment. No eligible employee, irrespective of length of service, would leave with less than £25,000.00. All employees would be asked to sign a settlement agreement as a condition of receiving these entitlements. They had to do this by 3 April 2015.

10(i) The claimant did not sign up as required by 3 April 2015. The effect of this as far as he was concerned was that he was unable to avail of any of the benefits of the package (other than the pay increase component) unless he was prepared to abandon his claims of age discrimination.

Had he agreed to the terms of the offer, the respondent company estimated that the claimant would potentially have received the bonus payments of £15,000.00, a statutory redundancy payment of £14,700.00 and the 4% pay rise resulting in an additional sum of around £1,500.00. In total he would have received around £31,200.00, in which the element in respect of statutory redundancy pay would

have been payable without deductions for tax and national insurance. According to the respondent company, this sum of £31,200.00 equated to nearly one year's net salary.

As against this it has to be pointed out that the sum of £31,200.00 was much less – 'vastly and disproportionality less' to use the claimant's counsel's words – than the figure to which he would have been entitled had he been able fully to avail of the benefits of the scheme.

(ii) Notwithstanding that the claimant was unable to avail of the severance package, his own financial position at the time of his redundancy was quite healthy.

He had worked for the company since he was 37.

In the year 2014/2015 he had earned £49,827.00 gross. He had previously taken an unreduced pension from the company pension scheme when he was 60 (in March 2011) and he continued to work and accrue final salary benefits under the same scheme.

At 60, he had received a lump sum (tax free) of £60,409.00. He had received a gross pension of £14,700.00 per year (this totalled £70,000.00 in the five years he had received it).

He had an ongoing salary of around £28,832.00 per year and at 65 he became eligible for an additional pension of £3,180.00 per year following the continued accrual of final salary benefit from age 60.

He had also availed of a rescheduling provision which provided a bridging option until he reached state pension age at 65, ie he took a higher company pension by £5,700.00 per annum until he became eligible for his state pension. This state pension which became payable in February 2015, which amounted to £119.00 per week (£6,188.00 per year) made up for any reduction.

He also had access to a pension entitlement from a previous employer, Plessey, for whom he had worked before he joined the respondent company. This amounted to £91.00 per month, and it started the week before the hearing.

(iii) The claimant was therefore certainly well off, and the company's pension scheme, of which he had availed, was certainly generous. This was something continually emphasised by the respondent company's witnesses. The claimant accepted in evidence that he had been well paid and had enjoyed good terms and conditions in the company's employment, that the redundancy package was generous and that, in principle, because of the benefits he had accumulated, he was in a better financial position than someone in his 30s who had been made redundant. He had previously been made redundant when he lived and worked in England. At that time he was in his 30s, and he accepted that at that time a redundancy package more generous than statutory redundancy pay would have provided a 'cushion' while he sought work.

(iv) The claimant also acknowledged jobs were in short supply. As indicated, he had previously informed the employer that he intended to continue working past 65. Although there are some discrepancies in his evidence in relation to the age at

which he intended to retire (variously stated as 70, 71 and 76 – nothing seems to us to turn on this) we accept as truthful his evidence in this respect. It seems to us in accordance with the work ethic which his employment records demonstrates. He did not, however, apply for any of the jobs available in the 'run-down' of the Ballymena factor or for employment elsewhere, but in evidence, gave reasons which we accept for not doing so.

(v) Figures from the Department for Works & Pensions in 2014 showed a definite trend for people over 65 to remain in employment since the abolition of the DRA in 2011, with over a quarter of a million more people in the UK over 65 staying in work since the DRA was fully phased out. The largest increase in 65+ employment rates had taken place in Northern Ireland where 8.9% of the workforce was over 65.

The claimant's unsuccessful grievance and the respondent company's reasons for rejecting it

11(i) On 12 March 2015 the claimant submitted a grievance to the respondent. He complained that he had been discriminated against on the ground of his age. In particular, he made the point that the respondent company had not updated or adjusted its redundancy scheme in the light of the abolition of the default retirement age in 2011.

(ii) The grievance was heard by Mr Philip Law, production manager at Ballymena, on 17 March 2015. It was not upheld and an outcome letter was sent to the claimant on 26 March 2015.

(iii) In that letter, Mr Law stated that the scheme had been in operation for a number of years and had been brought in after consultation with the trade unions.

He continued:-

> *" … [E]mployers are able to treat employees differently because of their age where that treatment is justified. The Company's Staff Redundancy Scheme provides enhanced payments for those aged under 65 years of age …*
>
> *The Redundancy Scheme is mainly intended to compensate employees for the loss of their jobs and to provide a financial cushion while they look for another job. Employees over the age of 65 will be able to take their full company pension, so they will be able to receive income that would not be available to those under 65. Limiting enhanced redundancy payments to those under 65 therefore avoids what might be seen as a 'windfall' for some employees.*
>
> *The Company believes that the relevant provisions in the Redundancy Scheme are justified as they ensure that the limited money available for redundancy payments is distributed fairly and reasonably …*
>
> *Through (the severance package) all eligible employees, including those over age 65, will be able to benefit from a range of bonuses and other payments.*
>
> *……..*

Having considered all the benefits and payments that you would receive on redundancy and taking account of all relevant circumstances, I believe the company's position is reasonable and justified."

In essence, Mr Law put forward three grounds to justify the scheme – the need to 'cushion' younger employees on the loss of their jobs, avoiding a 'windfall' for, in effect, older employees, and the need to have regard to resources which were 'finite'.

12(i) The claimant appealed against the unfavourable outcome to his grievance by letter of 31 March 2015. It was heard (by video link) by Reshma Gray, the respondent company's UK HR Operations Director, based in Weybridge. She heard the appeal on 22 April 2015. We reject the claimant's suggestions that Mrs Gray should not have heard his appeal or that she was biased in any way in May 2015.

(ii) A letter setting out Mrs Gray's decision was sent to the claimant on 5 May 2015. In her letter she stated:-

" … [U]nder the relevant statutory provisions employers are able to treat employees differently because of their age where the relevant treatment is justified.

… I believe the treatment of those who are aged over 65 under the Scheme is justified. … [T]he Scheme is mainly intended to compensate employees for the loss of their job and to provide a financial cushion while they look for another job. Employees who have reached the age of 65 when they are made redundant will be able to take their full company pension and also a state pension. The latter point means that they will have access to income that would not be available for those under 65. … [L]imiting enhanced redundancy payments to those under 65 avoids what could be seen as a "windfall" for some employees.

… [T]he relevant provisions of the Scheme were justified as they ensure that the limited funds available for redundancy payments are distributed in a fair and equitable manner across the whole workforce."

(iii) On the issue of whether the company should have revised its Scheme following the abolition of the default retirement age (DRA) in 2011, Mrs Gray pointed out there had been discussions with the trade unions about this matter. (It seems to the tribunal that such discussions were somewhat inconclusive, and ultimately the company decided to reflect the state position on the DRA, ie not to have one.)

She continued:-

"I accept that the removal of the DRA was discussed. [T]he company considered whether it should retain the Scheme in the light of the removal of the DRA and decided that it should do so. I understand that the reason for this was that the company considered it appropriate to retain the relevant provisions of the scheme for the reasons I have already outlined ie those aged 65 or over would be able to receive both their company and

state pensions and, due to the latter point, would have access to income that those under 65 would not have."

She also stated:-

"I draw support for my view that this is justified from the fact that the legislation removing the DRA provides specific exemption to allow for the withdrawal of insured benefits when an employee reaches age 65. While the scheme itself is not an insured benefit as it is funded by the company rather than an insurer, the fact that the law recognises that it is permissible to cease the provision of certain benefits at a particular age demonstrates that a similar approach can be taken in the context of enhanced redundancy pay."

(iv) In relation to the claimant's contention that pensions should not be taken into account when offering redundancy, Mrs Gray, continuing, replied as follows:-

" … [T]he main purpose of the redundancy scheme is to compensate employees for the loss of their employment and to provide a financial cushion while they look for alternative work. Clearly someone who is in receipt of pension income would have much less need of such a cushion."

As far as the net pay limitation was concerned she said:-

"You raised the issue of employees between the ages of 60 and 65 having access to their company pension but such individuals would not have access to their state pension when their employment terminates. I also note that the amount of redundancy payment reduces between the age of 60 and 65 under the net pay provisions in the Scheme, such that there is a phasing in of the enhanced redundancy payment. Given that those over age 65 would have access to both their company pension and a state pension, I consider that this is both a reasonable and proportionate way of implementing the policy."

13(i) From Mrs Gray's reply to the claimant it will be seen that she relied principally on the same factors put forward by Philip Law as legitimate aims of the scheme, which could be justified under age discrimination law – the need to 'cushion' younger employees, and the 'windfall' and 'finite resources' arguments.

(ii) Other aims of the Scheme put forward by the respondent (summarised at *Paragraph 40* of the submissions made on its behalf) were the need to compensate employees for the loss of their jobs, to avoid a culture of employees being reluctant to retire in the hope of holding out for a redundancy payment, and to provide a clear and consistent scheme so that employees would understand what payment they would receive if made redundant.

(iii) The respondent company, in its response to the claim, in the evidence given on its behalf by its witnesses, and in the submissions made on its behalf, put forward the case that the means which it adopted to achieve its aims were proportionate and necessary for the following reasons:-

(a) employees at 65 would have the financial benefits of both an occupational and state pension;

(b) the claimant, and colleagues in the same position as him, have been able to benefit from an unreduced pension from age 60. They had had the benefit of additional income, not available to younger employees, and at the same time continued to accrue additional pension benefits;

(c) the respondent company had operated a policy of regular consultation with recognised trade unions over the years, and the current scheme, introduced in 2008, had been the subject of discussions and negotiations with trade unions when introduced at the time of the factory closure. The scheme had been largely unchallenged by the unions, and in the ballot on the severance package, 80% of those voting had approved;

(d) notwithstanding the less favourable position of the over 65s on redundancy, they nonetheless still were eligible to receive substantial severance payments, and they would generally have received salary and benefits for a longer period of time than younger employees;

(e) it was reasonable for the respondent to assume the majority of the workforce would retire at or before 65. That was what happened both in general, and at Ballymena. Mr Melling's evidence was that of 950 employees in the respondent company's pension scheme, 98.2% had an expected retirement age of 65. In January 2015 the age people if the workers at Ballymena was as follows:-

809 were under 60;

78 were between 60 and 66; and

1 was over 66.

(f) the cost to the company of the enhanced severance package was £93 million. This was the respondent's maximum budget for the redundancy exercise, and included a 10% contingency fund made available at group level.

The relevant law

14(i) Age discrimination is prohibited by the Employment Equality (Age) Regulations (Northern Ireland) 2006 (for convenience we shall refer to them as the 'Age Discrimination Regulations').

Regulation 3(1) provides:-

" … a person ('A') discriminates against another person ('B') if —

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

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

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

(ii) which puts B at that disadvantage,

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

(ii) Regulation 3(1)(a) outlaws direct discrimination, Regulation 3(1)(b) indirect discrimination. Age group is defined in Regulation 3(3) as meaning a group of persons defined by age, whether by any reference to a particular age or a range of ages.

(iii) At this point, it is convenient to refer to the Employment Equality (Repeal of Retirement Age Provisions) Regulations (Northern Ireland) 2011. These Regulations revoke and amend provisions in the 2006 Regulations and repeal and amend related provisions in the Employment Rights (Northern Ireland) Order 1996 which excepted certain dismissals made on the basis of retirement from constituting direct age discrimination and unfair dismissal. Regulation 32 of the 2006 Regulations, providing for a default retirement age ('DRA') of 65, was revoked. The use of any compulsory retirement age must now always be justified.

(iv) Age discrimination laws apply to any enhanced redundancy scheme, where age is a factor governing payments. A respondent will have to demonstrate that any element which is potentially discriminatory on the ground of age is justified. Regulation 35 of the 2006 Regulations contains a particular statutory exemption for an enhanced redundancy scheme which is modelled on the statutory redundancy provisions, but the respondent accepts that provision has no application here.

(v) The notable feature of Regulation 3(1) arises in relation to what is conveniently termed the defence of 'justification' (that word is not now used in the legislation). Such a defence has always been available to indirect discrimination on the proscribed grounds, but in respect of age discrimination only, it applies to direct discrimination.

A heavy burden is placed on a respondent in respect of making out this defence. In Great Britain, the ACAS publication '*Guidance on Age in the Workplace*' suggests it will only apply in 'very limited circumstances'.

15(i) The origins of the 2006 and 2011 Age Discrimination Regulations outlawing age discrimination are to be found in the now European Union's Council Directive 2000/78/EC of 27 November 2000, which established a general framework for equal treatment in employment and occupation, and also laid down such a framework for combating discrimination on various grounds, including age.

(ii) Article 6 of the Directive ('*Justification of differences of treatment on grounds of age'*) provides:-

> *"1. Notwithstanding Article 2(2), [the concept of discrimination] member states may provide that differences of treatment on the ground of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."*

(iii) A national court hearing an age discrimination claim will be required to ensure that its domestic legislation is interpreted in such a way to comply with EU law, setting aside any provision of the former which conflicts with the latter (see generally : ***Mangold v Helm C144/04 [2006] IRLR 143;*** and ***Kücükdeveci v Swedex Gmbh & Co KG C55/07 [2010] IRLR 346***).

16(i) It is clear from the provisions of the Directive that the aims which can be justified in cases of direct age discrimination are narrower than those which can be justified in cases of indirect discrimination.

This was recognised in ***Seldon v Clarkson Wright and Jakes (a partnership) [2012] UKSC 16***, a decision of the Supreme Court.

The claimant, Mr Seldon, had been a partner in a firm of solicitors for a number of years. At the end of the year following his 65th birthday, the other partners forced him to retire. In doing so, they acted in accordance with the deed of partnership (which the claimant had signed). The respondent firm relied on six aims as justifying age discrimination, three of which the employment tribunal found to be legitimate. These were:-

(i) providing the opportunity for associates to become partners, and thus encouraging them to stay with the firm;

(ii) facilitating workplace planning; and

(iii) maintaining a congenial atmosphere.

The tribunal found that the retirement age was justified as a proportionate means of achieving the legitimate aims referred to above. When the case reached the Supreme Court, it was remitted to the employment tribunal to consider the proportionality of the employer's justification arguments.

(ii) In its decision the Court held that the approach to justifying direct age discrimination was not identical to the approach to justifying indirect discrimination and that Regulation 3 of the corresponding Age Regulations then in force in Great Britain (see now the equivalent in Section 13(2) of the Equality Act 2010) should be read down accordingly, so that United Kingdom municipal law was interpreted according to the Directive. (See : *Paragraph 51* of the decision).

(iii) Lady Hale, *at Paragraph 50* of her judgment, discussed legitimate aims in the context of direct age discrimination. She stated:-

(2) *If it is sought to justify direct age discrimination under article 6(1), the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is 'distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness'*

…

(3) … [F]lexibility for employers is not in itself a legitimate aim; but a certain degree of flexibility may be permitted to employers in the pursuit of legitimate social policy objectives."

At *Sub-paragraph (4)* she set out a number of legitimate aims, some overlapping, which had been recognised in direct age discrimination claims. These aims, which reflect ideas of 'intergenerational fairness' and 'dignity' were:-

(i) promoting access to employment for younger people;

(ii) the efficient planning of the departure and recruitment of staff;

(iii) sharing out employment opportunities fairly between the generations;

(iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas;

(v) rewarding experience;

(vi) cushioning the blow for long-serving employees who may find it hard to get new employment if dismissed;

(vii) facilitating the employment of older workers in the workplace;

(viii) avoiding the need to dismiss employees on the ground that they are no longer able to do the job, which may be humiliating for the employee concerned; and

(ix) avoiding disputes about an employee's fitness for work over a certain age.

At *Paragraph 67*, she continued:-

" … [The firm] identified three aims for the compulsory retirement age, … [Counsel for the claimant], has argued that these were individual aims of the business rather than the sort of social policy aims contemplated by the Directive. I do not think that that is fair. The first two identified aims were staff retention and workforce planning, both of which are directly related to the legitimate social policy aim of sharing out professional employment opportunities fairly between the generations (and were recognised as legitimate in ***Fuchs****). The third was limiting the need to expel partners by way of performance management, which is directly related to the 'dignity' aims accepted in* ***Rosenbladt*** *and* ***Fuchs****. It is also clear that the aims can*

*be related to the particular circumstances of the type of business concerned … **Georgiev**). I would therefore accept that the identified aims were legitimate."*

At *Paragraph 73*, Lord Hope stated:-

"As Lady Hale has demonstrated, the evolving case law of the ECJ and the CJEU has shown that a distinction must be drawn between legitimate employment policy, labour market and vocational training objectives and purely individual reasons which are particular to the situation of the employer. There is a public interest in facilitating and promoting employment for young people, planning the recruitment and departure of staff and the sharing out of opportunities for advancement in a balanced manner according to age. These social policy objectives have private aspects to them, as they will tend to work to the employer's advantage. But the point is that there is a public interest in the achievement of these aims too. They are likely to be intimately connected with what employers do to advance the interests of their own businesses, because that it how the real world operates. It is the fact that their aims can be seen to reflect the balance between the differing but legitimate interests of the various interest groups within society that makes them legitimate."

(iv) The aims of a business therefore do not need to be the precise aims set out in Article 6 of the Directive (ie employment policy, labour market and vocational training objectives), but need only to be consistent with such objectives. (See : *Smith and Woods' Employment Law, 11th Edition Page 407*.)

17(i) In relation to indirect age discrimination, there is no limitation on the aims which may be regarded as legitimate. This is clear from ***Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15***, decided at the same time as ***Seldon***. In that case, Lady Hale stated, at *Paragraph 19*:-

"The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: … ."

(ii) What constitutes a legitimate aim in the case of indirect discrimination is a question of fact. In the case of age discrimination, legitimate aims can include facilitating the recruitment and retention of staff of appropriate calibre, preventing a 'windfall' or the receipt of excessive compensation, and securing efficiencies or other desirable management aims such as managing job losses.

18(i) Insofar as justification is concerned, the legal principles were summarised in ***McCulloch v ICI Plc [2006] IRLR 848*** by the then President of the Employment Appeal Tribunal, Mr Justice Elias, at *Paragraph 10* of his judgment:-

"(1) The burden of proof is on the respondent to establish justification : see ***Starmer v British Airways [2005] IRLR 862*** *at [31].*

(2) The classic test was set out in ***Bilka Kaufhaus GmbH v Weber Von Harte [Case 170/84] [1984] IRLR 317*** *in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures 'must correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end' (Paragraph 36). This involves the application of the proportionality principle, which is the language used in Regulation 3 [of the Age Discrimination Regulations in Great Britain] itself. It has subsequently been emphasised that the reference to 'necessary' means 'reasonably necessary' : see* ***Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26*** *per Lord Keith of Kinkel at pp 30 – 31.*

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure, and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it. ***Hardy & Hansons PLc v Lax [2005] IRLR 726*** *per Pill LJ at Paragraphs [19] – [34], Thomas LJ at [54] – [55] and Gage LJ at [60].*

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context. ***Hardys*** *and* ***Hansons PLc v Lax [2005] IRLR 726 CA****."*

(ii) In ***R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293***, at *Paragraph 165*, Mummery LJ set out a three stage test when discussing proportionality:-

"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

19(i) In relation to the defence of justification, the respondent employer must therefore demonstrate that the treatment (or, as the case may be, provision, criterion or practice) meets the legitimate aim relied upon. (Whether the aim is legitimate is a matter of fact for the tribunal.) It must also show that it is proportionate and necessary, ie that the need outweighs the discriminatory effect of the behaviour in question, and that the aim cannot be met by a different method which would not have any, or less, discriminatory effect.

To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and a (reasonably) necessary means of doing so.

The terms 'appropriate', 'necessary' and 'proportionate' are not interchangeable and care must be taken in properly distinguishing the aims of measure from the means used to achieve it.

It is clear from the above that an aim that is itself clearly discriminatory cannot constitute a legitimate aim.

(See generally : ***Kutz-Bauer v Freie und Hansestadt Hamburg [2003] IRLR 368, ECJ***, expanding on the test in ***Bilka-Kaufhaus, and Magoulas v Queen Mary University of London UKEAT/0244/15 [29 January 2016]***.)

In ***Seldon, ante***, it was held that a general policy, as opposed to one justifying each retirement on its own merits, could be permissible, but that the use of a general policy must be a proportionate means of achieving the legitimate aim.

(ii) In determining whether the defence of justification has been made out, the tribunal must establish the relevant facts, and then carry out a balancing exercise taking into account all the surrounding facts and circumstances and giving due emphasis to the degree of discrimination caused against the object or aim to be achieved. This exercise must be carried out in the context of the particular business concerned.

(iii) In ***Allonby v Accrington and Rossendale College [2001] IRLR 364***, a decision of the Court of Appeal in a sex discrimination case in England and Wales, Sedley LJ explained the full and rigorous analysis which was required in carrying out such a balancing exercise. He said, at *Page 370*:-

> *"Once a finding of a condition having a disparate and adverse impact … had been made, what was required was at the minimum a critical evaluation of whether the … reasons [for imposing a condition] demonstrated a real need [to take the action in question]; if there was such a need, consideration of the seriousness of the disparate impact … on women including the applicant; and as evaluation of whether the former were sufficient to outweigh the latter."*

(iv) In carrying out such a balancing exercise or critical evaluation a tribunal will ask itself whether alternative measures were considered, and if alternative measures could have met the legitimate aims without such a discriminatory effect.

It should also consider both the qualitative and quantum aspects of the discrimination, ie how many people with a particular characteristic will suffer and how seriously they will suffer. If only a small number of people are affected, it may be easier to accommodate them.

(***MBA v Mayor and Burgesses of the London Borough of Merton [2014] IRLR 145***)

(v) Two more general points can also be made. In ***Woodcock v Cumbria Primary Care Trust [2012] ICR 1126*** it was held that cost alone cannot justify discrimination. There must be some other element in addition to cost. In ***BAE Systems (Operations) Ltd v Mr C McDowell***, the Employment Appeal Tribunal emphasised that a tribunal must demonstrate a holistic approach in its

assessment of the means adopted to achieve the various legitimate aims relied on by a respondent.

(vi) Having carried out the balancing exercise, the tribunal must make its own judgment as to whether the PCP was proportionate, considering its discriminatory effect against the reasonable needs of the employer's business.

20(i) In discussing the relevant law it is instructive and necessary to consider how courts and tribunals have approached the various reasons put forward in support of the respondent company's defence of justification.

(ii) In ***Loxley v BAE Systems (Munitions and Ordnance) Ltd [2008] IRLR 853 EAT*** it was accepted that preventing a 'windfall' can potentially constitute a legitimate aim.

In that case the company initially had a compulsory retirement age of 60. (It was increased to 65 in 1996.)

Its contractual redundancy scheme included a taper and cap on benefits. Benefits were only paid to those under 65 at the date of redundancy. Tapering provisions applied to those over 57 – payments which would otherwise have been made to such persons were reduced by $^{1}/_{36}^{th}$ for every month of service over 57. The claimant, Mr Loxley, was 61 when he took voluntary redundancy and was therefore not entitled to any benefit under the redundancy payment scheme.

The company's purported justification for the cap/taper was that employees were entitled to take their benefits under the company's pension scheme at 60. This would have provided those close to retirement with a windfall if they had also been entitled to take the full redundancy payment.

An employment tribunal dismissed Mr Loxley's claim of age discrimination and held that the tapering provisions had a legitimate aim of preventing older employees, close to retirement, from obtaining a 'windfall'.

Mr Loxley appealed to the Employment Appeal Tribunal. On the appeal, the respondent conceded that in view of the change in the compulsory retirement age, it was not 'strictly accurate' to say that this was a 'windfall' situation, but contended that it was still nonetheless a legitimate aim for the employer to distribute the necessarily limited financial pot available to meet redundancy payments in a way that ensured there was an equitable distribution of those funds across the workforce (see : *Paragraph 32* of decision).

At *Paragraph 37* the EAT rejected the claimant's submission that preventing a windfall could not be a legitimate feature of the scheme. Elias J (President) stated:-

> *"One of the purposes of a redundancy scheme of this nature is to cushion workers from the effects of losing their income. This is not required, or at least not to the same extent, where pensions are paid. Indeed if the position still were that retirement automatically took place at the age of 60 then an employer would in our view manifestly be justified in having a rule which prevented the employee being better off as a consequence of receiving redundancy pay than he would have been if working until retirement age.*

That is what the tapering provisions originally achieved until the extension of retirement age in 1996. This is a legitimate means of securing the aims of the scheme. Similarly it is legitimate to seek to ensure that the aims are achieved in an equitable and fair way. Whether these are better described as aims or as properly means of achieving the aims is perhaps a matter of semantics."

He continued:-

"39. We recognise that there are many employers who adopt redundancy schemes of this kind. We do not say for one moment that it may not be justified to exclude those who are entitled to immediate benefits from their pension fund from the scope of a redundancy fund. Moreover, in such circumstances tapering provisions of a kind adopted in this case will, we suspect, be very readily justified.

They would be necessary to ensure equity as between those close to retirement and those in retirement receiving pensions. However, it is not inevitably and in all cases justified for those entitled to immediate receipt of a pension to be excluded from the redundancy scheme. Ultimately it must depend on the nature of both schemes.

40. There can surely be no doubt that the fact that an employee is entitled to immediate pension benefits will always be a highly relevant factor which an employer can properly consider when considering what redundancy rights, if any, an employee ought to receive. No doubt in some, perhaps many, cases, it will justify excluding such an employee from the redundancy scheme altogether.

41. To answer that question, the tribunal had to ask whether the treatment of the claimant – in this case his exclusion from the scheme – achieves a legitimate objective and is proportional to any disadvantage which he suffers. It may be that his pension entitlement, even if taken earlier than he would otherwise have wished, is far more valuable than any redundancy entitlement. Neither we, nor it seems, the tribunal are in a position to assess that in this case. They appear to have a lot of financial information about the various benefits, but they have not analysed that information in their judgment."

In these circumstances the matter was remitted for re-consideration to a differently constituted industrial tribunal.

In the course of its judgment, the EAT also recognised (at *Paragraph 42*) that the fact that an agreement was made with the trade unions is potentially a relevant consideration when determining whether treatment is proportionate. It stated:-

"Plainly the imprimatur of the trade union does not render an otherwise unlawful scheme lawful, but any tribunal will rightly attach some significance to the fact that the collective parties have agreed a scheme which they consider to be fair."

(iii) In ***Kraft Foods UK Ltd v Hastie [2010] ICR 1355 EAT***, the Employment Appeal Tribunal held that a cap on awards on payments under a voluntary redundancy scheme was justified. It allowed an appeal from an employment tribunal which had rejected the defendant's argument that the cap constituted a proper means of achieving the legitimate aim of preventing the payment of more than employees' lost earnings.

The tribunal held that the object of the scheme was to compensate employees who took voluntary redundancy under it for the loss of earnings they could have expected to receive if employment had continued. 'Capping' and 'tapering' an employees approached retirement age was a standard feature of contractual redundancy schemes. Unless a scheme incorporated a cap it would result in payments which exceeded what was necessary to achieve that object in cases where the employee was close to retirement age. It was therefore legitimate for a redundancy scheme to incorporate a provision to prevent the payment of excess compensation and that the cap in the case before it was a proportionate means of achieving that aim.

(iv) In ***Lockwood v Department for Work and Pensions [2013] EWCA 1195 CA***, the claimant, a 26 year old civil servant, who was made redundant, had received a substantially lower compensation payment under the relevant Civil Service Scheme than someone over the age of 35, with the same period of service, would have received. She claimed that the amount of her severance payment compared to that which the older worker would have received constituted direct discrimination on the ground of her age. She brought a claim of age discrimination which was dismissed on the ground that she had not been treated less favourably than any comparator over the age of 35 because her circumstances were materially different. The employment tribunal did consider whether if she had not failed on the ground of less favourable treatment, the respondent DWP would have succeeded on the issue of justification. It held that it would have done. On appeal the Employment Appeal Tribunal, reached the same conclusions.

On a further appeal to the Court of Appeal, it was held that the claimant had indeed suffered less favourable treatment. However, the Court of Appeal held that the scheme was a proportionate means of achieving the employer's legitimate aim of producing a proportionate financial cushion for workers until alternative employment was found when balanced against the disparate treatment of younger workers.

(v) In ***Ingenior Foreningen : Danmark, acting on behalf of Ole Anderson v Region Syddanmark C-499/08 [2012] All ER (EC) 342 [2011] 1 CMLR 1140***, the Court of Justice of the European Union held that a measure in Danish municipal law providing severance payments for all long-serving employees but not those over 65 was disproportionate because it applied to all employees over 65, irrespective of whether they were actually drawing a pension.

The court held that this restriction or entitlement was not unreasonable in the light of the legitimate objective pursued by the legislature of providing increased protection to workers who had been dismissed but who were seeking new employment. The exclusion was based on the idea that, generally, employees left the labour market if they were eligible for a pension, and had joined the pension scheme before reaching 50. As a result of that assessment, which was age-based, workers who satisfied the criteria for eligibility for a pension from the employer, but who waived

their right to a pension temporarily to continue their career would not be able to claim the severance allowance even though it was intended to protect them.

In this regard the relevant provision of Danish Law unduly prejudiced the interests of workers in this latter category and went beyond what was necessary to advance the social policy aims of that provisions, so that the resulting difference in treatment could not be justified.

In ***Danst Jurist-Og Okonomforbund, acting on behalf of Totfgaard v Indenrigs-Og Sundhedsministeriet Case C-546/11 [2014] IRLR 37*** it was held that withholding termination payments from over 65s on the ground that they were eligible for a pension was not justified because the same aim could have been achieved by the lesser measure of withholding the payment only if the individual had actually decided to draw the pension.

Conclusions

21 We must now attempt to apply the relevant law to the case before us. At the risk of repetition, we emphasise that in reaching our conclusions we have continued to bear in mind that legitimate aims and proportionate means are distinct concepts – the fact that aims are legitimate does not mean that any discrimination is justified.

We also bear in mind that a respondent will bear a high (though not, of course, an insurmountable) burden in justifying direct discrimination and that as far as justification generally is concerned, the contentions put forward in support of it must be carefully scrutinised, and consideration given to whether any legitimate aim pursued could have been achieved 'by more lenient and equally suitable means' (***Handels-og-Kontorfunktionaererues Forbund Danmark (HK) (on behalf of Kristeusen) v Experian H/S [2014] ICR 27,*** *at Paragraph 63*.

The greater the disadvantage caused by a discriminatory provision, the more cogent the justification will have to be.

Any balancing exercise will have to have regard to the impact which any different scheme would have on the whole range of employees. (***McCulloch v ICI, op cit,***).

Finally, we reiterate that in the ***McDowell*** case, the Employment Appeal Tribunal, had emphasised the tribunal's failure to test whether the cap in that case on payments to those over 65 was justified as part of the broader severance framework and in the light of the aims it was designed to achieve, viewed collectively.

22(i) One of the aims relied upon by the respondent company was the wish to avoid a culture where employees may be reluctant to retire, because they are holding out for a redundancy situation to arise. (See *Paragraph 13(ii) above*.) No evidence was adduced from which we could find that such a culture existed at Ballymena, and therefore we do not give any consideration to this aim in reaching our conclusions.

(ii) While avoiding a 'windfall' can constitute a legitimate aim, we are not satisfied that this is a 'windfall' situation. We have accepted the claimant's evidence that he intended to work beyond 65. He therefore had a loss of salary for future years'

work. Additionally, he had worked over the years, contributing towards his pension. It was something to which he had an entitlement, and a right to expect. In any event, as pointed out at *Paragraph 5(iii) above*, there were younger people in receipt of a company pension, as it could be accessed from age 50.

The whole rationale beyond the abolition of the DRA was to enable older workers to stay on at work; the state pension age was increasing, and continues to increase, and we are satisfied that overall there is a discernible trend for older workers to continue working.

The respondent's contention that older workers would wish to retire at 65 seems to us to be a generalisation.

(iii) Other aims on which the respondent relied were 'cost neutrality' and 'finite resources', aims that we consider are to some extent linked or overlapping. The company placed great emphasis on both of these in its discussions and negotiations with the trade unions and workforce, in the evidence of its witnesses at the tribunal, and in its submissions.

In relation to 'cost neutrality' in particular, the company did not resile from its position on this issue even after the introduction of the Age Discrimination Regulations and the abolition of the DRA.

We consider that the company's argument in relation to these matters were presented in a very general way. 'Cost neutrality' and 'finite resources' almost achieved the status of mantras.

The respondent company was an extremely profitable one, and while we do not doubt its good faith or that of its senior managers, it seems to us to have been unrealistic to expect that following the introduction of the Age Discrimination Regulations, and the later removal of the DRA, that there would not be additional costs, though clearly those costs must have some limits.

There was no evidence before us of what additional funds might have been available.

(iv) We accept that the company was genuine in its desire to see that the resources for enhanced redundancies payments should be spread fairly and equitably across the workforce, but the inescapable reality here is that those employees who, like Mr Barlow, were over 65, were completely excluded from the benefits of the company's enhanced severance scheme.

Their interests were not given proper consideration. In fairness to the respondent company the position of the over 65s was, overall, not a matter pursued with any notable vigour by the unions. The claimant could be forgiven for thinking that his union had effectively abandoned him. However, that does not assist the respondent who, when the Age Discrimination Regulations were first introduced, had been made aware of the potential for breach of those Regulations, and had recognised their impact as is evidenced from MTU meetings from June 2007 onwards.

(v) There is no evidence that the respondent company seriously considered any alternative methods which could have constituted a more proportionate way of achieving its aims (eg tapering provisions, or amendment of the net pay limitation) to try to ensure that the claimant and those in his position who had given long years of service were not restricted to statutory redundancy pay.

Nor are we satisfied that the respondent took any meaningful steps to evaluate or analyse its scheme on an ongoing basis.

No transitional measures were considered, which could have mitigated the discriminatory effects of the scheme. We consider that this was due, in some part, to the employer's focus on cost neutrality.

23 We find that the claimant suffered both direct and indirect discrimination on the ground of age, and in relation to both such claims that its policy of excluding employees over 65 from the benefits of its enhanced redundancy scheme, and shift rundown payments, was not a proportionate means of achieving its aim.

24 As far as quantum is concerned, the claimant has provided a schedule of loss. It is our intention to issue a short supplementary decision dealing with compensation. Before doing so, we shall give the parties a period of **21 days from the date of issue of this decision** to make any representations they wish on quantum. They can of course apply to extend the 21 day period.

25 The Employment Judge would like to express his regret at the length of time it has taken to issue this decision. He accepts responsibility for this, and reiterates the apologies previously given to the parties in correspondence sent to them at his direction.

Employment Judge
(Acting under Section 27 of the Judicial Pensions and Retirement Act 1993)

Date and place of hearing: **4 – 5 February 2016;**
8 – 10 February 2016;
2 March 2016; and
5 – 7 September 2016, Belfast

Date decision recorded in register and issued to parties:

Case Reference No: 924/15

A P P E N D I X

BERNARD BARLOW V GALLAHER LIMITED

LIST OF ISSUES

CASE REF NO: 924/15 IT

INDUSTRIAL TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS (NORTHERN IRELAND) 2005 (as amended)

BETWEEN:

BERNARD BARLOW

Claimant

-and-

GALLAHER LIMITED

Respondent

LIST OF ISSUES

Legal Issues

1. Whether the Respondent is in breach of the Employment Equality (Age) Regulations (Northern Ireland) 2006 as set out below (having regard to European law where relevant)?

2. Whether the Claimant was subjected to less favourable treatment on grounds of age pursuant to Regulations 3(1)(a) and 7(2) of the Employment Equality (Age) Regulations (Northern Ireland) 2006 as alleged by the Claimant (having regard to European law where relevant)?

3. Whether the Respondent indirectly discriminated against the Claimant on grounds of age pursuant to Regulation 3(1)(b) of the Employment Equality (Age) Regulations (Northern Ireland) 2006 as alleged by the Claimant (having regard to European law where relevant)?

4. Were the alleged act(s) or omission(s) of the Respondent that are relied on by the Claimant for the purposes of issues 2 and 3 above a proportionate means of achieving a legitimate aim(s) pursuant to Regulation 3(1) of the Employment Equality (Age) Regulations (Northern Ireland) 2006?

5. Was the Claimant subjected to harassment and/or victimized by employees of the Respondent pursuant to Regulations 6 and 4 of the Employment Equality (Age) Regulations (Northern Ireland) 2006 as alleged by the Claimant (having regard to European law where relevant)?

6. Does the tribunal have jurisdiction to hear the Claimant's complaint? Should a pre-hearing review be held to determine this as a preliminary issue?

7. If the tribunal finds that it does have jurisdiction to hear the Claimant's complaints and finds that the Respondent has breached the Employment Equality (Age) Regulations (Northern Ireland) 2006 as alleged by the Claimant, what is the remedy (if any) to which the Claimant is entitled?

Main Factual Issues

1. What are the terms of the enhanced severance package agreed between the Respondent and the recognised trade union in respect of the closure of the Respondent's factory at Lisnafillan?

2. Was the severance package approved by a ballot of trade union members?

3. What are the circumstances in which the Claimant will receive a redundancy payment and/or other payments upon the closure of the Respondent's factory at Lisnafillan? Under the present arrangements what payment/s shall the Claimant receive?

4. Did the Claimant receive correspondence from the Respondent "confirming the terms of the enhanced severance package"? Was the Claimant advised by the Respondent that if he did not sign the letter he would not receive any additional payments including the 4% salary increase in the April salary? Did the Respondent inform the Claimant that the Respondent would make a redundancy payment to him in accordance with and subject to the Respondent's enhanced Redundancy Policy and was the Claimant informed that the arrangements set out in this letter were conditional on and subject to the Respondent's receipt of a copy of this letter signed by the Claimant on or before 3 April 2015 and the Claimant signing a compromise or other settlement agreement?

5. Is the Claimant due under these arrangements to receive a severance package which is less favourable than employees who are under the age of 65, even in circumstances where the employees have the same years of continuous service?

6. What are the terms of the Respondent's Staff Redundancy Scheme?

7. Does the Respondent's Staff Redundancy Scheme provide enhanced redundancy/severance payments for those aged under 65 years of age? What are the provisions of the Respondent's Staff Redundancy Scheme in relation to employees aged 65 years of age and over? Does the Respondent's Staff Redundancy Scheme apply to employees aged 65 years of age and over?

8. Are shift work employees under the age of 65 entitled to a shift run down bonus? Are employees aged 65 and over not entitled to a shift run down bonus even if they work to closure of the factory?

9. How does the Respondent's Staff Redundancy Scheme treat employees who will be over age 65 at the date of closure? What was the precise information conveyed to employees before the ballot on the enhanced severance package?

10. Does the Respondent's Staff Redundancy Scheme limit enhanced redundancy payments to employees under 65? Will the Claimant be excluded from the benefits of the Redundancy Scheme because he shall be over age 65 at the date of closure?

11. How are redundancy payments calculated for employees aged 65 years and over at the time of their redundancy?

12. Do employees aged 65 years and over receive payments under the Staff Redundancy Scheme to take into account their years of service? What is the basis for and nature of those payments?

13. What discussions did the Respondent have with trade union representatives about the current Staff Redundancy Scheme when it was introduced and in the context of consultation about the factory closure?

14. What steps, if any, did the Respondent take to consider the implications and impact of the removal of the default retirement age on the Respondent's Staff Redundancy Scheme? What discussions did the Respondent have with trade union representatives about such removal and its potential implications on the Staff Redundancy Scheme and other matters? What further steps, if any, should the Respondent have taken?

15. Did the Respondent carry out an equality audit of its Staff Redundancy Scheme?

16. How many employees are eligible for the full benefits of the enhanced severance package under the terms of Respondent's Staff Redundancy Scheme? What is the age profile of those employees?

17. How many employees are not eligible for the full benefits of the enhanced severance package under the terms of Respondent's Staff Redundancy Scheme?

18. In respect of those employees who are not eligible for the full benefits of the enhanced severance package under the terms of Respondent's Staff Redundancy Scheme, how many are deemed ineligible by reason of age and, in particular, by reason that they are aged 65 and over?

19. Has the Claimant been subjected to less favourable treatment on grounds of age as he has alleged? If the answer is affirmative, whether this treatment was a proportionate means of achieving a legitimate aim?

20. Did the Respondent's Staff Redundancy Scheme and the application thereof indirectly discriminate against the Claimant as he has alleged? Did the Respondent apply a provision, criterion or practice which excluded employees aged 65 and over from the full benefits of the enhanced severance package under the terms of Respondent's Staff Redundancy Scheme? Did this place employees aged 65 and over at a particular disadvantage in relation to a forthcoming redundancy situation and did it put the Claimant at that disadvantage?

21. What is the correct pool for comparison?

22. If the answer to issue 20 is affirmative can the Respondent show that the provision, criterion or practice was a proportionate means of achieving a legitimate aim?

23. What is the precise aim relied on?

24. Is the aim legitimate?

25. Was the Claimant subjected to harassment/victimised by employees of the Respondent because of the issues he had raised in respect of the implications of the Staff Redundancy Policy for persons aged 65 and over as alleged by the Claimant? How did the Respondent respond on becoming aware of any alleged acts or omissions claimed to constitute such harassment or victimisation?

26. What pension benefits have been, are or will be provided or available to the Claimant (whether occupational or state benefits) on or before the termination of his employment? Have such benefits been, or will they be, provided or available to younger employees?

27. Have employees aged 65 and over generally received salary payments and benefits over a longer period of time than younger employees?

28. If the Claimant is successful in his claim(s) to what remedy, if any, is he entitled?

29. Has the Claimant submitted his claim prematurely?