EMPLOYMENT TRIBUNALS

Claimant: **Mr D Leinhardt**

Respondent: **Harrogate and District NHS Foundation Trust**

Heard at: **Leeds** **On: 5 and 6 December 2018**

Before: **Employment Judge Maidment**
Members: **Ms NH Downey**
Mr WG Appleyard

Representation
Claimant: In person
Respondent: Mr N Newman, Solicitor

JUDGMENT having been sent to the parties on 17 December 2018 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues

1. The Claimant's sole complaint in these proceedings is of indirect age discrimination. This is based on the Respondent's provision, criterion or practice ("PCP") of the "adoption of the Lifetime Allowance – Pensions Restructuring Payments Policy in 2017 only retrospectively backdated to those in the NHS pension scheme as at 1 April 2016." The Respondent accepted that it applied such PCP. The Claimant defines himself as falling within a particular age group of those aged 55+. Did then the application of the PCP put those in that age group at a disadvantage when compared to those who are younger? If so, did the Claimant suffer that disadvantage?

2. If so, it is still open to the Respondent to defend what would otherwise be an unlawful discriminatory practice by showing it to be a proportionate means of achieving a legitimate aim. In terms of a legitimate aim, the Respondent maintains that the policy was to provide an incentive for the future retention of senior and experienced staff disadvantaged by the changes to taxation of pension schemes. It maintains that it was

proportionate to seek to do so in a way which was cost neutral and where there was a need for a cut-off point so as not to provide a windfall to those who had already elected to defer their pension entitlement, without any expectation of any additional benefit.

The evidence

3. The Tribunal had before it an agreed bundle of some 280 pages. Having identified the issues with the parties, the Tribunal took some time to privately read into the witness statements exchanged between the parties and relevant documentation. This meant that when each witness came to give evidence they could do so simply by confirming their statement and then, subject to brief supplementary questions, be open to be cross-examined on it.

4. The Tribunal heard firstly from the Claimant himself. Then, on behalf of the Respondent, the Tribunal heard from Mr Andrew Forsyth, Interim Company Secretary, and finally from Joanne Harrison, Interim Director of Workforce and Organisational Development.

5. Having considered all the relevant evidence, the Tribunal makes the following findings of fact.

The facts

6. The Claimant had been in the employment of the NHS since August 1982 and working at the Respondent since September 1995 as a consultant general surgeon. The Claimant's complaint in these proceedings is one of indirect age discrimination relating to the application of a policy entitled "Lifetime Allowance – Pension Restructuring Payments (LA-PRP)".

7. The Claimant in his witness evidence referred to a deteriorating relationship with the Respondent's management team from the summer of 2015 linked to the appointment around a year earlier of a Dr Tolcher as Chief Executive Officer. The Claimant referred to his treatment in respect of the above policy as being a final straw which caused his resignation from the Respondent's employment. The Claimant also complained of the Respondent's failure then to offer him an honorary contract. Such matters are outside the scope of the issues in the Claimant's complaint in these proceedings which were carefully defined by Employment Judge Lancaster at a previous Preliminary Hearing conducted on 6 August 2018.

8. The Claimant was a member of an NHS pension scheme. He accrued significant benefits in that scheme such that by 2013 he received advice from an independent financial adviser, made available to him through the BMA, to become a deferred member of the scheme with the cessation of future employee and employer contributions into it. The Claimant's decision to take that advice was as a consequence of him being otherwise liable to a significant tax charge by reason of him reaching HMRC's Lifetime

Allowance, then of £1.5m, for pension benefits. The Claimant ceased active membership of the pension scheme from 30 September 2013.

9. The Tribunal notes that the Lifetime Allowance was subsequently reduced and indeed on 6 April 2016 was then further reduced from £1.25 million to £1 million.

10. In January 2016 the Respondent's Chief Executive requested that the Respondent consider adding an amount equivalent to the employer's pension contributions to basic salary when she changed to become a deferred member of the pension scheme on 1 April 2016. Her decision to become a deferred member of the scheme related to her approaching the level of Lifetime Allowance.

11. There is no evidence that any similar proposal had previously been made by another member of staff, as was intimated by the Claimant. In March 2015 there had been a separate request to consider a salary sacrifice arrangement of a very different nature. The Respondent therefore had no policy which covered the Chief Executive's request in circumstances where there was an increased recognition within the Respondent and wider NHS of the effect of the, in particular reduced, Lifetime Allowance on the retention of senior staff.

12. The matter was then raised at the Respondent's next Remuneration Committee on 21 April 2016 where there was insufficient time to make a decision such that further consideration was deferred until the next Remuneration Committee meeting on 26 September 2016. The Respondent's Chairman nevertheless wrote to the Chief Executive on 24 May giving a commitment that, when a policy was developed and put in place, it would apply to her from 1 April. On 26 September the Respondent did agree to introduce a scheme which was considered to be cost neutral to the Respondent and which would be implemented retrospectively from 1 April 2016. Essentially, all employees of the Respondent could apply, on their choosing, once the policy was in place, to withdraw from the NHS pension scheme when approaching the Lifetime Allowance. They would then receive in their continuing employment an amount equal to their employer's pension contributions as an addition to salary.

13. Mr Philip Marshall, Director of Workforce and Organisational Development, asked Mr Andrew Forsyth, then Compliance and Revalidation Manager, to draft a policy to apply to all eligible members of the Respondent's staff. Given the amount of pension benefits required to be accrued before hitting the Lifetime Allowance, it was always considered that the policy would apply to a relatively small number of individuals, essentially executive directors and medical consultants.

14. Mr Forsyth took advice from professional accountants and the Treasury regarding the legality of the proposed policy to ensure it would not be viewed as tax avoidance or evasion. He spoke to other NHS trusts to determine whether they had come up with any similar proposal, but it appeared that the Respondent was the first one to consider such arrangements. A policy document was then created.

15. It was stated to set out options for those staff whose pension benefits were approaching or had exceeded the Lifetime Allowance. It was applicable to all staff employed by the Respondent for more than three years and for whom the Respondent paid an employer contribution into any of the various NHS pension schemes. It provided for a "Pension Restructuring Payment" to be made as a supplement to their salary equivalent to the amount the Respondent would have paid into the pension scheme (less statutory deductions). Applications would be considered at the Respondent's discretion and subject to various additional criteria being satisfied, which included aspects of conduct and performance. Again, it was stated that the employee had to be a current member of an NHS pension scheme to which the Respondent was making a contribution when the application was made. The policy was stated to have been subject to a stage I equality impact assessment but no written assessment was in fact made.

16. The policy was put through a number of different consultation forums including the Local Negotiating Committee ('LNC') which represented the interests of doctors within the Respondent. Mr Forsyth discussed the policy principles with the chairman of that committee on 14 December 2016 and with the full committee on 16 March 2017 and 11 May 2017. The policy was also discussed at various meetings of a separate Policy Advisory Group and Partnership Forum. A final meeting took place with the LNC on 15 March 2018 where it was reiterated that the effective implementation date would be from 1 April 2016. This was agreed by the LNC.

17. The Claimant himself was aware of the development of the policy in September 2017 and read through the draft policy on the Respondent's intranet in late September/early October 2017. The Claimant in evidence stated that he was unclear as to his own eligibility. The Claimant emailed Mr Marshall and the chair of the LNC, Mr Metcalfe, on 27 September asking how he could apply and received a response in which Mr Metcalfe said that he had only recently become aware of the policy himself. The Tribunal accepts Mr Forsyth's clear evidence, including as to the dates of earlier discussions, that this was not an accurate statement by Mr Metcalfe. Mr Marshall subsequently responded on 2 October advising that the policy did not exist when the Claimant left the NHS pension scheme. This was followed by a further communication from Mr Marshall of 4 October saying, inaccurately, that the policy had been approved on 20 February 2017 and applied to all staff from that date. This prompted the Claimant to make a formal application for benefits under the policy which resulted in Mr Marshall advising the Claimant on 16 October that the Claimant was not eligible for

a Pension Restructuring Payment as the policy was not in place when he had left the pension scheme in 2013. Shortly thereafter the Claimant gave notice of his resignation from the Respondent's employment.

18. Correspondence from October 2017 onwards was copied into the Claimant's BMA representative and the Claimant said that he was advised by a succession of 4 BMA representatives during the period culminating in his raising of internal grievances. The Claimant's correspondence of 7 October referred to his treatment as discriminatory and the Claimant confirmed to the Tribunal that he had in his mind then the potential of him having suffered from discriminatory treatment.

19. On 6 November the Claimant raised an appeal against Mr Marshall's decision on eligibility for the Pension Restructuring Payment. Mr Marshall responded on 23 November seeking to further explain why he felt the Claimant was not eligible. The Claimant requested on 16 December 2017 a stage 3 appeal hearing in line with the Respondent's grievance policy.

20. A letter to all consultants from the Respondent of 22 December referred to the policy, saying it was likely to apply to a relatively small number of staff and had been developed as a retention measure to try to avoid the loss of skilled and experienced staff.

21. The Claimant left the Respondent's employment on 31 January 2018.

22. The Claimant felt forced to reiterate his request for a stage 3 appeal hearing and, after initially suggesting this be dealt with by written representations, Mr Marshall accepted the Claimant's request for a hearing. Arrangements were subsequently made and his grievance was heard on 9 May 2018. The Claimant received a letter dated 24 May informing him that his appeal had been unsuccessful. He lodged his Employment Tribunal complaint on 20 June 2018 having commenced ACAS Early Conciliation on 18 June 2018.

23. The Claimant had left the NHS pension scheme, as stated above, in 2013 when he was 54 years of age. At the implementation date of the policy (with backdated effect) as from April 2016 the Claimant was just under 57 years of age. Two other consultants, in common with the Claimant, had left the pension scheme before the implementation date and applied for a Pension Restructuring Payment under the policy. They were both refused eligibility, one being at that point 47 years of age and the other 50 years old. 9 employees were successful in their applications, 3 of whom (including the Chief Executive) benefited most from the retrospective effect, having left the pension scheme from April to September 2016. Of the 9 who were granted the Pension Restructuring Payment, their ages as at the 2016 implementation date were 47, 49, 50, 51, 54, 54, 56, 56 and 57.

24. The Claimant maintains that these statistics ignore those consultants in the over 55 age group who simply did not apply for the benefit having, like the Claimant, left the NHS pension scheme prior to the policy implementation date. Information in respect of any such individuals has neither been disclosed by nor sought from the Respondent in circumstances where this category of employee had not been identified at the earlier Preliminary Hearing as relevant to the Claimant's complaints. There is no evidence of such individuals before the Tribunal.

25. The Tribunal has been taken to articles in NHS and pension publications highlighting the consequences of the £1 million Lifetime Allowance in making the retention of staff more difficult. These highlight the choice of individuals who have reached the Lifetime Allowance of continuing to pay into a pension scheme and risk significant financial penalties or to withdraw from the scheme. The Respondent's evidence was that the policy it implemented was considered to be a way of encouraging high earners to stay in the Respondent's employment rather than electing to retire. The Respondent said that it was keen to ensure that it kept valued and highly skilled members of staff and if it could to do so in a cost neutral way by offering the policy as a potential encouragement. The Respondent found it challenging to recruit and retain staff as a relatively small District General Hospital without teaching hospital status and in competition for staff from other larger trusts in the region.

26. The Respondent points the Tribunal to the well-recognised funding difficulties within the NHS and the need to utilise public funds appropriately with value for money being the key measure. Continuing to employ the experienced staff at which the policy was aimed simply meant, it maintained, under the policy, that instead of paying an amount of money by way of pension contributions, the sum was paid as an addition to salary and therefore, in that sense, was cost neutral. Mr Forsyth highlighted the additional cost to the Respondent of allowing individuals such as the Claimant who had left the pension scheme a significant time previously to receive a retrospective addition to their pay. He categorised a payment of such a sum in those circumstances to be a *"windfall"* which would be unacceptable from a responsible spending perspective and, also, in terms of effective corporate governance. He described the Claimant's suggestion of the application of a cut-off date of September 2013 to be *"entirely self-serving"* and having no logical basis in terms of the intention of the policy.

27. The Claimant's position was that the policy was a tool to provide the Chief Executive with a pay rise and that she was the only person to immediately benefit from a retrospective policy in circumstances where the Respondent was in financial difficulties. He considered it unusual for a policy to be effectively implemented before it had been finally agreed upon. He disputed that the policy was cost neutral. Employees who receive the benefit receive an amount over and above what they would have received had they simply become deferred members of the pension scheme. Had the policy not been

implemented, then the money which was paid as additional remuneration in lieu of pension benefits could have been spent on patient care. The Respondent would have been better off without introducing the policy at all.

Applicable law

28. Indirect discrimination, as defined in Section 19 of the Equality Act 2010, occurs where:

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

29. The relevant protected characteristics include age. Section 5 of the Act relates the protected characteristic to persons of a particular age group and to sharing the particular characteristic being a reference to persons of the same age group. This can mean persons of a particular age or range of ages.

30. As regards group disadvantage, Baroness Hale said in **Homer v Chief Constable of West Yorkshire Police 2012 UKSC 15** (paragraph 14):

> *"….. Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But, as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in Equality: the New Legal Framework, Hart 2011, pp 64 to 68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the*

fact that certain protected characteristics are more likely to be associated with particular disadvantages."

In **Games v University of Kent [2015] IRLR 202 EAT** Judge Richardson stated:

"It follows that it was not necessary for the Claimant, in order to establish particular disadvantage to himself and his group, to be able to prove his case by the provision of relevant statistics. These, if they exist, would be important material. But the Claimant's own evidence, or evidence of others in the group, or both, might suffice. This is, we think, as it should be: the experience of those who belong to groups sharing protected characteristics is important material for a court or Tribunal to consider. They may be able to provide compelling evidence of disadvantage even if there are no statistics at all. A court or Tribunal is, of course, not bound to accept such evidence. It should, however, evaluate it in the normal way, reaching conclusions as to its honesty and reliability, and making findings of fact to the extent that it accepts the evidence."

31. Another key passage in **Homer** relates to what is now section 19(2)(d) – the issue of justification. Consideration of section 19(2)(d) involves approaching the issue of justification in a structured way, asking the right questions (paragraph 26). These questions were outlined as follows.

"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: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110*.*

20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293*,* [2006] 1 WLR 3213*, at [151]:*

". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69*, 80:*

"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?"

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 *[31, 32], it is not enough that a reasonable employer might think the criterion justified. The Tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."*

At paragraph 22 in **Homer** Lady Hale added that: *"To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so." "A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate."*[23]. The availability of non-discriminatory alternatives is relevant: see [25]."

32. The Tribunal refers to the Court of Appeal case of **Harrod v Chief Constable of West Midlands Police 2017 ICR 869** where LJ Bean said:

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

"32. The first step in the analysis must be to identify the PCP or PCPs which had the discriminatory effect complained of. As noted above, the Appellant defined the relevant PCP(s) as "all factors taken into account … at the decision-taking meetings"; and the Tribunal accepted that definition. But, as we have said, that seems too general a description. For the purpose of a claim of indirect discrimination the PCP should be defined so as to focus specifically on the measures taken – that is, the thing or things done – by the employer which result in the disparate impact complained of (cf. Kraft Foods UK Ltd v Hastie [2010] ICR 1355*, at paras. 9-10). In the present case that would appear to mean that the relevant PCP is the cheapness criterion. No doubt other features of the selection process…..potentially affected the outcome; but the only feature which had a disparate impact as between applicants of different ages was the underlying selection on the basis of relative cost of the benefits payable under the CSCS.*

33. The next step must be to identify the aim for the pursuit of which the cheapness criterion constituted the means. Plainly the criterion was a means of selecting between applicants, but it is necessary to identify what aim selection was intended to achieve. This is rather less straightforward. The immediate aim of selection was to bring the number of applicants down to a level the cost of which came within the £12m budgeted for the exercise. But it could be argued that it is necessary to include within the definition of the

aim the carrying out of the redundancy/early retirement exercise itself, and perhaps also to ask what the aim of the exercise was. In that case the answer would be that the aim of the exercise was to reduce headcount, which in turn was a means of ensuring that the Appellant's costs did not exceed its revenue. The truth is that the distinction between means and aim is not always easy to draw.

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

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

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

37. The essence of the Tribunal's reasoning was that the Appellant had not demonstrated a "real need" to limit its spending on the Scheme to £12m – or, to put it another way, to limit its spending on all three schemes to £50m. It held that it had not done so because it had not shown that payment of the additional £19.7m was "unaffordable". By that it evidently meant that the Appellant had not shown that the funds were absolutely unavailable, in the sense that they could not be paid without insolvency: it pointed out that the Appellant's reserves far exceeded that amount (albeit that Treasury approval was needed to spend them) and that later in the same year, in the ATP, it contemplated spending a far greater figure. In our view, to apply a test of unaffordability in that sense is to fall into the error of treating the language of "real need", or "reasonable needs", as Balcombe LJ put it in Hampson, as connoting a requirement of absolute necessity. It is well established that that is not the case: see

the judgments of the Court of Appeal in Barry v Midland Bank ([1999] ICR 319*, at p. 336 A-B) and in Cadman v Health and Safety Executive* [2005] ICR 1546*……..[where] Maurice Kay LJ said, at para. 31 (p. 1560 B-C):*

"The test does not require the employer to establish that the measure complained of was "necessary" in the sense of being the only course open to him. That is plain from Barry. … The difference between "necessary" and "reasonably necessary" is a significant one …"

The effect of that principle, applied to a case like the present, seems to us to be that an employer's decision about how to allocate his resources, and specifically his financial resources, should constitute a "real need" – or, to revert to the language of aim and means, a "legitimate aim" – even if it is shown that he could have afforded to make a different allocation with a lesser impact on the class of employee in question. To say that an employer can only establish justification if he shows that he could not make the payment in question without insolvency is to adopt a test of absolute necessity. The task of the employment Tribunal is to accept the employer's legitimate decision as to the allocation of his resources as representing a genuine "need" but to balance it against the impact complained of. This is of course essentially the same point, adjusted to the different formulation of the test, as we make at para. 34 above. If the Tribunal had carried out that exercise it would, we believe, inevitably have come to the same conclusion as we have reached, on our approach, at para. 35.

38. We have not in reaching this conclusion lost sight of the fact that the cheapness criterion was indeed disproportionately unfavourable to employees in the Claimants' age group, and we can well understand their disappointment at their non-selection. But it is fundamental that not all measures with a discriminatory impact are unlawful……."

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

33. In performing the required balancing exercise therefore, an employment Tribunal must assess not only the needs of the employer, but also the discriminatory effect on those who share the relevant protected characteristic. In **University of Manchester v Jones 1993 ICR 474** the Court of Appeal held that this involved both a quantitative assessment of

the numbers or proportions of people adversely affected and a qualitative assessment of the amount of damage or disappointment that may result to those persons, and how lasting or final that damage is. Particular hardships suffered by the Claimant may also be taken into account provided proper attention is paid to the question of how typical those hardships are of others who are adversely affected. The greater the discriminatory effect, the greater the burden on the employer to show that the PCP corresponds to a real commercial objective and is appropriate for achieving that objective. The degree of justification required is "proportionate" to the degree of disparate impact caused by the employer's practice or policy.

34. Applying the legal principles to the facts found by it, the Tribunal reaches the following conclusions.

Conclusions

35. The Claimant's complaint of indirect age discrimination relies on the application of the Respondent's policy disadvantaging those in the age bracket of 55+.

36. The Tribunal accepts that the Respondent applied the Lifetime Allowance – Pensions Restructuring Payments Policy retrospectively backdated to give eligibility only to those in the NHS pension scheme as at 1 April 2016.

37. The first question is therefore whether that put other people in the 55+ age group at a disadvantage when compared persons who were in (in particular, on the Claimant's case) younger age groups.

38. In the circumstances of this case, the age range of people likely to be eligible to benefit under the policy was only ever going to be employees aged from approximately their late 40s to normal retirement age. Employees would ordinarily have had to have been in NHS (and/or other) employment for a significant number of years to have built up sufficient pension benefits to be at risk of exceeding the Lifetime Allowance.

39. There is a logic, as the Claimant maintains, to older employees being more likely to have hit the limit of the Lifetime Allowance pre-2016 (and not benefitted from the policy), but the Tribunal has before it no evidence of such individuals and the choices they made. Furthermore, the question is complicated by the fact that the Lifetime Allowance has been in the past significantly greater than that as at April 2016. It is speculative to assume that consultants in an older age bracket pre-2016 have reached the Lifetime Allowance level and left the NHS pension schemes in significant numbers. The Tribunal fundamentally must base its determination on evidence and not on speculation.

40. The evidence does not in fact assist the Claimant. There is a group of 12 employees who have sought to benefit from the policy. Of the 3 who were

refused eligibility only the Claimant was in the 55+ age category, the other 2 being significantly younger than the Claimant at 47 and 50 years of age as at the cut-off date. That does not suggest a particular disadvantage suffered by those aged 55+. The evidence of those who were accepted under the policy similarly does not assist the Claimant. Of the 9 who benefited, 3 were aged 55+ and the others benefiting in an age range from 47 – 54 years of age. All the Tribunal can deduce is that employees hit the Lifetime Allowance at a variety of ages with the key factor being their prior pensionable earnings in either NHS or private pension schemes or a combination of the two. The Claimant's inability to show a particular group disadvantage in the application of the policy is fatal to his case.

41. Even if the Claimant had been able to show a particular disadvantage, as well as his own personal disadvantage, the Respondent is able to defeat a complaint of indirect discrimination if it can show that the policy it applied was a proportionate means of achieving a legitimate aim.

42. The Tribunal accepts that the genuine aim of the policy was to encourage the retention of experienced and highly paid staff, who would otherwise be financially disadvantaged by the application of the (reduced) Lifetime Allowance had they remained in employment and certainly within one of the NHS pension schemes. The introduction of the policy was prompted by the Chief Executive's personal request for her own benefit, but the policy created was to deal with wider retention issues which were, on the evidence, a genuine issue within the Respondent and the wider NHS particularly given the significant reduction in the level of the Lifetime Allowance in 2016. The policy indeed did benefit a number of consultants, not just the Chief Executive, including with retrospective effect from May - August 2016.

43. Whilst going to the question of proportionality also, the limit of the retrospective effect was an intrinsic feature of the Respondent's legitimate aim as found by the Tribunal in that it was to benefit those and encourage those to stay who might otherwise have left the Respondent's employment. The aim was not to pay benefits to individuals who had already some time earlier left the pension scheme and yet remained within the Respondent's employment. Those who left the pension scheme at a time from when the policy was under construction (and who therefore might have been aware of the benefits the Respondent was devising) were allowed to take advantage of it, but not those who had made their decision earlier and without any potential expectation of benefit.

44. The limitation of retrospective effect was proportionate in that the Respondent, by definition, did not need to incentivise people to stay who had already chosen to do so and receive a consultant's salary but no further pension benefits. The Respondent incurred a cost in implementing the policy in that, without it, those employees who benefited might have stayed in the Respondent's employment in any event without the need for any incentive and the Respondent would in those cases have ceased to make

pension contributions. However, the Respondent put a value on the additional payments as being an increase in the chance of senior/experienced employees staying. The backdating of the policy earlier than April 2016 and of the additional Pension Restructuring Payments would simply have produced a cost which had never existed and would provide no potential benefit to the Respondent in that it would have been demonstrably unnecessary - those employees receiving the payment retrospectively had already decided to and had continued to work for the Respondent.

45. Many benefits change over time with cut-off points and eligibility criteria introduced. This may seem unfair and indeed can operate unfairly as with the reduction in the Lifetime Allowance itself or, for instance, the increase to the state pension age dependent upon an individual's date of birth. The Claimant's fundamental grievance is of unfair treatment and in particular when compared to the benefits received by the Chief Executive. However, his complaint before this Tribunal is not and cannot be of unfair treatment. It is only of indirect age discrimination and, even if there had been a disadvantage to the Claimant's age group, the Respondent has shown that the policy introduced for all staff was a proportionate means of achieving its legitimate aim.

46. Even if all of the aforementioned points had been determined in the Claimant's favour, it would have been necessary for the Tribunal to address the issue of applicable time limits. The Claimant was informed in October 2017 that he could not benefit from the policy. Given the applicable time limit of three months, his claim ought therefore to have been lodged with the Tribunal in January 2018. His claim was in fact lodged on 20 June, around 6 months out of time. The Tribunal does not consider that time ran from a later date of 29 March 2018 when the Partnership Forum simply corrected an omission regarding a lack of statement regarding the implementation date in the policy, which had already been agreed and was in place. The Claimant was unaware of that correction, albeit certainly not unaware from October 2017 of the cut-off date of 1 April 2016 and was not basing his determination as to whether or not to pursue a Tribunal complaint on that event.

47. In the Claimant's evidence before the Tribunal he has advanced no explanation for his delay in submitting his Tribunal complaint. At most the Tribunal could infer from his witness statement evidence that he was exhausting the internal processes before submitting a Tribunal complaint but the Claimant has not said so in terms. In any event, that internal process concluded on 24 May 2018 when he was told that his appeal was unsuccessful. There was then a further month before the Claimant lodged his complaint with again no explanation for delay. This indeed is in circumstances where the Claimant was aware of the potential that he had suffered from unlawful discrimination as far back as October 2017 and where he had BMA advice throughout. In the light of the Claimant having

advanced no explanation for his delay in commencing Tribunal proceedings, the Tribunal cannot determine it to be just and equitable to extend time and certainly not to 20 June 2018 to have allowed the Tribunal in any event to have had jurisdiction in this matter.

48. For all these reasons the Claimant's complaint must fail and is dismissed.

Employment Judge Maidment

Date 29 January 2019