Case No: CO/1944/2006

Neutral Citation [2006] EWCH 2373 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 27th September 2006

Before :

Andrew Nicol QC, sitting as a Deputy Judge of the High Court

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Between :

UNISON	**Claimant**
- and -	
The First Secretary of State	**Defendant**

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(Transcript of the Handed Down Judgment of
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James Goudie QC and Ijeoma Omambala (instructed by **Helen Phillips,** Legal Officer, UNISON) for the the Claimant
James Eadie (instructed by **Treasury Solicitor)** for the Defendant

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Judgment

Andrew Nicol QC :

Introduction

1. In this application for judicial review the union, UNISON, seeks to quash certain changes to the Local Government Pension Scheme ('LGPS') which are to be made by the Local Government Pension Scheme (Amendment) Regulations 2006 SI 2006 No. 966 ('the Amending Regulations') and which are due to come into force on 1st October 2006. In very brief summary, UNISON argues that the change was put forward by the government as necessary in order to comply with a directive of the European Union, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment. In particular, the Directive requires Member States to take measures in relation to discrimination on grounds of age. UNISON argues that the defendant misconstrued the Directive and its application. Properly understood, the union says, the Directive did not apply to the feature of the LGPS which is in issue, either because that feature did not constitute discrimination on grounds of age, or because it was excluded from the scope of the Directive, or, in the third alternative, because any age discrimination in this feature of the LGPS was justifiable and the directive permits age discrimination which is justified. Unison also contends that the projections used by the government as to the costs and benefits of the change were seriously flawed.

2. The LGPS is established under the Superannuation Act 1972 and is governed by regulations issued under s.7 of that Act by the Secretary of State. The current regulations are the Local Government Pension Scheme Regulations 1997 SI 1997 No 1612 as amended. The particular feature of the scheme in issue in these proceedings is known as the '85 year rule' and is to be found in reg.31 of the 1997 Regulations. This says:

> '(1) If a member leaves a local government employment (or is treated for these regulations as if he had done so) before he is entitled to the immediate payment of retirement benefits (apart from this regulation), once he is aged 50 or more he may elect to receive payment of them immediately.
>
> (2) An election made by a member aged less than 60 is ineffective without the consent of his employing authority (but see paragraph (6)).
>
> (3) If the member elects, he is entitled to a pension and retirement grant payable immediately.
>
> (4) If the sum –

(a) of the member's age in whole years on the date his local government employment ends or the date he elects, if later,
(b) of his total membership in whole years, and
(c) in a case where he elects after his local government employment ends, of the period beginning with the end of that employment and ending with the date he elects,

is less than 85 years, his retirement pension and grant must be reduced by the amounts shown as appropriate in guidance issued by the Government Actuary (but see paragraphs (5) and (6) and regulation 36(5) (GMPs)).

(5) A member's appropriate employing authority may determine on compassionate grounds that his retirement pension and grant should not be reduced under paragraph (4).

(6) If a member who has left a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body –

(a) he may elect to receive payment of the retirement benefits immediately, and
(b) paragraphs (2) and (4) do not apply.

(7) If a member does not elect for immediate payment under this regulation, he is entitled to receive a pension and grant without reduction, payable from his NRD [I interpose that this stands for 'Normal Retirement Date' which is prescribed as 65 for both men and women] or from such earlier date on or after his 60th birthday as the member elects on which the sum of the items referred to in sub-paragraphs (a) to (c) of paragraph (4) is 85 years or more.

(8) An election under paragraph (1) must be made by notice in writing to the member's scheme employer.'

3. In summary, then, a member of the LGPS is entitled to receive a pension at 65. Between 60 and 65 the member is also entitled to elect to receive a pension but this will be reduced to reflect the fact that it is being taken earlier than 65 unless the member fulfils the 85 year rule i..e. that in his or her case the sum of (a) age when employment ends, (b) total years in the scheme and (c) the period between the end of employment and date of election is 85 years or more. Between 50 and 60 the member may elect to receive a pension, but only with his or her employer's consent. In that case there will also be a

reduction in benefits to reflect the fact that the pension is being taken earlier than 65 unless the 85 year rule is satisfied.

4. The position of local government employees is different from those in other parts of the public service where the normal retirement date has in the past been 60, although the government has proposed measures to increase it to 65. This case is only concerned with the LGPS.

5. Regulations to abolish the 85 year rule were made in 2004 (see Local Government Pension Scheme (Amendment) (No.2) Regulations 2004 SI 2004 No. 3372) but before this change was due to come into force on 1st April 2005, the amending regulations were themselves negated (see Local Government Pension Scheme (Amendment) Regulations 2005 SI 2005 No. 1903). Consequently, the 85 year rule survived.

6. Before turning to the 2006 Regulations and their genesis, it is convenient to say a little more about the Directive. This was adopted on 27th November 2000. It covers many different types of discrimination (religion, belief, disability, age and sexual orientation), but the only aspect which concerns the present proceedings is discrimination on grounds of age. In this regard, Member States have until 2nd December 2006 at the latest to take measures to implement the Directive (see Article 18).

7. The preamble to the Directive includes the following:

> '(14) This Directive shall be without prejudice to national provisions laying down retirement ages
>
> ….
>
> (25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.'

8. The purpose of the Directive, as set out in Article 1, is to lay down a general framework for combating discrimination *inter alia* on grounds of age. Article 2(1) explains that the principle of equal treatment means that there shall be no direct or indirect discrimination on one of the specified grounds. Direct discrimination is defined in Article 2(1)(a) as

> ‘where one person is treated less favourably than another is, has been, or would be treated in a comparable situation, on any of the grounds referred to in Article 1.’

Where an apparently neutral provision has the effect of putting persons at a disadvantage by reference to any of the grounds covered by the Directive this will amount to indirect discrimination unless the provision in question is justified (see Article 2(2)(b)(i)), but indirect discrimination is not at issue in these proceedings. The Directive applies to all persons as regards both private and public sectors in relation to (amongst other things) ‘employment and working conditions, including dismissals and pay’ (see Article 3(1)(c))

9. While Article 2 includes no general defence of justification to direct discrimination, special provision is made for discrimination on grounds of age. Article 6 provides:

> ‘(1) Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds 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.
>
> Such differences of treatment may include, among others:
>
> (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
>
> (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
>
> (c) the fixing of a maximum age for recruitment which is based on the training requirements for the post in question or the need for a reasonable period of employment before retirement.
>
> (2) Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.’

10. The 85 year rule had been preserved in 2005, but the costs involved with its retention continued to be examined by the government. On 2nd December 2005, the Minister for Local Government, Phil Woolas, announced that the government was about to consult on proposed amendments to the LGPS which would include the removal of the 85 year rule as from 1st October 2006. Consultation is required before regulations are made – see Superannuation Act 1972 s.7(5). Mr Woolas referred to the studies which had been carried out as to the cost of retaining the 85 year rule and the government's view that the proposed regulations would 'secure the on-going solvency of the Scheme without any additional calls on central or local government budgets.' He also said

> 'Further scheme amendments are also necessary to implement the terms of the European Employment Directive 2000/78/EC which establishes a general framework for equal treatment in employment and occupation. To give effect to the Directive and compliance with the timetable for associated Government legislation on age discrimination and employment law being introduced by DTI, the effective date for the removal of the rule of 85 from the LGPS will be 1 October 2006.'

He concluded,

> 'The continued affordability and viability of the Scheme, as well as its acceptability to taxpayers, remains a central theme of the Government's intentions for the LGPS. So too is our commitment towards ensuring the Scheme offers an equality proofed pension framework for all its increasingly diverse and part-time workforce. Delivering an effective and affordable balance between the cost of its provision to employers and tax payers on the one hand, and fairness to Scheme members on the other, remains a priority, within the overall resource framework of local government and of other employers within the Scheme.'

11. The consultation went ahead. Discussions took place with, amongst others, the relevant government department, UNISON and the Government Actuary's Department. UNISON was keen to preserve the 85 year rule or, failing that, to maximise the transitional provision benefit for current members. On 28th March 2006 Mr Woolas made a further statement to the House of Commons. He recalled that LGPS was a guaranteed final salary pension scheme which was also a funded scheme. He said

> 'In deciding on the regulations needed to ensure that all members' pensions are safe, and prudently funded, the Government have to take account of the advice of actuaries, as well as representatives of employers and members, and other interested parties. My 2 December statement made clear the Government's intentions to secure the scheme's continued

affordability and viability, without placing an unfair burden on tax-payers. The Government remain committed to that objective, and also to providing an equality-proofed scheme which is flexible and attractive in its provisions to employees and employers, both now and in the future.'

He continued,

> 'To ensure compliance with European Union age discrimination legislation, set out in Council Directive 2000/78/EC, and to secure ongoing cost stability, the rule of 85 will be removed from the Scheme with effect from 1 October 2006.'

12. The Amending Regulations were made the following day, 29th March 2006. Regulation 39 effectively abolishes the 85 year rule. By regulation 1(3)(c), this change will come into effect on 1st October 2006. The Schedule to the Regulations made transitional provisions. With further amendments which were later made by The Local Government Pension Scheme (Amendment) (No.2) Regulations 2006 SI 2006 No. 2008 ('the Amendment (No.2) Regulations'), those current members who will be 60 on or before 31st March 2016 continue to enjoy the benefits of the 85 year rule and there is a degree of protection to those who will be 60 or more after 31st March 2016 but before 1st April 2020. The relevant government department is now the Department for Communities and Local Government. The change makes no difference to the argument and I shall refer to the relevant Secretary of State from time to time as the Defendant.

Is it necessary to determine the discrimination questions?

13. Mr Eadie on behalf of the Defendant has a preliminary submission in connection with the Claimant's arguments based on the Directive. He takes issue with those arguments, but he submits that, even if they were right, they would not assist the Claimant. This is because there were two independent reasons which led the government to abolish the 85 year rule. The government did believe that this was required by the Directive, but the other reason was the need to control the cost of the Scheme. In addition to the passages in Mr Woolas's statements which I have quoted above he refers to the witness statement of Brian Town who is employed by the Department of Communities and Local Government and is Head of Branch providing policy advice on the LPGS. Mr Town says,

> 'The Deputy Prime Minister has concluded that the 85 year rule is age discriminatory and therefore needs to be removed from the Scheme in order to comply with the Directive…However, even without this need to comply with the Directive, the Deputy Prime Minister would have removed the rule of 85 on policy grounds on the basis of proper management of local authority budgets and stabilising the costs of the

pension scheme and the choices to be made on spending. Without doing so the liability, identified as some 1.5 – 2.5% of pensionable pay, would have fed through either into a likely need to increase council tax or making equivalent budgetary savings with potential for job losses and/or reductions in services.'

14. Mr Eadie relies on the decision of the Divisional Court in *R v Broadcasting Complaints Commission ex parte Owen* [1985] QB 1153 in which May LJ said at p. 1177

> 'Where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review. In such a case, looked at realistically and with justice, such a decision of such a body ought not to be disturbed….
>
> Another approach to the same problem in such circumstances, which really reflects the same thinking is this: the grant of what may be the appropriate remedies in an application for judicial review is a matter for the discretion of this court. Where one is satisfied that although a reason relied on by a statutory body may not properly be described as insubstantial, nevertheless even without it the statutory body would have been bound to come to precisely the same conclusion on valid grounds, then it would be wrong for this court to exercise its discretion to strike down, in one way or another, that body's conclusion.'

15. Mr Goudie QC, on behalf of the Claimant, argues that, if he is successful in relation to his discrimination argument, it is not necessary for him to show that an erroneously perceived need to comply with the Directive was the dominant reason why the decision was taken to abolish the 85 year rule (although he would say that at the very least, this was a very powerful reason). It is enough for the Claimant to show that the legally flawed factor materially influenced the Defendant's conduct. Similarly, he submits that it is not necessary for him to show that, without the discrimination argument, the government would have decided to keep the 85 year rule. It is sufficient that it might have done so. He argues that an impugned factor would only be legally irrelevant if the same decision would inevitably have been taken if that factor had been disregarded. He refers to the judgment of Glidewell J. in *R v ILIEA ex parte Westminster Council* [1986] 1 WLR 28 at 48-49 and the decision of the Court of Appeal in *Simplex G.E. (Holdings) v Secretary of State for the Environment* (1988) 57 P&CR 306 at 324-327.

16. Mr Goudie does not challenge the accuracy of Mr Town's statement, but, he says, the Court should look carefully at what it says and, more importantly, at what it does not say. Mr Town, he notes, talks only of the decision to end the 85 year rule. He is not speaking of the transitional arrangements. Mr Goudie draws attention to the Final Regulatory Impact Statement in relation to the Regulations that were made in March 2006. The Statement identified as one of the issues in the context of which decisions had to be made in relation to transitional protection as 'The 85 year rule would also have to be removed by 1 October 2006 in any case in order to comply with domestic age discrimination legislation to implement the Framework Directive for equal treatment in employment and occupation.' The Regulatory Impact Statement then examines various different options for transitional provisions. Three of the options contemplate varying degrees of temporary continuation of the 85 year rule. In each case the Statement identifies as one of the social costs of the option 'Continuation of a discriminatory provision for those who will benefit from [the option]'.

17. As far as the law is concerned, I am not sure that there is a great deal of difference between Mr Goudie and Mr Eadie. So far as there is a difference, I consider that the *BCC* case provides the most helpful guidance. It was referred to by the Court of Appeal in *Simplex* without criticism. I note that in the *Simplex* case Staughton LJ said at p. 329 'the authorities cited by Purchas LJ show that, where one of the reasons given for the decision is bad, it can still stand if the court is satisfied that the decision-making authority would have reached the same conclusion without regard to that reason.' I see no difference between that formulation and the one adopted by Puchas LJ.The third judge, Sir Roualeyn Cumming-Bruce, agreed with both of the other members of the court which again suggests that there was no substantial difference between Staughton LJ and Purchas LJ. I consider that Staughton LJ's formulation is the one that I should follow.

18. Mr Town's evidence speaks directly to this issue so far as the removal of the 85 year rule is concerned. There is no evidence to contradict what he says, namely that the Deputy Prime Minister would have removed the rule of 85 on policy grounds even without the need to comply with the Directive. The perceived need to comply with the Directive certainly did feature prominently in the government's explanations for why it was taking this step. In Mr Goudie's words it seems that it was a strong element in the government's reasons for ending the 85 year rule. But on the basis of Mr Town's evidence (which is consistent with the prominent place that was also given to the cost and financial viability considerations in the government pronouncements), I am satisfied that even if the Defendant did err in its approach to the Directive, it would still have made the decision to end the 85 year rule.

19. I do not accept Mr Goudie's submission that a different conclusion should be reached in respect of the transitional arrangements. Mr Eadie commented

correctly that the Claim Form made no reference to the transitional arrangements. He did not suggest that the Claimant should be precluded from making its arguments in relation to them, but it did mean that it would be unfair to draw an inference adverse to the Defendant from Mr Town's failure to say in terms that the transitional arrangements would also have been the same independently of the government's view of its obligations under the Directive. I agree.

20. Mr Eadie also submitted, that it was the case that the government considered that the 85 year rule was contrary to the Directive and it is unsurprising that the options for various transitional provisions should draw attention to the obvious corollary that the longer the 85 year rule continued (on this basis) the longer discrimination would continue. The issue, however, is whether the court is satisfied the transitional arrangements would (like the primary decision to abolish the 85 year rule) have remained the same even if the discrimination aspect was disregarded. On all the evidence it appears to me that the cost and financial viability of the LGPS was a major consideration. I see no sensible reason for distinguishing the primary question as to whether the 85 year rule should be abolished and the consequential questions as to what transitional protection should be made. A further pointer in that direction is contained in the Final Regulatory Impact Statement. This examined, as I have said, various options for transitional protection. One of the options (option 7) was to protect those who would otherwise have satisfied the 85 year rule at age 60 or above by 2012. Annex H paragraph 67 commented,

> '67. Even though the 85 year rule is age discriminatory, articles 2.2 and 6.2 of the Directive 2000/78/EC permit Member States to objectively justify continuation of such discrimination to achieve a legitimate aim. It is considered that the protection of those scheme members closest to retirement who do not have time to make alternative arrangements to off-set any reduction in their benefits as a result of the removal of the 85 year rule is objectively justified.
>
> <u>Economic</u>
>
> 68. **Benefits** - None – these protections were assumed at the 2004 valuations and so are already reflected in employer contribution rates for 2005/6 – 2007/08.
>
> 69. **Costs** - None - these provisions were assumed at the 2004 valuations and so are already reflected in the employer contribution rates for 2005/06 – 2007/08.'

Another of the options (option 9) was to protect those who would otherwise have satisfied the 85 year rule before 2018. As to this paragraph 82 of Annex H to the Statement said,

> '82. The Government's view is that extending the 2012 protections until 2018 could also be justified on the same grounds as Option 7.
>
> Economic
>
> 83. **Benefits** – None
>
> 84. **Costs** – Around an additional £1 billion on top of the cost of 2013 protections as assumed at the 2004 fund valuations. This would mean that there would be less money available in the new-look scheme for benefit improvements for all scheme members.'

The choice made by the government in March 2006 was option 7. In my judgment, Mr Eadie can rightly point to this as evidence that where there were two options both of which, on the government's view of the Directive, canvassed the argument that could be lawfully adopted, the Defendant chose the option which better fitted with the economic considerations. I do not consider that this argument is undermined or affected by the later decision in July 2006 (when the Amendment (No.2) Regulations were made) to extend the transitional protection to those who would otherwise have satisfied the 85 year rule and were 60 or more by 2016.

21. Mr Goudie argued that the Government's position that change was necessary to comply with the Directive coloured the consultation that took place over the winter of 2005/2006. I do not accept that this is a reason why it is necessary to examine whether the Defendant's view of the Directive was correct. It is abundantly plain that there were repeated representations by the Claimant (and others who were concerned) which were directed to the cost issues and the appropriate methodology for calculating them. Similarly, these were the subject of extensive discussion between the parties. I am not satisfied that these were inhibited by the view which the Defendant took about the impact of the Directive.

22. In conclusion, I am satisfied that the Defendant's decision in relation to the transitional provisions would, like his decision to abolish the 85 year rule, have been the same independently of the view that he took as to the Government's legal obligations under the Directive.

In any event, did the Defendant misdirect itself as to the impact of the Directive?

23. Because of the conclusion to which I have come on the first issue, it is not strictly necessary for me to examine this second question. Mr Goudie, though,

said that the union considered that it might be material in any further discussions to know whether the government's approach to the Directive was legally sound. For what it is worth, therefore, I give my conclusion on these further matters which were fully argued out before me. It should also be borne in mind that the imminent implementation date for the amending regulations has meant that this judgment has had to be prepared expeditiously.

Does the 85 year rule amount to age discrimination at all?

24. Mr Goudie argued that it did not. He took me to the example in the Partial Regulatory Impact Statement of the Amending Regulations which set out the government's view that it was age discrimination. This said,

> 'The Government has concluded under this legislation the 85 year rule would be considered age discriminatory and therefore must be removed from the Scheme no later that 1 October 2006. This is because the 85 year rule takes the sum of the member's age and pensionable service to determine eligibility to pension benefit. If a member does not have sufficient age and pensionable service, they are not eligible for the benefit.
>
> The following example may help: The members must be in comparable situations but for their age; one is 61 and the other 63; they both have 22 years service and wish to retire; the 63 year old would have no actuarial reduction in their pension as they satisfied the 85 year rule, whereas the 61 year old would have an actuarial reduction. The reason for the different pension entitlements is on the basis of age; therefore the rule is age discriminatory.'

25. Mr Goudie commented that in this example the 63 year old would have no reduction because of the 85 year rule and the 61 year old would have a one year actuarial reduction. Mr Goudie invited me to contrast the position with that which would prevail if the 85 year rule was abolished. In that case, the pensions of both would be reduced by reference to the number of years before the normal retirement age (65) that they in fact retired. In the case of the 63 year old this would lead to a 2 year actuarial reduction. In the case of the 61 year old there would be a 4 year reduction. Thus, the disparity between the two members would be greater without the 85 year rule than it is with it.

26. In my judgment, this argument does not lead to the conclusion that the 85 year rule is not discriminatory. As Article 2(2)(a) of the Directive makes clear, direct discrimination occurs where one person is treated less favourably than another is or would be treated in a comparable situation. The distinguishing characteristic between the two cases must (for present purposes) be age. Mr Goudie's example contrasts the position where the distinguishing characteristic is the nature of the pension regime. It does not meet, still less undermine, the government's case that under the present regime, the 85 year

rule produces different outcomes where the distinguishing characteristic is age.

27. In the example in the Partial Regulatory Impact Statement, the younger member was disadvantaged. However, the 85 year rule in other situations can disadvantage an older member. Mr Eadie gave the following example,

> Member A and Member B join the Scheme at the same time. Member A joins the scheme at 30 and leaves after 15 years service. Member A satisfies the 85 year rule at 60 and may take the 15 years of preserved benefits at age 60 without reduction. Member B joins the scheme at age 45 and leaves after 15 years service. Member B does not satisfy the 85 year rule until age 65. Therefore Member B cannot take 15 years of benefits without reduction until he is 65. The only difference between the two members is the age at which they joined the Scheme.

28. At some stage it seems that the Claimant sought to persuade the Government to take a different course by providing them with a copy of an opinion from Mr Goudie dated 11th November 2005. In that he said 'The Government is advised that the 85 year rule will be age discriminatory under the Employment Framework Directive. I am inclined to agree.' Neither Mr Goudie nor his client are estopped from arguing the contrary in these proceedings, but in this case I respectfully think that his first thoughts were correct. The 85 year rule is discriminatory on grounds of age.

Is the 85 year rule taken out of the scope of the Directive by Article 6(2)?

29. I have set out the terms of Article 6(2) in paragraph 9 above. Mr Goudie argues that the 85 year rule is concerned with 'entitlement to retirement benefits'. He refers to *R v Secretary of State for Social Security ex parte EOC* [1991] ECR 1-4297. This judgment of the European Court of Justice concerned Article 7(1)(a) of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment of men and women in matters of social security. This Directive allowed Member States to exclude certain matters from the scope of the Directive, including 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.' The issue in the case arose because men were required to pay national insurance contributions for 44 years before receiving an unreduced state pension whereas women had to pay contributions for only 39 years. The European Court said at paragraph 3 of the judgment,

> 'Since the text of the derogation refers to the 'determination of pensionable age for the purposes of granting old-age and retirement pensions', it is clear that it concerns the moment from which pensions become payable. The text does not, however, refer expressly to

> discrimination in respect of the obligation to contribute for the purposes of the pension or the amount thereof. Such forms of discrimination therefore fall within the scope of the derogation only if they are found to be necessary in order to achieve the objectives which the Directive is intended to pursue by allowing Member States to retain different pensionable age for men and women.'

The Court considered that the purpose of the derogation was to allow member states to maintain (at least temporarily) this form of discrimination to avoid disrupting the financial equilibrium of the pension systems. If that object was to be achieved it was necessary to allow Member States to continue as well the contribution structure which was also part of the same financial equilibrium. To find the contrary would render nugatory the purpose of Article 7(1)(a). It therefore concluded that differential contribution periods were also outside the scope of the Directive.

Mr Goudie argues that the 85 year rule is similarly integral to the determination of age at which entitlement to retirement benefits arises. It should therefore be treated as within the implicit scope of the derogation in Article 6(2).

30. Mr Eadie argues that the 85 year rule does not come within the express terms of Article 6(2). It fixes the point at which there is an entitlement to an unreduced pension by reference to age and time since the member joined the scheme. Because Article 6(2) is a derogation from the fundamental principle of the Directive, it should be construed narrowly. He emphasises that the ECJ in the *EOC* case used a test of necessity. The 85 year rule is not necessary to achieve the object of Article 6(2). In the case of age discrimination, even direct discrimination can be justified but an expansive interpretation of Article 6(2) would allow a discriminatory practice to continue even if it could not satisfy the justification criteria.

31. In my view, the 85 year rule does not come within the derogation.

    a. I accept that the phrase 'entitlement to retirement benefits' would embrace in the present context, entitlement to *unreduced* retirement benefits. From age 60 a member of the LGPS is entitled to *some* retirement benefit, but the benefit will be reduced if the 85 year rule is not fulfilled. I think that this follows from the *EOC* case where the issue was also whether a man who was only entitled to a reduced pension because his contributions had been paid for more than 39 years but less than 44 could rely on the Directive. It was never suggested that he was outside the terms of the Directive because he could have received *some* pension.

    b. However, the 85 year rule does not simply lay down different ages at which there will be an entitlement to the unreduced pension. It adopts a

formula which is essentially based on two elements: age at retirement (or more accurately age at which the member elects to receive a pension) and the age at which the member joined the scheme. The combined effect of paragraphs (b) and (c) of regulation 31(4) – see paragraph 2 above – is that it is a matter of indifference whether after joining the scheme, the member continues in local government employment or not. I emphasise that I am here discussing the impact of the 85 year rule. Length of service will have an impact elsewhere in the computation of the size of the pension but not via the 85 year rule. Simplifying the position somewhat (but not by much) it is possible to tell whether the 85 year rule is fulfilled by using a formula A + (A-B) where A is the age at election to receive a pension and B is the age at the time the member joined the Scheme. If the formula produces a figure of 85 or more the rule is satisfied.

c. Mr Goudie comments that Article 6(2) expressly allows different ages to be fixed for different employees, groups of employees or categories of employees. He accepts that the 85 year rule uses age at date of retirement plus other criteria, but those other criteria, he would submit, do no more than define the groups or categories of employees who will have different ages at which they will receive unreduced pensions.

d. Attractively though this argument was put, it seems to me that it is flawed. The other significant criterion is age at the date of joining the Scheme (B in my simplified formula). In my view, the other criteria which are used to define the groups or categories of employees cannot be ones which are themselves age related.

e. It is true that Article 6(2) also allows schemes to continue which fix differential ages for *admission* to pension schemes. But that aspect of the derogation is not relevant to the present dispute. Similarly, the derogation allows the use of age criteria in actuarial calculations. But that aspect is also irrelevant to the present dispute.

f. Nor do I think that it is necessary to interpret Article 6(2) in the way that Mr Goudie contends in order to give proper effect to the purpose of the derogation. The *EOC* case is not analogous. The purpose of allowing different retirement ages to be specified for different groups of workers will not be rendered nugatory or futile if the 85 year rule falls outside of the derogation. Furthermore, the Directive would allow the practice to continue if it was justified even though it was directly discriminatory and was not taken out of the scope of the Directive by the derogation.

Did the Government err in law when it decided that the 85 year rule could not be justified under Article 6(1)

32. I have shown that Article 6(1) does allow even direct age discrimination to be justified. As Article 6(1) spells out, this means that the difference in treatment on grounds of age must be objectively and reasonably justified by a legitimate aim and the means of achieving the aim must be appropriate and necessary. Mr Goudie argues strongly that the 85 year rule is justified in this sense and that the government erred in law when it concluded otherwise. For this additional reason he submits the Defendant misdirected himself when he regarded abolition of the 85 year rule as being required by the Directive.

33. There was an important difference here between the parties as to the approach which I should adopt to this issue. Mr Goudie argued that it was for the Court to rule on the merits. In other words, he submitted, it was for me to say 'yea' or 'nay' whether the 85 year rule was justified under Article 6(1). Mr Eadie, on the other hand, submitted that this was wrong. In any subsequent litigation between a claimant and the government, it would be for the government, if it thought right, to seek to persuade the court or tribunal that the 85 year rule pursued a legitimate aim and was necessary and appropriate. The Defendant had come to the conclusion that he could not do that. That was a judgment which he had made. This Court could only interfere if that judgment was one which no reasonable minister could reach.

34. In my judgment, Mr Eadie is right. This Court is not an employment tribunal or Court hearing a private claim between an employee contending that the Rule of 85 is discriminatory and a respondent or defendant seeking to defend a practice which it believes is justified. Rather it has to apply conventional public law principles to judgments and assessments which the decision-maker has made in the course of adopting the regulations. No doubt in making those judgments the decision-maker will have been aware that the outcome of any such future litigation could not be predicted with exactitude. I have to decide whether the implicit judgment that the government could not successfully defend the 85 year rule as justified was one which was legally open to it. That does not mean deciding whether the judgment was correct. Rather it means considering whether a reasonable decision-maker could have come to that conclusion or whether the conclusion was irrational.

35. Mr Goudie argues that the 85 year rule rewards loyalty and encourages people to join the local government work force at an early age. Both are desirable for a workforce which includes some of the most stressful and demanding jobs in society. He submits that the rule also encourages the retention of workers who value having a target to work for at which they can be assured of an unreduced pension.

36. However, I consider that there is considerable force in Mr Eadie's response. He relied particularly heavily on the feature of the 85 year rule to which I refer in paragraph 31(b) above, namely that it treats indifferently those who remain in local government service and those who start in that employment

but then leave. Thus it is not a system which rewards loyalty. Those who are loyal and remain do benefit, but so, too, do those who leave local government employment after what may be a short period of service. The 85 year rule may encourage people to join local government at a relatively young age, but the advantage of this is marginal if there is not also an incentive to remain and, for the reasons I have just given, the 85 year rule does not include this second element. In short, I accept that the Defendant's judgment that he did not consider he could defend the rule as justified age discrimination was not irrational or otherwise unlawful.

37. Mr Goudie's alternative case was in respect of the transitional arrangements. He submitted that giving lifetime protection to the existing members of the Scheme would have had the legitimate aim of protecting rights which had already accrued and legitimate expectations and was objectively and reasonably justified. Other public service employees were able to receive an unreduced pension at 60 and members of the LPGS should be treated no less favourably. The abolition of the 85 year rule had come about without agreement, contrary to what had been agreed at the Public Services Forum Agreement in October 2005. In the further alternative, some intermediate protection would have been justified that was more generous than the position under the amending regulations even when those were somewhat extended by the Amendment (No.2) Regulations. In Scotland transitional protection had been extended to members who became 60 at any time before 1st April 2020 – see The Local Government Pension Scheme (Scotland) (Amendment No.2) Regulations 2006 made by the Scottish Ministers.

38. Mr Eadie responded as follows –

a. Rights which have already accrued are protected by the transitional provisions in the amending regulations. Protection is extended by the Amendment (No.2) Regulations so as to protect the rights of all current members accrued to 1st April 2008 (see regulation 17), those current members who become 60 before 1st April 2016 continue to enjoy the benefit of the 85 year rule in respect of the whole of their pensions (i.e. including pension accrued after 1st April 2008) and there is tapered protection for those who will reach 60 before 1st April 2020.

b. To provide continuing protection for all those who are currently members for their lifetimes would be very expensive – about £5 billion according to the Government Actuary's Department

c. The justification, which the government acknowledged, for some transitional protection was that members close to retirement age might otherwise have difficulties in making alternative arrangements for their pensions. That did not apply or not apply with so much force to those who were younger, who were further away from retirement and who would

have longer to make alternative plans or take account of their altered pension rights.

d. The position of other public sector workers was not comparable because the 85 year rule applied exclusively to the LGPS.

e. Other intermediate options were not as expensive, but they all required the government to make a judgment taking account of the aim for some protections (which the government had accepted as legitimate), its diminishing force as the protection was widened and cost. These were matters of evaluation. The regulations for England and Wales which were challenged by these proceedings could not be said to be unreasonable simply because a slightly different judgment had been made in Scotland (and, in any case, the extension of tapered protection until 2020 for members in England and Wales meant that the difference was less sharp than Mr Goudie portrayed).

39. In my judgment these are all rational bases on which the Defendant could have made the choices as to transitional protection that he did. The fact that other arrangements could also have been lawfully adopted as the Scheme which the government might have wished to defend as justified within Article 6(1) is nothing to the point. Mr Goudie's alternative challenges to the transitional arrangements are not made out.

Were the amending regulations or its preceding consultation legally flawed because of the information or projections on which they were based?

40. I do need to consider the Claimant's further ground of challenge, namely that the consultation process and the regulations under challenge are legally flawed because they were based on incorrect information and assumptions as to the costs of retaining the 85 year rule and, if the rule was to be abolished, the cost of the more extensive temporary protection for which UNISON was campaigning.

41. The differences are substantial. Mr Goudie relies on the studies carried out for the Claimant by Jonathan Mowbray, Senior Consultant and Actuary of Aon Consulting. These lead him to conclude that the cost, for instance, of allowing all current members to continue to take advantage of the 85 year rule would be about £1.25 billion, while the figures from the Government Actuary's Department ('GAD') and supported by witness statements from Ian Boonin, Chief Actuary of the Public Services Pensions Division A3 in the Pensions Directorate of GAD estimate the costs of providing the same protection as about 4 times that sum.

42. Mr Mowbray submits that the differences are due to a number of factors, but they include:

a. GAD's assumption that all members will take normal retirement at the earliest age at which they can take an unreduced pension. Because a very significant proportion of members do not do this, but retire on terms which are not affected by the 85 year rule, GAD's approach overstates the cost of affording all current members the option of retaining the benefit of the 85 year rule.

b. GAD has used a consistent long term discount rate of 3.5% in arriving at an average annuity value when the more common practice nowadays would be to use separate discount rates for pre- and post-retirement events.

c. There has also been introduced into the LGPS the option of taking a larger cash sum in return for a reduced pension. This will produce a saving for the Scheme which GAD has undervalued. GAD has also under-estimated the likely take up rate of this option.

d. The Claimant also disputes GAD's approach to age at which future members to the scheme will retire and mortality rates.

e. GAD has also taken no account of what are called 'strain payments'. These are payments which are made when a member of the Scheme retires on efficiency or redundancy grounds. Abolition of the 85 year rule, would, the Claimant argues, cause more members to rely on strain payments. However, this additional cost of the Scheme as amended has not been taken into account by GAD.

43. Although these are complex matters, there is, in my judgment a short answer to this part of the Claim. There has been extensive discussion and exchange of views between GAD and the union and Aon. All of the matters which I have referred to above have either been considered by GAD or there was the opportunity for them to be considered. All of them require judgments to be made. The Defendant was entitled to rely on the advice it received from GAD, both for the figures which the government put forward in its consultation and, after the competing views had been taken in to account, as the basis on which the regulations should be made. Mr Goudie accepted that he would have to show that the choices made by the government were ones which were irrational. That is a high hurdle to cross. Having regard to the evidence of Mr Boonin (as well as Mr Mowbray), I do not consider that it has been crossed in this case.

44. In his oral submissions, Mr Goudie concentrated on the failure to take account of the likely increase in the number of strain payments. Mr Boonin's response was as follows,

> 'Strain payments are not prefunded in the pension scheme, rather they are usually payable when the redundancy occurs. They do not therefore accrue as a pension liability and do not form part of the fund actuaries' regular triennial valuation to recommend the rate of regular employer contribution to the scheme. Consequently, when advising on the likely impact on pension scheme finances and employer contributions from potential changes to the scheme such as commutation savings or the removal of the rule of 85, strain payments (which, in any event, effectively go towards the provision of redundancy benefits as opposed to pension benefits) would not be included.'

45. I would not characterise this response as irrational.

46. Consequently, this part of the challenge fails as well.

Conclusion

47. This application for judicial review is dismissed.

THE DEPUTY JUDGE: Miss White and Miss Sampson, the draft of the judgment that I circulated to the parties recently attracted comments from the Treasury Solicitors for which I am grateful. I have incorporated those into the revised version which should be, if it has not already been, made available to you.

For the reasons which I have I given in this written judgment, the application for judicial review is dismissed.

MISS WHITE: My Lord, I apply for an order that the claimant pay the defendant's costs of the application, not only because my Lord has dismissed the application, but because my Lord has found in favour of the (end of sentence inaudible).

THE DEPUTY JUDGE: Miss Sampson?

MISS SAMPSON: My Lord, that application is resisted on the ground that the claimant did not act unreasonably in bringing the claim at the permission stage (end of sentence inaudible).

THE DEPUTY JUDGE: I am sorry, Miss Sampson, I cannot hear you. The acoustics in here are terrible.

MISS SAMPSON: My Lord, the application is resisted on the grounds that the claimant had an arguable case at the permission stage. The claimant has not acted unreasonably in bringing this application.

THE DEPUTY JUDGE: Yes, thank you. No, the claimant must pay the defendant's costs -- detailed assessment if not agreed.

MISS WHITE: I am grateful, my Lord.

THE DEPUTY JUDGE: Anything else?

MISS WHITE: No, my Lord.