Neutral Citation Number: [2009] EWCA Civ 387

Case No: A2/2008/2659

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Sir Thomas Morison, sitting as a deputy judge of the High Court on 17th October 2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2009

Before :

LADY JUSTICE ARDEN
LORD JUSTICE WALL
and
LORD JUSTICE AIKENS

- -

Between :

ROLLS-ROYCE PLC	**Appellant**
- and -	
UNITE THE UNION	**Respondent**

(Transcript of the Handed Down Judgment of
WordWave International Limited
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165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

John Bowers QC and Simon Cheetham (instructed by Messrs. Eversheds - Solicitors) for the Appellants
Peter Edwards (instructed by **Messrs Rowley Ashworth - Solicitors**) for the Respondents

Hearing date: 22nd January 2009

- -

Judgment
As Approved by the Court

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Lord Justice Wall :

Introduction

1. Over the period during which our judgments in this case have been reserved, we have, both as a consequence of arguments advanced at the hearing and, latterly, at our written request, received additional submissions from both sides in this appeal. In addition, I have had the advantage of reading the judgment of the Grand Chamber of the European Court of Justice (ECJ) in the case of ***Birgit Bartsch v Bosche und Siemens Hausgerate (BSH) Altersfursorge GmbH*** (23 September 2008) and the decision of the third chamber of the ECJ in the case of ***The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*** (5 March 2009). I have also seen in draft the judgments to be given by Arden and Aikens LJJ. This judgment, accordingly, is written with all these matters in mind.

2. As I see it, the first question which arises in this appeal (for which permission was given by the trial judge, Sir Thomas Morison, sitting as a deputy judge of the High Court on 17 October 2008) is whether or not we should hear it.

3. This unusual situation comes about in the following way. On 6 June 2008, the appellant, Rolls-Royce plc (the company) brought proceedings in the Queen's Bench Division of the High Court against Unite the Union (the union) under Part 8 of the Civil Procedure Rules 1998 (CPR). The relief which the company sought was in the following terms:-

> A determination of the law on redundancy selection under the Employment Equality (Age) Regulations 2006 (the Regulations). The (company) requires the court to consider and determine whether the inclusion of length of service within a selection matrix for redundancy situation would be in breach of the Regulations and therefore unlawful.

4. On 21 July 2008, the proceedings came before Bean J for directions. He ordered that Part 8 of the CPR applied to the claim and appended to his order an amended form of the questions to be determined by the court. Amongst other directions, he ordered that the claim was to be listed before a High Court judge with experience of employment law for a two day hearing in October 2008. It does not appear that Bean J gave a judgment before making this order: if he did, we do not have a copy of it.

5. On 9 October 2008, the claim was heard by Sir Thomas Morison, sitting as a deputy judge of the High Court, whose reserved judgment is dated 17 October 2008 ([2008] EWHC 2420 (QB)). He found for the union and dismissed the claim. It is against this decision that the company seeks to appeal.

6. In paragraph 1 of his judgment, Sir Thomas identified the questions he had been invited to determine. They were: -

> (i) Is the retention of length of service as a criterion within a selection matrix for redundancy, as contained within the collective agreements relating to the Claimant's Derby and Hucknall sites, a proportionate means of achieving a

> legitimate aim within Regulation 3(1) of the Employment Equality (Age) Regulations 2006?
>
> (ii) Can the service related selection criterion properly be classified as a "benefit" within Regulation 32(1) of those Regulations? If so, does the service related selection criterion "fulfil a business need of (the company's) undertaking" within Regulation 32(2) of the Regulations?

7. However, Sir Thomas immediately followed the posing of these two questions with this, highly significant, paragraph:-

> It will be immediately apparent that the questions which relate to achievement or fulfilment of legitimate aims or business needs are ones which, in the employment context, would normally and desirably be determined by 'an industrial jury' namely an Employment Tribunal or the Employment Appeal Tribunal (EAT). I sit as a single Judge without the benefit of the advice and wisdom which the lay Members of those Tribunals bring to questions of the sort being asked. Despite my misgivings, at the request of both counsel, I was pressed to proceed to a determination under Part 8 of the CPR. There are no issues of fact to be determined; there has been no oral evidence. I have been provided with witness statements on behalf of both parties which, essentially, set the scene for the resolution of their disputes. With considerable misgivings, I acceded to the request of both parties.

8. Furthermore, when granting permission to appeal, Sir Thomas did so on two bases, which he expressed in the following way:-

> 1. I remain uneasy about the procedure
>
> 2. This is clearly an important point for the parties.

9. In his witness statement filed in the proceedings, Mr Michael Stokes, a partner in the firm of solicitors instructed by the union, made a number of points about the procedure adopted by the company. Amongst them were the following: -

> 10. The short argument in relation to Part 8 of the CPR is that if an Employment Tribunal (ET) had been asked to consider this point, it would have been interested to hear evidence from the union side as to whether such a provision could be described as a benefit for this purpose, and then, whatever the answer to that question, to consider whether the appropriate justification test had been met.
>
> 11. On a wider and possibly more important issue raised by this claim, the court has been asked to determine either whether a service criterion is, by its very nature, discriminatory in every case, or whether this provision in this collective agreement is discriminatory in its own context.
>
> 12. I would submit that if the court is being asked the first question it should decline to answer it. Despite the fact that the ACAS code is not positive about such criteria, it is important to note that the legislators have made potential discriminatory provisions like this lawful if they can be

> justified. If the court were being asked the first question the (company) would be asking it to say that a service criterion of this kind could never be justified. I would respectfully submit that the court should not be answering such a sweeping question in Part 8 proceedings.
>
> 13. Alternatively, if the court were being asked the second question, namely whether the provision in this case is discriminatory in context, it should refuse to deal with the application purely on the basis that the "context" in this situation includes the whole factual background to these agreements, the effect in this workplace of this criterion, the age breakdown of the workforce itself, the purpose of such a provision, the impact of such a provision in conjunction with the other redundancy selection criteria and a host of other questions which would assist an ET in assessing whether the provision was justified.

10. Mr. Stokes went on to tell the court that the union intended to refer the removal of the service criterion to an ET, and that grievances had been lodged on behalf of "hundreds of employees of the company with a view to sample or test cases being referred to the ET for determination on this issue". His argument, accordingly, was that the ET, not the High Court, was the proper forum for a discussion of age discrimination and justification in the field of employment.

11. As will, however, be apparent from the extract from Sir Thomas' judgment which I have set out at paragraph 7 above, the union did not persist in its objections, and Sir Thomas determined the issues placed before him. Furthermore, in this court we were faced with an agreement between the company and the union that we should hear and determine the appeal on its merits, a principal term of which was that, irrespective of the outcome, the company would pay the union's costs.

12. We were, however, sufficiently, concerned about the position to invite further written submissions from the parties. These we duly received after the hearing had concluded. Since I regard the point as being of considerable importance, I propose to set out the arguments in some detail.

Should we hear the appeal? The case for the company

13. For the company, Mr John Bowers QC reminded us that almost 100% of the "works" employees and about 70% of the "staff" employees, covered by the collective agreements at the company's Derby and Hucknall sites, were members of the union.

14. With regard to declaratory relief, Mr. Bowers submitted that the general circumstances in which it may be appropriate to grant a declaration were where:

    (1) there was a dispute between the parties;

    (2) the dispute arose from specific facts which were already in existence;

    (3) the dispute was still alive; and

    (4) the determination would be of some practical consequence to the parties.

15. Mr. Bowers relied for these propositions on the textbook ***Zamir & Woolf: The Declaratory Judgment,*** 2002, paragraphs 4.092 and 4.093; and on the decision of Neuberger J (as he then was) in the case of ***FSA v Rourke*** (2001) ***The Times*** 12 November, in which the judge had granted a declaration in civil proceedings, notwithstanding that the facts upon which he based it were capable of giving rise to a criminal liability.

16. Mr. Bowers accepted that whether to grant a declaration was a matter of discretion, but argued that a declaration may be granted whether or not any other remedy is claimed:- see CPR Part 40.20. The question in each case resolved into whether granting the declaration would accord with justice and serve a useful purpose and whether there were any special reasons why the court should not grant one. The company's case was that a dispute was joined here (that is to say there was a ***lis*** between itself and the union) at the latest when the company and union took diametrically opposed views at meetings on 16 and 17 April 2008 as recorded in paragraph 14 in the statement made in the proceedings by Miss Helen Foord, a senior HR Business Partner employed by the company.

17. Mr Bowers argued that it was a proper exercise of the court's discretion to grant declaratory relief in these unusual circumstances where a party (here, the company) brought proceedings before the courts relating to matters involving statutory construction which had an impact on a collective agreement. The company had brought the proceedings because it wanted to avoid violating the law, and because this was the only method of getting the matter before the court. Mr Bowers submitted that:

    (a) the declaration would affect an issue of concern to a large number of employees: "The fact that declaratory relief will benefit a significant section of the public is clearly a matter which the court will take into account in deciding how to exercise its discretion" (***Zamir & Woolf*** at 4.192);

    (b) the declaration would guide the future conduct of the parties. Mr. Bowers relied on ***Dyson v The Attorney-General*** [1912] 1 Ch. 158, in which this court had held that a declaration might be granted where it would "guide (their) action in the future" per Cozens Hardy MR at 166. Similar sentiments had been expressed by Fletcher Moulton LJ at [1912] 1 Ch 158 at 167.

18. Mr. Bowers argued that the court should be sympathetic towards granting declaratory relief in those circumstances. Although ***Dyson*** concerned criminal proceedings, the circumstances were analogous because:

    (a) the company effectively risked a substantial penalty if it was found to have been acting in a discriminatory manner in that a series of successful age discrimination aims could be brought; and

    (b) as in ***Dyson,*** the question raised affected a substantial number of people and therefore had wide implications.

19. There was, Mr. Bowers submitted, a further question, namely: who were the proper defendants to the proceedings? As was stated in ***Zamir & Woolf*** (para 6.01, citing Lord Maugham in ***London Passenger Transport Board v Moscrop*** [1942] AC 332 at 345) in principle it was desirable that all persons who appeared to have a real interest in objecting to the grant of a declaration which is claimed in legal proceedings should be made defendants. At [1942] AC 332 at 345, Lord Maugham stated:-

> the courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties before a declaration by its terms affecting their rights is made.

20. Furthermore, Mr. Bowers argued ***Zamir & Woolf*** at paragraphs 6.13 indicated that the court would adopt an "extremely pragmatic approach to the circumstances of each case".

21. Mr Bowers sought to assuage our anxieties about making a declaration involving the status of third parties who had had no opportunity to participate in the proceedings by advancing a range of different arguments. The first was that at the time of the issue of the proceedings (6 June 2008), the only party who appeared to have a real interest in objecting to the declaration was the union, given the fact of the collective agreement and the fact that no one had been declared compulsorily redundant at that stage.

22. Secondly, the company had indicated that it would not use the selection matrix contained in the relevant collective agreements to make selections for redundancies in the areas of the business to which they applied until there had been legal clarification of the issues (see paragraph 15 of the witness statement of Mr Wayne Davies, the solicitor having the conduct of the proceedings on behalf of the company). It would thus have been a cause of unnecessary stress and anxiety (and as well as being disruptive of employee morale and good industrial relations) had the company sent copies of the pleadings to all (or some) of the employees covered by the collective agreement at Derby and Hucknall. Not only would this have suggested to them that they might be made redundant, but it would also no doubt have caused anxiety that they might be made subject to costs orders in such proceedings.

23. Mr Bowers also submitted that it was appropriate; (a) for the union to be the sole defendant; and (b) not to have joined individual employees to the claim for the following additional reasons:

    (i) the union had negotiated and entered into the collective agreements on behalf of those individual employees covered by the agreements at Derby and Hucknall (and union density is and was at all material times very high). All employees who were covered by the relevant collective agreements were subject to the same application of the length of service criterion contained within the collective agreements. As had been accepted orally by counsel for the union those employees would be covered by the agreements whether or not they were members of the union;

    (ii) the union did not argue before Sir Thomas Morison that it should not be the sole Defendant, nor that individual employees should be

Defendants.

(iii) although he did not set this out within a judgment (the matter having been listed before him as a Pre-Trial Review after having been adjourned to him by Master Leslie), Bean J. had also considered that the union should be the defendant and not individual employees. During the course of argument, junior counsel's note recorded Bean J as saying:

> "It is clearly right that the tribunal cannot hear an action for a declaration and the High Court is the only place where questions of this kind can be resolved. In principle it needs to be (the company) seeking the declaration and I agree that (the union) should be Defendant. (The union) accepts that it is as good a defendant as any. The Court should take a pragmatic view";

(iv) the issue of whether or not the length of service criterion contained in the collective agreements was potentially indirectly discriminatory was exactly the same in each individual employee's case for the reasons already developed in oral argument. No individual employee could have any additional or different arguments as to that issue (although the impact on each may vary). Therefore, the issue could be (and had been) properly investigated and argued in a case involving the union alone as defendant;

(v) as the court was already aware, the union was protected by the company against any adverse financial consequences of these proceedings: in other words, the company had agreed to pay the union's costs;

(vi) individual employees would thus not be prejudiced by an order made in their absence, because it was difficult to envisage that there were additional arguments that could be made had they been joined to the claim.

(vii) it was clear that the union would welcome a determination of this important point and had not opposed the company's method of proceeding.

24. Mr Bowers argued in the alternative, if the arguments previously set out were incorrect in law, that the company would be constrained to accept that individual employees were not hereafter bound by any declaration within these proceeding. However, there was no reason why the declaration sought should not be granted given its utility between the company and the union. The outcome of the appeal would determine whether or not the criterion could lawfully be retained in the redundancy procedure as between the union and the company. That was the main point of seeking the declaration.

25. Mr. Bowers further submitted that if the contested criterion were then removed from the relevant collective agreements, there could be no individual claim which would

raise the issue whether the criterion was indirectly discriminatory on grounds of age. If it were retained, individual employees could bring claims alleging that it had had a discriminatory effect. Further, the decision whether or not to retain the criterion which the company submitted was discriminatory was not one to which individual claimants would directly be parties given that the only parties to the collective agreement were the company and the union.

26. In the further alternative, Mr Bowers argued, it would be open to the court to add individual defendants and give them leave to make such representations as they wished (see CPR Part 19.2(2)). The overwhelming likelihood (to the point of certainty) was that such defendants would refer the matter to their union. The company's further alternative position was reliance upon CPR Part 3.10 that any error made should not invalidate the procedure.

27. Mr. Bowers reminded us that the company had raised in reply Schedule 5 of the ***Employment Equality (Age) Regulations 2006*** and wished to deal with the point raised by the court as to whether that would be an alternative remedy. He submitted that it would not. In short, he argued that all Schedule 5 said was that a term in a collective agreement was thereby rendered void if it provided for unlawful discrimination on grounds of age. Similar provisions were found within the other discrimination legislation. This could not provide an alternative remedy to the application herein for a declaration. Mr Bowers accepted that the collective agreement was not legally enforceable between the parties to it (see section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992). However, Schedule 5 allowed a challenge to be brought only by an individual, not by the employer, so the company could not use this procedure.

28. Mr. Bowers submitted, finally, that this was a test case, and that there was a genuine dispute between the parties The declaration would serve a practical purpose and individual employees would not be prejudiced. It was, accordingly, appropriate for the court to grant a declaration.

Should we hear the appeal? The case for the union.

29. On behalf of the union, Mr Peter Edwards maintained in writing the position he had adopted in oral argument. He professed perplexity at the company's decision to appeal, given that it had succeeded in obtaining the opinion of an eminent and specialist Employment Law Judge - an ex-President of the EAT, to boot. This, he argued, should have reinforced the company's avowed and repeatedly confirmed stance, namely that it was not seeking to resile from the collectively agreed term contained in the Agreement: it simply wanted clarification of the law. The company had, he submitted, already obtained the clarification which it stated that it was seeking.

30. Mr Edwards repeated the reservations which the union had about the course which the company had decided to take. Despite those reservations, and after further serious consideration, however, the union continued to concur with the submission made on behalf of the company that it was/would be impracticable for either party (or, indeed, a member of the workforce) to seek verification from an ET as to the lawfulness of retaining the collectively agreed term with regard to length of service prior to the application of that term.

31. It followed, Mr. Edwards argued, that the union considered the course adopted by the company as the "least bad" alternative if, as was patently the case, the company was not content to rely on the declaration already given by Sir Thomas Morison. It was right – as had happened - that the union should be protected as to its costs of the appeal, and in the circumstances, the union agreed with the submissions made by the company that it would be appropriate for this court to determine the appeal against the declaration already made by Sir Thomas Morison.

Should we hear the appeal? Discussion

32. I have set out the submissions made by the parties in some detail because I frankly acknowledge that I have not found this to be an easy point. Furthermore, I have to say that I am unimpressed by the arguments advanced by the union on this point, from which I derive little assistance.

33. The logic of a principled resistance on the union's part to the procedure adopted by the company would be that the appeal should be allowed, and the declaration made by Sir Thomas Morison set aside on the grounds that he should not have embarked on the process in the first place. That outcome is plainly one which the union does not want. As it is, it has the benefit of a judgment in its favour, which it seeks to uphold in this court. On this point, therefore, my analysis is that the union's position is essentially one of thinly disguised self-interest, and it is for this reason that I gain no assistance from Mr. Edwards' submissions in relation to it.

34. In these circumstances, it seems to me that this court has to go back to first principles. The two critical questions on this aspect of the case are, in my judgment; (1) whether or not answering the questions posed by the company is an exercise which the court should be undertaking at all; and (2) if it is, whether or not Part 8 of the CPR is the appropriate procedure.

The use of CPR Part 8

35. Although I have read and re-read CPR Part 8 (and the delay in the production of this judgment has given me the benefit of the 2009 edition of ***Civil Procedure***) I derive no assistance from it. The editors of ***Civil Procedure*** do not identify any case in which it has been used, and the ***Practice Direction*** likewise contains a dearth of authority. In these circumstances, I see no point in setting out either Part 8 or ***The Practice Direction*** which relates to it.

36. So far as the pleadings are concerned, I have already identified the relief sought in the claim form. We have not seen the Acknowledgement of Service. The union, however, put in the statement from Mr Stokes (to which reference has already been made) and a statement from a Mr Michael Lomax an employee of the company, and (despite a stray "not" in the first line of the second paragraph of his statement) the Senior Union Representative for all union members based at the company in Derby.

37. Apart from the witness statements put in by the company, the only document generated by the proceedings themselves is a Minute of Order dated 21 July 2008 following the hearing before Bean J, the relevant part of the contents of which I have already summarised. Apart from the inference that Bean J, an experienced employment lawyer, plainly thought that the use of Part 8 was appropriate to

determine the claim, I gain no assistance from the formal documents generated by the legal process. Moreover, as I have already indicated, there is no learning on Part 8 or the Practice Direction which follows it.

Should be hear the appeal? General principles

38. As was stated by Lord Bridge of Harwich in ***Ainsbury v Millington*** [1987] 1 WLR379 at 381B to C:-

> It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

39. He went on, however, immediately to add: -

> Different considerations may arise in relation to what are called “friendly actions” and conceivably in relation to proceedings instituted specifically as a test case.

40. An example of the latter seems to me to be the recent decision on the House of Lords in ***Kay (FC) v Commissioner of the Police of the Metropolis*** [2008] HL 69, which, when it was in the Divisional Court ([2006] EWHC 1536 (Admin)), Sedley LJ described as "a friendly action", the shared purpose of which was "to get the law clear about an issue of some public importance before anything goes wrong". In that case, the police took the view that under the Public Order Act 1986, the claimant should give advance notice to the police of the route which the critical mass cycle ride intended to take on its monthly mass ride through London. The claimant brought the action to resolve the point. On the institution of the proceedings, there was no actual ***lis*** between the parties, although there was a real issue between them on a point of general public importance. The House of Lords appears to have had no hesitation in adjudicating on the point.

41. It is also, I think, instructive to note that in the Divisional Court, where the claimant succeeded, it was not thought necessary to grant him declaratory relief: it was sufficient for the court to give its opinion on the questions asked. As Sedley LJ put it:

> Having received this judgment in draft, counsel are agreed that this is a declaratory judgment, that it is not necessary to make a formal declaration, and that for substantive purposes this judgment is all that is needed.

42. Similarly, in the House of Lords, where the claimant again succeeded, the House simply allowed his appeal against the decision of the majority in this court. Thus whilst Baroness Hale of Richmond took the view that it would be “preferable” for the conclusion of the House to be expressed in declaratory form (see paragraph 54 of her speech), no actual declaration was made. This is a point to which I will return, briefly, at the end of this judgment.

43. In ***Ainsbury v Millington*** itself, the local authority in question had regained possession of the relevant property and had re-housed the applicants who had previously applied for an injunction entitling them to occupy it. The question of the

court's jurisdiction to grant an injunction entitling them to occupy was thus truly academic, and the principle stated by Viscount Simon in ***Sun Life Assurance Company of Canada v Jervis*** [1944] A.C. 111,113-114 applied: -

> My Lords, in my opinion, the House should decline to hear this appeal on the ground that there is no issue before us to be decided between the parties. I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing list between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties.
>
> What is sometimes called a "friendly action" is not necessarily open to this objection, either in the first court or on appeal, for the respective parties in such an action are arguing for different results and the winner gains something which he would not gain if he lost, but the objection here is that, if the appeal fails, the respondent gains nothing at all from his success.

44. Not all academic appeals meet with such a fate, however. Thus in ***Birmingham City Council v LR and other*** [2006] EWCA Civ 1748, the appeal was undoubtedly academic on the facts. This court, however, decided to hear it, and accepted submissions made by leading counsel for the local authority on the following basis:-

> 22. Mr. Harrison explained that the appeal was being brought by the local authority as a 'test case' to obtain clear guidance urgently needed from this court concerning the interpretation of statutory provisions relating to the special guardianship procedures. The Appellant was a major local authority with a substantial case load of litigated child care cases. It had a legitimate interest in bringing proceedings to obtain clarification of provisions and procedures affecting an increasing number of cases.
>
> 23. Mr. Harrison submitted, accordingly, that a point of principle was involved. Due to the importance of the points which arose, therefore, Mr. Harrison invited us to rule on them.
>
> 24. Having heard further argument and considered the matter, we came to the conclusion that we would hear the appeal. We did so because we accepted that the points raised in this appeal are important and would be likely to arise again in any event. In practical terms, counsel on all sides had come to court prepared to argue the appeal. We accept, furthermore, that the local authority was taking a principled stance by implementing paragraph 4 of the judge's order whilst, at the same time, seeking permission to appeal against it. Having heard full argument, we reserved judgment.

45. I note that the editors of ***Civil Procedure***, in an extensive note to section 19 of the Supreme Court Act 1981 (2009 edition, volume 2 paragraph 9A-77) comment that in

modern times the appellate courts have indicated a greater willingness to entertain proceedings which raise points of law which, although "academic" or "hypothetical" are points of general public interest. Reference is made to a number of authorities The editors are clear, however, that no general principle to this effect has emerged.

46. Perhaps the most helpful authorities in recent times are ***Bowman v Fels*** [2005] EWCA Civ 226, [2006] 1 WLR 3083 and ***Gawler v Raettig*** [2007] EWCA Civ 1560. In the former, the appeal to this court raised important issues as to the application to the legal profession of certain provisions of the Proceeds of Crime Act 2002. Various professional bodies appeared as interveners in the appeal. However, by the time the appeal came on, the substantive litigation between the parties had been settled. This court (Brooke, Mance and Dyson LJJ) nonetheless proceeded to hear the appeal. Giving the judgment of the court, Brooke LJ said:-

> We were therefore anxious to continue hearing the appeal if we possibly could, so as to comply with the entreaties of all the parties who appeared before us. To send them away empty-handed on an issue of such importance seemed to be not only churlish but also in breach of the overriding objective which illuminates all civil court practice today.

47. It is also significant, I think, that after a reference to the speech of Lord Sylnn of Hadley in ***R v Secretary of state for the Home Department ex p Salem*** [1999] 1 AC 450 at 456 (which related to the resolution of public law issues where there was no ***lis*** between the parties), this court added:-

> 14. The contemporary practice of both the House of Lords and this court to permit interventions in private litigation when discrete points of statutory construction are causing great difficulty in a way that was not contemplated when ***Ainsbury v Millington*** was decided has created a new scenario within which to consider a point of this kind (compare ***Callery v Gray*** [2001] EWCA Civ 1117, [2001] 1 WLR 2112, CA; [2002] UKHL 28, [2002] 1 WLR 2000, HL, where there were many interveners in this private law litigation).

48. In the event, this court concluded:-

> 15. If it is in the public interest for this court to decide an important and difficult point of law arising out of the interpretation of a recent statute, when both the parties to the case and three interveners of the status of those who appeared before the court are anxious that the court should do so, it is in our judgment unnecessary for the court to resort to artificial devices on which to found its jurisdiction.

49. The question of the circumstances in which the court should entertain academic appeals in general, and ***Bowman v Fels*** in particular was further considered by this court in ***Gawler v Raettig*** [2007] EWCA Civ 1560. The question involved was the level of contributory negligence in an action for personal injuries where the claimant had not been wearing a seat belt. An agreement between the parties rendered the appeal academic. The question was whether or not the court should give permission

for it. This court refused to grant permission, although it agreed that its judgments could be reported.

50. Having conducted an extensive review of the existing authorities, the Master of the Rolls concluded:-

> 34. Thus the court was of the view (in ***Bowman v Fels***) that, even though the litigation was private, if it was in the public interest to entertain the appeal, the court would be free to do so. This seems to me at bottom to be the correct approach. However, although as has been observed several times, the case involved public law duties, I do not read it as limiting the exception to each case, provided that the hearing of the appeal is in the public interest.
>
> 36. Finally, in ***Bowman v Fels*** the court paid tribute at [17] to the discussion of the problem by Professor Zuckerman in the 2003 edition of ***Civil Procedure*** at paragraphs 23.139 to 23.145. In the more recent second edition of ***Civil Procedure*** (2007) Professor Zuckerman said this at paragraph 23.148.
>
> "In sum, the hearing of appeals that are no longer determinative of the rights of the parties will depend on whether the matter is of general public interest and whether entertaining an appeal is the most effective way of resolving the issue and promoting the overriding objective."
>
> This consideration of the cases leads, in my opinion, to the conclusion that the court will not entertain an appeal between private parties in private litigation unless it is in the public interest to do so. Moreover, this is likely to be a very rare event, especially where the rights and duties to be considered are private and not public. Indeed, so far as I am aware, if we permitted this appeal to proceed, it would be the first case in which the court had ever considered such an appeal, since (as stated above) ***Bowman v Fels*** was a case involving an issue of public law.
>
> 37. All will depend upon the facts of the particular case and in what follows I do not intend to be too prescriptive. However, such cases are likely to have a number of characteristics in addition to the critical requirement that an academic appeal is in the public interest. They include the necessity that all sides of the argument will be fully and properly put: see e.g ***National Coal Board v Ridgeway***, per Bingham LJ at page 604f and ***Bowman v Fels*** at [12] and [15]. It seems to me that in the vast majority of such cases, this must involve counsel being instructed by solicitors instructed by those with a real interest in the outcome of the appeal. As Waller LJ observed in the course of the argument, it is far from satisfactory simply to have counsel (or other advocate) advancing such arguments as occur to him without the benefit of instructions from an interested party or group of some kind. Further, before giving permission the court will wish to consider what the other options are and how the proposed issues could otherwise be resolved without doing so by way of academic appeal.

Should we hear the appeal? Conclusion

51. Having looked carefully at all the authorities, I have come to the conclusion, contrary to my initial reaction, that we should hear this appeal. I will endeavour to set out my reasons for reaching that conclusion in the following paragraphs.

52. I say at once that I do not think this an academic appeal: to the contrary my anxiety about hearing it has throughout been driven by my concern that its outcome could directly affect a large number of people (those made redundant in the future by the company) without any of those people having any say in it. That, in my judgment, is the principal argument against entertaining the appeal.

53. In broad terms, however, I accept the arguments for proceeding advanced by Mr. Bowers, although I feel bound to say that the anxiety I have expressed in the previous paragraph is only partially assuaged by Mr. Bowers' argument as set out – in particular – at paragraphs 23(iv), (vi) and 26 above.

54. My reasons, however, for entertaining this appeal are firstly, that we are being asked to construe a Statutory Instrument deriving from the European Directive on Age Discrimination. In my judgment, the construction and interpretation of material emanating from Parliament is both a matter of public importance, and one of this court's proper functions.

55. Secondly, although these are private as opposed to public law proceedings, and although there is no immediate ***lis*** between the parties, the point is not academic, and if not resolved by this court will lead to a dispute between the company and the union, who do not agree on it. In this respect, the case seems to me to be analogous with ***Kay***.

56. Thirdly, the point is one of some importance, and is likely to affect a large number of people both employed by the company and beyond. Fourthly, the propriety of proceeding has been considered by two judges of the High Court, Bean J and Sir Thomas Morison. The former deemed the Part 8 procedure appropriate: the latter determined the issues before him. There has been no appeal against or challenge to Bean J's decision.

57. Finally, and I accept that this is a pragmatic point, we are being asked (by both parties) to hear the appeal, and it has been fully argued both before the judge and before us. Both we and counsel have invested a substantial amount of time in it.

58. In general terms, therefore, I have come to the conclusion that it would be unduly purist for this court to decline to adjudicate on a point which has been brought before us by means of a procedure which has been deemed by the parties and by the court below to be appropriate. It seems to me further that the thrust of modern authority favours engagement rather than abstention. In the alternative, I would be prepared to hold that the facts of this case are such as to bring it within the rare category of cases identified by the Master of the Rolls in ***Gawler v Raettig***.

59. All that said, however, I remain anxious about the fact that we are being asked to decide an issue which is likely to affect a large number of people who will have had no say in our decision. It is plain that the company is going to make a substantial number of people redundant. Many of those – perhaps a majority - will not have many years of service. If such people are made redundant, they may well seek redress

from an ET on the basis that their dismissals were unfair. It is furthermore likely in these circumstances that the company will seek to rely on our decision before the ET, and that claimants will, accordingly, be directly affected by our decision.

60. In these circumstances, I have reached the clear conclusion, speaking for myself, that I should approach the questions posed to us on a narrow basis; and, again speaking for myself, I would like to make it clear that nothing in this judgment should be read as inhibiting any potential claimants before the ET from raising the issue that the redundancy process was unfair, or that they have been unfairly dismissed. Although any order or declaration we make – subject to any further appeal – will determine the meaning of the Directive and the lawfulness or otherwise of the collective agreement between the company and the union, I am clear that redundant employees should be entitled to raise both arguments before ETs.

The substantive appeal

61. Having taken 60 paragraphs to decide to hear the appeal, I rather fear that I am likely to take a similar amount of space in reaching a conclusion on it. There are, however, two particular reasons for this. The first is that I think there is considerable force in some – particularly the first - of Mr Bowers' criticisms of Sir Thomas' judgment (as to which see, in particular, paragraph 82 below). The second is that I have found a number of the arguments addressed to us unhelpful. What I propose to do, therefore, is to set out the relevant terms of the collective agreements and the statutory material, followed by extracts from the judgment, and the arguments addressed to us. I will then state my own conclusions.

62. Throughout the process, however, it needs to be borne in mind that this court is engaged on the exercise of the construction of the Regulations. We are not hearing an appeal on a point of law from the EAT which has also had the input of the expertise of the trade union and employers' representatives who sit both in ETs and in the EAT.

63. In summary, therefore, the four questions which, in my judgment, go to the root of the issues for determination in this court are the following:-

(1) is the length of service criterion in the collective agreement indirectly discriminatory within regulation 3(1)(b)?

(2) what is meant by "benefit" in regulation 32?

(3) is the use of the length of service criterion a proportionate means of achieving a legitimate aim within regulation 3(1)?

(4) (depending, of course, to some extent on the meaning of the word "benefit" in regulation 32(1)) does it reasonably appear to the company that its use of the length of service criterion fulfils a business need of the company's undertaking (the proportionality point in relation to regulation 32)?

The collective agreements

64. There are in fact two collective redundancy agreements in place between the company and the union within the company's Derby group of factories known respectively as

the Derby Works and the Derby Staff Collective Agreements. Both contain provisions for length of service within the redundancy matrix as a selection criterion. The relevant terms of both agreements are, however, identical, and there is no need to set out both. We were referred to the following passages in Joint Staff Unions Agreement, which took effect on 1 November 2003:

> 1. **PURPOSE**
>
> To define the arrangements associated with a manpower rationalisation programme, which will enable manpower levels to be correctly balanced to workload and cost requirements.
>
> **2. GENERAL**
>
> As a first stage in a management rationalisation programme, and after consultation has taken place with the Unions, Management will accept suitable volunteers offering themselves for selection in order to minimise the number of compulsory job losses.
>
> **3. REDEPLOYMENT AND REDUNDANCY ROCEDURE**
>
> The stages for achieving the required manpower reduction will be as follows:
>
> > 3.3. Volunteers will be sought, for redeployment or redundancy, from all staff employees and will be listed by Business Unit……
> >
> > 3.12 If the company concludes that it is unlikely sufficient volunteers will be found by the given date it will notify all employees, within an Occupation Group in the affected Business Unit that there is a risk of redundancy and that an assessment against the assessment matrix will be carried out.
> >
> > 3.13 Assessors must have significant knowledge of the work of the people they are required to assess to satisfy themselves that they can give a fair assessment. Normally the period of assessment should not be more than 2 years unless there are significant factors outside that period which the Assessors wish to consider.
> >
> > 3.17 All individuals who, as a result of the application of the matrix, are identified as "at high risk to redundancy" will be notified of this by letter (the "high risk" letter). Either at the time this letter is issued or subsequently, but prior to the appeal stage, individuals "at high risk" are entitled to informal face to face feedback on their scores. This will include their own detailed assessment rating, together with the highest and lowest scores given to anyone in the relevant Occupation Group in the relevant Business Unit and they will be consulted as to their individual position.
>
> **4. ASSESSMENT MATRIX**

> 4.1 The matrix has been designed to ensure that the selection process is fair in general terms and fair to the individual. The matrix should be completed by at least two Assessors, one of whom should be in the Management Structure. At least one of the Assessors must have a good knowledge of the individuals concerned and the work they perform. The assessment should be made in the presence of the local experienced Human Resources Officer, to ensure validity and consistency.
>
> 4.4 Where two or more employees in a surplus Occupation Group have the same total assessment score, length of service with the Company will be the deciding factor and the longest serving employee will be retained.
>
> 4.5 Selection for redundancy on grounds of race, sex, disability, membership of a Trade Union, or carrying out Trade Union or Health and Safety duties is prohibited. Assessment of recognised Trade Union Representatives should be discussed with the local Human Resources Manager, in the first instance, who will ensure there is not adverse assessment due to Trade Union activities.

65. Appendix 1 to the document is a "Memorandum of Understanding" in which the union recognises the need for the company to "restructure flexibly and peaceably", and accepts the need for a fair redundancy framework. At the same time, the document records the fact that the Union does not accept the principle of compulsory redundancy and has negotiated "better severance terms" for all employees with 10 or more years' service.

66. Appendix 3 is headed: **SELECTION FOR REDUNDANCY / MATRIX / NOTES FOR GUIDANCE.** This document provides that an employee receives one point per year of continuous service, and identifies the other features which are marked as part of the matrix. These comprise **Achievement of Objective; Self Motivation (drive); Expertise / Knowledge; Versatility / Application of Knowledge; Wider personal contributions to team.** Each heading is divided into four, enabling the Assessor to choose in each case the category (in crude terms from poor to excellent) into which the employee falls. There is also provision in the matrix for deducting points for episodes of unauthorised absence (from high to low) in the last two years.

67. In his skeleton argument for the appeal, Mr Bowers accepted that each of the identified headings was scored with a maximum of 24 points in the first of the two collective agreements and 20 points in the second. He also referred to the question of unauthorised absences, which he told us could lead to a maximum deduction of 10 points in the first agreement, and of 6 in the second. For the union, Mr. Edwards stated that the various headings in the collective redundancy agreements (ignoring the length of service criterion) provided for a possible total of 130 points.

68. Speaking for myself the point I derive from these submissions is that the length of service criterion is by no means either plainly dominant in or necessarily determinative of, the redundancy selection process.

69. Appendix 6 to the document deals with the "Role and Responsibilities of the Over-Checker Role". It is the role of the over-checker "to review a representative sample of the employee matrix assessments for the occupation group to which they have been appointed". The sample has to be at least one third to one half of the total number of employee matrix assessments in the occupation ground within the Business Unit. The documents states: -

> The review is an independent examination of the assessments to ensure that they are accurate and consistent. Accuracy will be checked in the areas of;
>
> - the correct continuous years of service being allocated the correct number of points,
>
> - the correct / recorded number of episodes of unauthorised absence in the defined period leading to the correct number of points being deducted,
>
> - all points being given to an employee being correctly added to make their total score.
>
> Consistency will be looked for / sought in all sampled employee matrix assessments, particularly where different Assessors appear to have used the scoring categories differently. More simply, they will be looking for Assessors who appear to be either "hard or soft" in their scoring, to ensure that fairness and consistency have been applied to all employees rated by such Assessors.
>
> Any employee assessments that appear to have anomalies within the assessed scores for any or all of the five behavioural categories, will be subject to additional scrutiny or possible re-review by the original Assessors.

70. Appendix 7 deals with severance terms. It provides by paragraph 1 for a long service supplement for employees with more than 10 years' continuous service of an additional one week's pay for each completed year of service subject to a maximum of 25 years. There is also a service related supplement payable (paragraph 2).

71. By an amended agreement dated 2 January 2003, the objective of the agreement was stated in the following terms:-

> It is the aim of this Agreement to ensure that in the event of a redundancy, the Company's Business suffers the minimum disruption and maintains a workforce that is appropriate to meet its future operational needs, whilst compensating employees for the loss of employment in a manner reflecting their years of service.

There does not, however, appear to be anything else of relevance in the amended agreement.

72. Although I have set out what I hope are the relevant extracts from the collective agreements, I am very conscious of the fact that even substantial extracts do not do justice to a document which was plainly negotiated with great care, and which has as

its premise – as I read it - the objective of creating a system for redundancy selection which is, above all, fair.

The Council Directive 2000 / 78 / EC of 27 November 2000 (the Directive)

73. The Directive describes itself as "establishing a general framework for equal treatment in employment and occupation". It begins with a number of recitals. We were taken to the following:-

> Whereas
>
> (1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community.
>
> (4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation
>
> (5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.
>
> (11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
>
> (29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

74. The following Articles of the Directive are, I think, relevant:-

Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment'shall mean that there shall be no direct or Indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur 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;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Article 6

Justification of differences of treatment on grounds of age

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 based on the training requirements of the post in question or the need for a reasonable period of employment before.

The Regulations

75. The relevant provisions of the Regulations are, I think, the following: -

Discrimination on grounds of age

3. (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if—

(a) on 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.

(2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(3) In this regulation—

(a) "age group" means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages; and

(b) the reference in paragraph (1)(a) to B's age includes B's apparent age.

PART 2
DISCRIMINATION IN EMPLOYMENT AND VOCATIONAL TRAINING

Applicants and employees

7. — (1) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against a person—

(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;

(b) in the terms on which he offers that person employment; or

(c) by refusing to offer, or deliberately not offering, him employment.

(2) It is unlawful for an employer, in relation to a person whom he employs at an establishment in Great Britain, to discriminate against that person—

(a) in the terms of employment which he affords him;

(b) in the opportunities which he affords him for promotion, a transfer, training, or receiving any other benefit;

(c) by refusing to afford him, or deliberately not affording him, any such opportunity; or

(d) by dismissing him, or subjecting him to any other detriment.

76. For present purposes, the critical regulation is regulation 32, the material parts of which read: -

PART 4
GENERAL EXCEPTIONS FROM PARTS 2 AND 3

Exception for provision of certain benefits based on length of service

32. —(1) Subject to paragraph (2), nothing in Part 2 or 3 shall render it unlawful for a person ("A"), in relation to the award of any benefit by him, to put a worker ("B") at a disadvantage when compared with another worker ("C"), if and to the extent that the disadvantage suffered by B is because B's length of service is less than that of C.

(2) Where B's length of service exceeds 5 years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers).

(3) In calculating a worker's length of service for these purposes, A shall calculate—

> (a) the length of time the worker has been working for him doing work which he reasonably considers to be at or above a particular level (assessed by reference to the demands made on the worker, for example, in terms of effort, skills and decision making); or
>
> (b) the length of time the worker has been working for him in total;
>
> and on each occasion on which he decides to use the criterion of length of service in relation to the award of a benefit to workers, it is for him to decide which of these definitions to use to calculate their lengths of service…….
>
> (7) In this regulation—
>
> "benefit" does not include any benefit awarded to a worker by virtue of his ceasing to work for A.

Clearing the ground

77. Before examining the arguments, it is, I think, helpful to record that, as I understand the matter, we are dealing in this case with indirect discrimination under regulation 3(1)(b) and not direct discrimination under regulation 3(1)(a). I did not understand either counsel to submit that the terms of the collective agreements resulted in direct discrimination. The reason for this is not far to seek. Male employees, for example, of any age between 30 and 60 could each have 10 years' service with the company. Each would score 10 points on the redundancy matrix. There would be no direct discrimination against any one of them. The company would not be treating one employee "less favourably than he would treat other persons".

78. In my judgment, therefore, the argument thus has to be that the points system based on length of service with the company indirectly discriminates against the younger employees as a group pursuant to regulation 3(1)(b). The indirect discrimination will be unlawful under regulation 3(1)(b) if the company "cannot show" that the length of service provision in the redundancy selection process "is a proportionate means of achieving a legitimate aim".

79. Regard must also, of course, be had to Regulation 32(2), and what is meant by "benefit" in regulation 32(3).

Sir Thomas Morison's view

80. Having set out the facts and summarised the arguments addressed to him, Sir Thomas Morison found for the union "for the reasons they give in their arguments". He expresses his own decision in the following paragraphs: -

> 14. I start with Regulation 3. I agree with Mr Edwards of counsel, for the Union, that Rolls-Royce have defined the policy behind the Collective Agreements too narrowly. If employers were unconstrained by concepts of fairness to their staff, they would choose to retain those members of staff whom they considered to be best for the business. Subjective judgments would be made and people chosen on the basis, for example, that they would fit in to the new workforce. The concept of fairness introduced over 30 years

ago limited, and to some extent prevented, the employers' unconstrained freedom of choice. Redundancy policies were developed, often in conjunction with recognised trade unions. The Collective Agreements relating to redundancy in this case represent a compromise negotiated between the Employers and Union. As they make clear, the Union is in principle opposed to compulsory redundancy. That is because the Union sees its role as the protector of the staff from the unconstrained powers of the employer to run his business as he will. The Union wishes to protect those whom they represent from being put onto the labour market.

15. The Collective Agreements represent a compromise between them. It is in both parties' interests that a redundancy exercise, if such is needed, is carried out in a way which is perceived as fair and can be executed *"peaceably"*. In my Judgment, this is a legitimate business aim. It is an aspect of a *"legitimate business policy"* within the meaning of Article 6 of the Directive. The fact that the parties have achieved a peaceable transition following redundancy does not necessarily mean that Rolls-Royce have achieved their defined business aim, although it seems to me that length of service is likely to be a fair indicator of both loyalty and experience which might not be fully taken account of in the measurement process. Had the Court been concerned with a Scheme which was LIFO (last in first out) alone then that might be objectionable; but this is not such a case. It seems to me that the parties have adopted a scheme which enables the employer to succeed in a defence to an age discrimination claim under Regulation 3: the legitimate aim is the advancement of an employment policy which achieves a peaceable process of selection agreed with the recognised Union. The criterion of length of service respects the loyalty and experience of the older workforce and protects the older employees from being put onto the labour market at a time when they are particularly likely to find alternative employment hard to find.

16. But, in any event, it seems to me that this case falls squarely within Regulation 32. The 'award of any benefit' is not constrained as the employers suggest. The words are general. In a redundancy selection matrix it seems to me clear that to give points for long service does confer on the employee concerned a benefit. Just as it might lead to an increase in holiday entitlement, which Rolls-Royce would describe as the award of a benefit, so it might lead to the retention of employment which would otherwise be lost. To remain in employment whilst others lose their jobs would be properly described as a benefit. To have the benefit of long service is a normal use of language.

17. Regulation 32(2) simply requires the employer to justify the impact of an age related award only to those employees whose length of service exceeds 5 years. It seems to me significant that Parliament contemplated that a length of service criterion might reasonably appear to an employer to encourage loyalty or reward experience. Where there is an agreed redundancy scheme, negotiated with a recognised Trade Union, which uses a length of service requirement as part of a wider scheme of measured

performance, it is probable in my judgment that such would be regarded as reasonably fulfilling a business need.

18. In my Judgment, therefore, Rolls-Royce are wrong in their contention that the length of service criterion in the Collective Agreements is unlawful as a result of the Age Regulations.

The attack on the judgment

81. Mr Bowers' fundamental submission, as I understood it, was that a selection process which included length of service - a point for each year – was likely to favour older employees, and thus to amount to indirect discrimination within regulation 3 in any dismissal based on redundancy. The younger employee had not had the opportunity to accrue the same length of service as an older employee. The company had thus accepted the general proposition that the application of the service criterion arguably had a disproportionate effect on younger workers, and that it was inappropriate for the company to put forward a defence of justification which it could not sustain.

82. Mr Bowers complained that Sir Thomas had failed properly to answer the first question put to him. The reason for this was that he had focused on the scope and definition of the legitimate aim, and had not considered the question of proportionality either properly or at all. Mr Bowers submitted that the test of justification was not determined solely by the legitimacy of the aim, but by the proportionality of the means followed to achieve the aim. This omission, it was said, was sufficient to vitiate Sir Thomas' conclusions

83. Furthermore, Mr Bowers argued, the judge had both wrongly equated the company's policy with the legitimate aim of the redundancy exercise, and had misdescribed that aim as "the advancement of an employment policy which achieves a peaceable process of selection agreed with the recognised union". That description was inaccurate because Sir Thomas had failed to differentiate between the process of selection and the aim of the redundancy exercise. The judge had been led into this inaccurate description because he had failed to appreciate that the concepts of fairness and "the peaceable process of selection" went to proportionality rather than a determination of the aim itself. He had also failed to understand that the company felt unable to put forward the agreement (which included the age criterion) as representing a legitimate aim. The "legitimate aim" was in fact what the company regarded as the potentially discriminatory practice of length of service within the redundancy exercise: furthermore, the legitimate aim was not to reward loyalty or achieve industrial harmony: it had to be to fulfill a business need of the company's. Length of service was not necessarily synonymous with loyalty, as the judge appeared to think.

84. In addition, Mr Bowers argued, loyalty was a characteristic recognised specifically and separately throughout the other measured criteria. This was a further demonstration that to isolate length of service was to act in a discriminatory manner. Mr Bowers distinguished the decision of the European Court of Justice (ECJ) in ***Cadman v Heath and Safety Executive*** [2006] IRLR 169 (***Cadman***) in which it was said that "length of service" went "hand in hand" with experience on two bases: firstly, that the case concerned aims of pay policy and permitted the employer to reward length of service through pay without any further justification: secondly, that

the company, in agreement with the union, had developed a far more accurate measure of an employee's experience and ability than simple length of service.

85. Mr Bowers also submitted that the mere fact that the service related criterion was enshrined within a collective agreement was not determinative. It was, of course, a relevant consideration but where, as here, the law had changed, agreements which were fair when negotiated could become unlawful. Were it otherwise, unions and employees could with impunity negotiate potentially discriminatory practices.

86. Sir Thomas had also been wrong in concluding that the case fell "squarely within regulation 32". Firstly, gaining points for length of service in a redundancy situation was not a "benefit" within regulation 32. Secondly, by fixing on the five year period identified in regulation 32(2) Sir Thomas had forgotten the company's inability to meet that requirement under the agreement as it stood. Furthermore, the illustrations in Article 6.1 of the Directive (from which regulation 32 derived) were concerned with benefits awarded during employment, not with the basis for determining who was retained. The use of the phrase "award of any benefit" suggested something which improved an employee's terms of employment. The example Mr. Bowers gave was that of an additional holiday entitlement.

87. Finally, Mr Bowers argued, the judge had held that regulation 32(2) "simply" required the employer to justify the impact of an age related award only to those whose length of service exceeded 5 years. But that observation did not address the question as the heart of this case, namely what happened when it did ***not*** reasonably appear to the company that the way in which it would be obliged to use the length of service criterion fulfilled one of its business needs.

88. For all these reasons, Mr. Bowers argued, the judge had neither answered the questions put to him nor got the answers he had given right. The appeal should, accordingly be allowed and Sir Thomas' decision reversed.

The case for the action

89. For the union, Mr. Peter Edwards relied in large measure on the arguments which had succeeded before the judge. Those arguments were, as may perhaps have been expected, a mixture of the legal and the pragmatic. It will, I think, be sufficient for present purposes if I simply tabulate the points Mr. Edwards made:-

(1) the length of service criterion was but one of many considerations involved in the overall fairness of the redundancy selection process; other provisions also took age and length of service into account. It was not being suggested that these were discriminatory;

(2) it was important that the length of service criterion was contained in a collective agreement between the company and the union: - see ***Loxley v BAE Systems*** [2008] ICR 1347 at paragraph 42 of the decision of the EAT and the decision of the ECJ in ***Palacios de le Villa v Cortefiel Services SA*** [2007] IRLR 989; the courts should as a matter of policy uphold such agreements;

(3) there was no evidence that use of the length of service criterion in the redundancy selection process was in any way detrimental to the company's business;

(4) the unchallenged evidence from the union was that younger employees understood why longer serving members received what had been described in evidence as "this benefit";

(5) regulation 32 provided both an exception to the application of parts 2 and 3 of the regulations and set a different, and arguably less onerous test. The word "benefit" in regulation 32 was not to be construed restrictively. It was properly to be interpreted as meaning "an advantage" – this accorded with its dictionary definition. The inclusion of the length of service criterion was thus plainly a "benefit" within regulation 32. It was moreover, wholly objective;

(6) the examples given in regulation 32(2) could equally be applied to the retention of the selection criteria based on length of service. Such provision were amongst the most effective to encourage / reward loyalty and reward experience;

(7) the court should give substantial weight to the evidence put in on the union's behalf. In particular, Mr. Stokes had said: -

> "It is the case that certain age or service related contractual provisions will be highly valued by a union that has obtained benefits by collective bargaining. This is not because a Trade Union has any built in desire to benefit older workers. However (the union) like other Trade Unions does put a great deal of value on provisions that legitimately and ***proportionately reward loyal service*** or which give protection to older workers. Benefits of this kind are negotiated in the knowledge that all workers are likely to benefit from them at some future point."
>
> "The other side of the coin is that a company that employs a service criterion in this way will also benefit those workers who have stuck with the employer the longest. The Age Regulations refer themselves to the reward of loyalty as being a business aim, providing (the company) in my view, with a ready justification for retaining the service criterion";
>
> the court should thus hold that the inclusion of the length of service criterion was perhaps the most effective way of rewarding and encouraging loyalty;

(8) The length of service criterion was not a blunt tool. It was not a LIFO approach. It was one of a balanced set of criteria;

(9) this court should follow and apply ***Cadman***;

(10) if the court was against the union on the meaning of the word "benefit" the service related criterion could, nonetheless, be justified on the basis that it was a "proportionate means of achieving a legitimate aim". As legitimate aims, the union relied on the encouragement / reward of loyalty; the protection of the oldest and thus most vulnerable members of the workforce; the reward of experience and the promotion of good industrial relations. Older employees inevitably found it more difficult to find other employment. The statutory redundancy scheme provides higher redundancy payments for those over 41, and for those with longer service. These provisions have not been changed by the regulations;

(11) the union also supported the reasons given by the judge.

Discussion and conclusion

90. I have come to the conclusion that this appeal should be dismissed. That said, however, I reach my conclusion for reasons which, in some measure at least, differ from those expressed by Sir Thomas. In particular, there seems to me to be considerable force in Mr Bowers' first ground of appeal namely that Sir Thomas has simply not addressed the question of proportionality. At the same time, I have found a number of the arguments advanced by the union unhelpful in the context of statutory construction. Had I been chairing a constitution of the EAT, or even sitting as the Chairman of an ET, I might well have been impressed (in a debate which centred on unfair dismissal) by a number of the pragmatic arguments advanced by the union. The fact remains, however, that I am sitting as a judge of the Court of Appeal having to decide a point of statutory construction.

91. I will, accordingly, attempt to set out my thought process in the paragraphs which follow. I repeat that, in my judgment, this is a case about indirect discrimination, and that the four critical questions of statutory construction are those which I have posed in paragraph 63 above.

92. I begin with the agreement(s). I take from them two particular factors. The first and most important is that the length of service criterion is but one of a number of criteria in the context of an overall selection for redundancy. Moreover, it is by no means determinative or definitive of selection.

93. The second point is that the purpose of the agreement(s) is to achieve a correct balance of "manpower levels" with "workload and cost requirements" – see paragraph 1 of the Joint Staff Unions Agreement set out at paragraph 64 above. In my judgment, both this provision, and that agreed in 2003 (set out at paragraph 71) are significant, and both enable this court to hold, as I think it should, that the objective of the agreements is to reconcile the different perspectives of company and union in order to produce a selection process which is fair.

94. I move from the agreement to the Directive. There is, of course, a certain irony in the present case, in that "age" discrimination conventionally falls to be considered in the context of discrimination against the elderly, whereas the opposite is the case here. I remind myself, however, that irony is not a principle of statutory construction, and

that indirect discrimination on the grounds of youth can still be discrimination within Article 2(2)(b) and (i) of the Directive and Regulation 3 of the Regulations.

95. However, Article 6 of the Directive provides a defence of objective and reasonable justification by a legitimate aim. A number of examples are given. In my judgment, the length of service criterion qualifies under Article 6 as "legitimate employment policy" and a "labour market objective". In my judgment, to reward long service by employees in any redundancy selection process is, viewed objectively, an entirely reasonable and legitimate employment policy, and one which a conscientious employer would readily and properly negotiate with a responsible Trade Union.

96. In my judgment, the Directive is to be construed as a working document. It is designed to cater for good employment practice through the Economic Union. It must, accordingly be constructed in a manner which is practical and realistic.

97. In my judgment, therefore, the Directive envisages that the United Kingdom – like other Member States - may legitimately provide in its own legislation that terms such as those contained in the collective agreement(s) in this case will provide an exception to the concept of indirect discrimination contained in Article 2(2)(b) and (i).

98. The critical document, however, is the Regulations, and the equally critical question seems to me to be whether or not the company is able show that the criterion is not "a proportionate means of achieving a legitimate aim".

99. This, in my judgment, is the question Sir Thomas did not address, and were we within ***English v Emery Reimbold & Strick*** [2002] EWCA Civ 605, [2002] 1 WLR 2409 territory, I would be tempted to send the case back to Sir Thomas with an invitation to him to address the point. The inference from his judgment is plainly that he thought the means proportionate. However, on a point of this importance it does not seem to me that inferences are enough.

100. For the purposes of this judgment, I am content to assume that regulation 3(b)(i) and (ii) apply to establish indirect discrimination. I am, however, quite satisfied that, viewed objectively, the inclusion of the length of service criterion is a proportionate means of achieving a legitimate aim. The legitimate aim is the reward of loyalty, and the overall desirability of achieving a stable workforce in the context of a fair process of redundancy selection. The proportionate means is in my judgment amply demonstrated by the fact that the length of service criterion is only one of a substantial number of criteria for measuring employee suitability for redundancy, and that it is by no means determinative. Equally, it seems to me, the length of service criterion is entirely consistent with the overarching concept of fairness – or, to put the matter at its lowest – there is no evidence to contradict the statements made on the union's behalf that the company's younger employees accept it.

101. In these circumstances, it may not be strictly necessary to consider regulation 32. I propose to do so, however, because although the wording is different, the conclusion I reach about it is the same. In my judgment, the key word in regulation 32(2) (which I do not propose to set out again at this point) is "reasonably". The company has come to this court to ask whether or not the collective agreement(s) are lawful, or whether they breach the Directive and the regulations. In my judgment, viewed objectively, a

length of service criterion of more than five years does ***reasonably*** (my emphasis) fulfil a business need of the company – the need I have already identified of having a loyal and stable workforce.

102. The fact that the company in these proceedings expresses doubt about the proposition is, in my judgment, neither here nor there. Similarly, the fact that the company may wish to re-think it is in no sense determinative. As I understand the matter, the company has taken proceedings for the very purpose of resolving its doubts. In my judgment, this court can resolve them. The long service criterion, reasonably viewed by the company, does fulfill a business need.

103. Finally, and again for completeness, I would add that in my judgment, the length of service criterion is plainly capable of constituting a "benefit" within regulation 32. I reach this conclusion on the plain meaning of the word. To count a point for every year of service in a redundancy selection process is plainly capable of constituting a benefit, without any violence to the word's meaning, and in the absence of any statutory definition which inhibits the word from otherwise having its wide dictionary definition.

104. I hope this discussion deals with the four points which I identified as crucial in paragraph 63 of this judgment. It follow that; (1) I would entertain the appeal; (2) I would answer all three of the questions posed in paragraph 1 of Sir Thomas' judgment in the affirmative; and (3) dismiss the appeal. I do so, however, with the proviso that I have expressed in paragraph 60 above.

Addendum

105. I do not see anything in the additional submissions made to the court in answer to the questions posed by this court after the argument had concluded which causes me to alter the conclusions I have expressed, nor do I read the two decisions of the ECJ identified in paragraph 1 of this judgment as being in any way inconsistent with those conclusions. In these circumstances, I do not propose to extend what is already an overlong judgment by discussing them.

106. In so far as Aikens LJ reaches different conclusions from those which I have set out, I fully respect and understand his point of view, but do not agree with him for the reasons which I hope I have given.

107. On regulation 32 I respectfully endorse and agree with Arden LJ's provisional view.

108. Finally, I also respectfully agree with Arden LJ that it is sufficient for us simply to dismiss the appeal. We do not, I think, need to embark upon the very interesting but ultimately unproductive argument about whether or not it is necessary for this court to make formal declarations as to the current state of the law. As my recitation of Mr Bowers' arguments makes clear, the company is plainly seeking declaratory relief. If we simply dismiss the appeal, however, my view is that everybody knows where they stand; the redundancy exercises can proceed, and the ET can adjudicate on any claims made subsequently to it.

109. I would, accordingly, simply dismiss the appeal.

LORD JUSTICE AIKENS:

110. Wall LJ has set out the facts, the relevant provisions in the two Collective Agreements and the legislation, so I can go straight to a consideration of the two principal issues in the case. Rolls-Royce and Unite both wish this court to determine and declare the law on whether a length of service criterion in the "Selection for Redundancy Matrix" in each of two Collective Agreements falls foul of two regulations in the Employment Equality (Age) Regulations 2006 ("the Regulations"). The first issue is whether, in the circumstances in which this appeal arises, this court should be prepared to determine and declare on the issues that have been identified at paragraph 63 of Wall LJ's judgment. On the assumption that the answer is "yes" (in whole or in part) do that question, the second principal issue is whether the length of service provisions to indeed fall foul of the provisions of regulations 3 and 32. As Wall LJ has already noted, there are two sub – issues in relation to each regulation.

Some more background.

111. There is undoubtedly a dispute between Rolls-Royce and Unite on whether the length of service criterion in the "Selection for Redundancy Matrix" in each of the two Collective Agreements falls foul of Regulation 3(1) or is a "benefit" within Regulation 32(2) and, whether, in each case, it can be justified. But it is, in my view, important to remember how this dispute has arisen. The two Collective Agreements pre-date the Employment Equality (Age) Regulations 2006. On 20 November 2007, Rolls-Royce announced that it would be consulting on job reductions of between 1,500 and 2,000 posts world-wide, in various sectors and functions. Rolls-Royce announced at its Derby plant that it would be consulting on reductions of about 140 jobs in the aerospace division. Under ***section 188*** of the ***Trade Union and Labour Relations (Consolidation) Act 1992,*** Rolls-Royce is therefore obliged to have consultations with Unite, a recognised union, about the proposed redundancies. Under ***section 188(4)(d)*** and ***(e),*** Rolls-Royce is obliged to disclose to the union both the proposed method of selecting those for dismissal by redundancy and the proposed method of dismissal.

112. Rolls-Royce, having taken advice, formed the opinion that the length of service criterion does fall foul of the Regulations and so is unlawful. It is conscious that an employee who is dismissed by reason of redundancy can still claim that his dismissal is unfair and unfairness in the selection process can amount to unreasonable action on the part of the employer.[1] The employer effectively has the burden of showing that a dismissal is fair, even in the case of dismissal by reason of redundancy. Therefore, Rolls-Royce does not wish to be faced with potential claims in Employment Tribunals by employees that have been made redundant following the procedure set out in the Collective Agreements (and so using the long service criterion as one of a number of criteria), that the criterion is unlawful, with the result that the dismissal is unfair.

113. As Wall LJ has noted, when Rolls-Royce brought its claim, it sought a "determination" of the issue of "*whether the inclusion of the length of service within the selection matrix for redundancy situation would be in breach of the Regulations and therefore unlawful"*. Effectively, Rolls-Royce asked the court to declare that the

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[1] See: ***Employment Rights Act 1996 section 98*** and ***Williams v Compair Maxam Ltd [1982] IRLR 83.***

inclusion of that criterion was in breach and was unlawful. A witness statement of Ms Helen Foord, Rolls-Royce's Senior HR Business Partner, was served in support of Rolls-Royce's claim for the declarations it seeks. Paragraph 9 sets out these fears of Rolls-Royce. So it is clear that the origin of the present dispute between Rolls-Royce and Unite is what Rolls-Royce fears may be argued, not by the union, but by employees made redundant at Derby (and perhaps elsewhere) after the service related criterion has been used as part of the redundancy procedure. For my part I accept that these concerns of Rolls-Royce are genuine. Counsel for Unite did not argue to the contrary.

114. Wall LJ has already pointed out that Unite was originally not in favour of the questions of the lawfulness of the service related criterion being resolved by CPR Pt 8 proceedings in which Unite was the sole defendant. In paragraph 4 of the witness statement of Mr Stokes, to which Wall LJ has already referred,[2] he states that this is not a case which is, in his view, "*unlikely to involve a substantial dispute of fact*"; ie. in his view, it would involve a substantial dispute of fact. Mr Stokes said, on the contrary, that "*a Court or Tribunal would need to hear extensive factual evidence as to the justification for retaining or removing the service – related redundancy selection criterion*". In paragraphs 10 to 13, Mr Stokes sets out the factual issues that a Court or Tribunal might have to consider. Wall LJ has already quoted those passages at paragraph 9 above.

115. As Wall LJ also points out, paragraph 14 of Mr Stokes' witness statement stated that the union had made it clear to Rolls-Royce that it wished to refer the removal of the service criterion to an Employment Tribunal. There the union would argue that its removal "*…is a detriment, and that applying the removal of this provision to the whole workforce amounts to indirect age discrimination against the older group of workers who are losing the benefit of this provision"*. Therefore, Mr Stokes said, "*….grievances have been lodged on behalf of hundreds of employees of the company with a view to sample or test cases being referred to the Employment Tribunal for a determination of this issue"*. As Mr Stokes pointed out, issues of age discrimination (and other types of discrimination) in employment are routinely dealt with by Employment Tribunals and if an employee alleges breach of the Age Regulations, he is required to bring any claim in the Employment Tribunal not the courts.

116. A further witness statement was put in on behalf of the union. This was provided by Mr Michael Lomax, who has worked at Rolls-Royce's plant at Derby since 1971 and is Unite's chief negotiator for collective bargaining on behalf of staff employees that had been members of Amicus before it combined with other unions to form Unite. Mr Lomax made several important points. First, that it is generally recognised that the older a person gets, the harder it is for him to find new employment if he loses his job. Secondly, trade unions who negotiate redundancy agreements such as those with Rolls-Royce have in their minds the areas where they need to protect the interests of vulnerable members, in which class he includes older employees. Thirdly, that the length of service criterion is an objective one and is not dependent on the subjective view of managers who have to make assessments for the other criteria that the Collective Agreements require to be made if there is a prospect of redundancies. Fourthly, he said that he is not aware of any complaints from younger workers about the existing criteria. He thinks that younger members appreciate that they will have

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[2] See para 9 above.

the advantage of the length of service criterion when they have done more service with the company.

117. Mr Lomax appended a number of emails from members of Unite. They are responses to the union's request for "supporting comments" towards its stance in these proceedings. All the responses, bar two, are from members in their forties or fifties, who have worked for Rolls-Royce from 18 to 41 years. One respondent, aged 60, has worked for 44 years; another, aged 28, has worked for 10 years. All said that length of service is an important criterion. Many said that length of service cannot be directly equated with age.

Exercise of the Court's jurisdiction in this case to grant declaratory relief in the context of an action brought under CPR Part 8.

118. The court's present jurisdiction to grant a declaration is derived from statute, originally the ***Court of Chancery Act 1850***, then ***section 50*** of the ***Chancery Procedure Act 1852***. The present statutory foundation is ***section 19*** of the ***Supreme Court Act 1981,*** and also ***CPR Pt 40.20.*** It is well – established that a claimant does not need to have a subsisting cause of action against a defendant before the court will grant a claimant a declaration: see ***Guaranty Trust Co of New York v Hannay.***[3]

119. The grant of a declaration is discretionary. The law has developed since the statement of principle by Lord Diplock in the leading case of ***Gouriet v Union of Post Office Workers.***[4] I have looked again at ***Gouriet's case,*** the decisions of this court in ***Meadows Indemnity Co Ltd v Insurance Corporation of Ireland Pld and the International Commercial Bank Plc,***[5] ***In Re S,***[6] ***Feetum v Levy,***[7] and most recently, ***The Office of Fair Trading v Foxtons Ltd,***[8] as well as the decisions referred to in Wall LJ's judgment. There is no doubt that the circumstances in which the court will be prepared to grant declaratory relief are now considerably wider than they were thought to be after ***Gouriet's case*** and the ***Meadows case.*** In the words of Jonathan Parker LJ in ***Feetum v Levy,*** *"…things have indeed moved on since the* ***Meadows case*** *was decided; and the courts should not nowadays apply such a restrictive meaning to the passage in Lord Diplock's speech in* ***Gouriet's case****"*.

120. For the purposes of the present case, I think that the principles in the cases can be summarised as follows: (1) the power of the court to grant declaratory relief is discretionary. (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question. (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not

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3 ***[1915] 2 KB 536.***

4 ***[1978] AC 435 at 501.*** Lord Diplock stated: *"…for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event"*.

5 ***[1989] 2 Lloyd's Rept 298***

6 ***[1996] Fam 1.***

7 ***[2006] Ch 585.***

8 ***[2009] EWCA Civ 288.***

fatal to an application for a declaration, provided that it is directly affected by the issue.[9] (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned. (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court. (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue.

121. How are those principles to be applied to this case? There is a dispute between Rolls-Royce and Unite on the issue of whether the length of service criterion in the criteria for deciding redundancy issues set out in the Collective Agreements is "lawful" under the Regulations. Both parties recognise that the Collective Agreements are not themselves legally enforceable agreements within ***section 179*** of the ***Trade Union and Labour Relations (Consolidation) Act 1992,*** because there is no provision in them which states that they, or any part of them, should be so. Therefore, strictly speaking, there is no dispute concerning "legally enforceable rights" between the parties presently before the court. On the other hand, both Mr Bowers and Mr Edwards accepted that the provisions of ***Part 2 of Schedule 5*** of the Regulations stipulate that the issue of the validity of discriminatory terms contained in collective agreements, which are not intended or presumed to be legally enforceable contracts, may be determined by an employment tribunal. More importantly, the terms of the Collective Agreements concerning redundancy procedures (at least) are incorporated into the contracts of employment between Rolls-Royce and employees at the Derby plant. Therefore, issues concerning the lawfulness of the length of service criterion could very well arise as between Rolls-Royce and any employee who is made redundant using that criterion, in the way I have already described. That issue could affect many employees. As Mr Edwards put it, the issue is whether the *contractual* redundancy selection criterion of length of service is lawful or not. It is that fact that led Rolls-Royce to start these proceedings, in order to get a ruling on the lawfulness (or otherwise) of the length of service criterion. However, it must also be accepted that all, or nearly all, such employees are members of Unite and it is there to represent their interests.

122. As Wall LJ fully recognises, individual employees, who might be directly affected by any declaration on the lawfulness of the length of service criterion in the redundancy process, are not before the court. Wall LJ accepts that any employee who wishes to raise the issue that the redundancy process was unfair because of the issue concerning the service related criterion and the effect of the Regulations, must be entitled to do so in an Employment Tribunal. I agree. But I think that recognition of this fact, which is what prompted Rolls-Royce to bring the proceedings in the first place, inevitably prompts a more fundamental question: is the present exercise legitimate and serving any useful purpose if these issues will, or might well be, reconsidered all over again in the context where it really matters, viz. when disputes arise between Rolls-Royce and individuals who have been made redundant by Rolls-Royce? I doubt it. In my view, the initial opposition of Unite to these proceedings by Rolls-Royce was right. I

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[9] In this respect the cases have undoubtedly "moved on" from ***Meadows.***

agree with Wall LJ that the union's subsequent attitude may well be driven by its belief that it has obtained a tactical advantage, having won the argument before Sir Thomas Morison.

123. Are my concerns about the fact that individual employees are not involved in this litigation and the issues are likely to be reconsidered in further claims before the Employment Tribunal overborne by a public interest in getting one or more answers on the issues raised "in principle"? Again, I doubt it. The answers we give can, of course, be considered by any individuals who are made redundant using the length of service criterion – or not – depending on our decision. But I think the utility of the exercise is much curtailed because we are asked to decide this case using the CPR Pt 8 procedure. Even on the case advanced by Unite, which accepts that the length of service criterion constitutes indirect age discrimination within Regulation 3(1)(b), it therefore raises the question of whether the age discrimination can be justified by Rolls-Royce ("A" in the Regulation) as being a "*proportionate means of achieving a legitimate aim*" in order that it can be held lawful.

124. It is clear, from cases such as ***McCulloch v Imperial Chemical Industries plc,***[10] a decision of the EAT, that if this issue had arisen in the context of a claim for unfair dismissal, the question of whether the service related criterion was justified would involve an Employment Tribunal making a full analysis of the facts. That would enable it to make a "*fair and detailed analysis of the working practices and the business considerations involved"*, to see if the length of service criterion was both proportionate and "*reasonably necessary"*.[11] Both parties appear to accept that the issue of whether justification exists has to be considered either at the time this court makes its decision or, when a person is selected for redundancy, using the length of service criterion. [12] Regulation 3(1) is clear that it is for the employer to show that the criterion that is in question can be justified as a proportionate means to a legitimate aim. In the case of Regulation 3(1), it is an objective test. Rolls-Royce has stated in evidence that it believes that it cannot show that the length or service criterion is a "*proportionate means of achieving a legitimate aim"*. If Rolls-Royce declines to do so, then should the court act solely on the evidence of Unite, when the people who are likely to be most affected are those who might be declared redundant who are not before the court? That seems particularly doubtful when, according to the submissions of Unite, the relevant time for assessing whether the length of service criterion is justified would be the date of the application of the redundancy selection criterion in question.[13]

125. The same argument arises in relation to the question of whether the award of points for length of service constitutes a "benefit" for the purposes of Regulation 32(1). It if does, then it is only legitimate if Rolls-Royce ("A" in the Regulation) can demonstrate that it appears to it that the way in which it uses that criterion in the award of the "benefit" "*fulfils a business need of his undertaking (for example by encouraging the loyalty, or motivation or rewarding the experience, of some or all of his workers)"*. Again, it appears that both parties accept that the relevant date for considering the

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10 ***[2008] ICR 1334.***

11 See particularly paras 10 – 12 and 32 – 40 of the judgment of Elias P.

12 Unite's Second Supplementary Submissions paras 14 – 16; Rolls-Royce's Supplementary Submissions, paras 14 – 17.

13 Unite's Second Supplementary Submissions para 16.

issue of justification is either now, when the matter is before the court, or the date of the application of the redundancy criterion in question. The court will have to conduct a factual analysis and, (on my view) the test of justification under Regulation 32(2) is a subjective one. Should the court do this exercise when Rolls-Royce states, in evidence, that it cannot argue that the use of the criterion does fulfil a business need?

126. Given those difficulties, if I had been confronted with this question when sitting at first instance, I would have held that the court should not exercise its jurisdiction to grant any declaratory relief, whatever I thought of the merits. But it appears that Bean J gave his approval to the Part 8 procedure to be used to determine what, if any declaratory relief should be given by a Queen's Bench judge. Furthermore, Sir Thomas Morison has made declarations concerning the questions posed, albeit with considerable misgivings. In other words, both judges exercised a judgment in favour of this court using its discretionary power to grant declaratory relief, using the Part 8 procedure.

127. So I think I have to ask: was that exercise of judgment unreasonable? My basic concern is that insufficient consideration has been given to the fact that those most affected by the decision, the employees who might be made redundant, are not before the court. They have been unable to adduce any factual evidence or make submissions that might be relevant before Sir Thomas Morison sitting as a Queen's Bench judge, or before a specialist tribunal that normally considers such matters. I appreciate that these employees are represented by the union and the majority of those who have voted on the matter have said that they are content for the union to take the line it does in this litigation. But, by way of example, what of the older employee who went to work for Rolls-Royce over the age of 45, compared with someone who is younger but has worked for longer because he started to work there at 18? In any redundancy exercise the older person will be disadvantaged if the length of service criterion is used. He may wish to challenge the use of the criterion in the Employment Tribunal, saying its use is discriminatory and unlawful, so that his dismissal was unfair. He should not be hampered by the fact that there is a decision of this court which holds that, in principle, use of the length of service criterion is lawful under Regulation 3(1) and it is a lawful "benefit" under Regulation 32(2).

128. In the circumstances I have concluded that it is wrong for this court to do anything more than answer two very narrow questions of statutory construction that arise in relation to Regulation 3(1) and 32(1). I deal with these below. Otherwise, I would decline to exercise the jurisdiction to grant declaratory relief at all in this case.

The substance of the appeal: the questions to be answered.

129. I agree with Mr Edwards for Unite that it is preferable to answer first the questions concerning Regulation 32. The broad scheme of the Regulations is that Regulation 7 (in Part 2 of the Regulations) makes it unlawful for an employer to discriminate against an employee in several situations. Regulation 7(2) makes it unlawful to discriminate (amongst other things) "*in the opportunities which he affords him for promotion, a transfer, training, or receiving any other benefit*"[14] and "*by*

[14] Regulation 7(2)(b).

dismissing him or subjecting him to any other detriment".[15] By Regulation 2(1) (in Part 1), references to "discrimination" are to any discrimination falling within Regulation 3. But Regulation 32(1), (in Part 4) stipulates that, subject to Regulation 32(2):

> *"…nothing in Part 2 or 3 of the Regulation shall render it unlawful for a person ("A"), in relation to the award of any benefit by him, to put a worker ("B") at a disadvantage when compared with another worker ("C"), if and to the extent that the disadvantage suffered by B is because B's length of service is less than that of C."*

130. In other words, if the age discrimination by the employer, as defined by Regulation 3(1), also falls within the scope of Regulation 32(1), then, subject to paragraph (2) of that Regulation, the age discrimination is not unlawful. In a case within Regulation 32(1) there is no need to make any investigation of whether the length of service criterion falls foul of Regulation 3(1). However, this is subject to paragraph (2) of Regulation 32. The effect of that provision is that if a worker (B) has a length of service which is more than 5 years and he is still put at a disadvantage (by reason of length of service) to another worker (C), then for the provision to be lawful the employer has to demonstrate that "*…the way in which [the employer] uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (by example, by encouraging the loyalty or motivation or rewarding the experience, of some or all of his workers".*

The construction of Regulation 32(1)

131. This Regulation must be construed against the background of Council Directive 2000/78/EC, which has already been set out by Wall LJ. The background and broad objectives of the Directive are set out in elaborate detail in 37 paragraphs of preamble. But the key purpose of the Directive is stated in Article 1, which Wall LJ has quoted at paragraph 74 of his judgment. I agree that Regulation 32(1) and (2) constitute the UK's transposition into domestic legislation of the framework articulated in Article 6 of the Directive, particularly Article 6.1 (b). The effect of that Article (as concerns Regulation 32) is that national law may provide that differences of treatment which involve the fixing of minimum conditions of seniority in service for access to "*…certain advantages linked with employment"* 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…".* It should be noted that Article 6.1 of the Directive gives the choice to Member States as to whether they make such a provision in their national laws, provided that they relate to legitimate social policy objectives as set out in the Article.[16] Moreover, the issue of whether "*differences of treatment on grounds of age"* can be "*objectively and reasonably justified by a legitimate aim"* (as elaborated), must be viewed in the context of the national law of member states.

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[15] Regulation 7(2)(d).

[16] See the decision of the ECJ in: ***R on the application of The Incorporated Trustees of the National Council of Ageing (Age Concern England) v Sec of State for Business, Enterprise and Regulatory Reform: [2009] EUECJ C – 388/07,*** particularly at para 52.

132. The argument of Mr Edwards for Unite is that when a worker is given a certain number of points for his length of service by those operating the criteria for identifying potential redundancy candidates under the Collective Agreements, the worker is being awarded a "*benefit"* within Regulation 32(1). Therefore, that exercise cannot be unlawful provided it satisfies the test in Regulation 32(2) when applied to those who have done more than 5 years service.

133. In Regulation 32(7), it is stated that, in Regulation 32 "*benefit does not include any benefit awarded to a worker by virtue of his ceasing to work for [his employer]"*. In my view that exclusion is not relevant to the alleged "benefit" in this case. "*Benefit"* is not otherwise specifically defined in Part 4, but its use in Regulation 32 is subject to the partial definition given in Regulation 2(2). This states that "*benefit…includes facilities and services."*. That definition is clearly not exhaustive. Mr Edwards reminded us of one of the *Oxford English Dictionary* definitions of benefit, which is: *"…advantage or profit"*. He submitted that being given more points for greater length of service constituted an "advantage" and so is a "*benefit"*.

134. Mr Bowers submitted that "*benefit"* in its context is something more tangible than a potential advantage over other redundancy candidates. He argued that the award of points to those serving longer is not akin to an "*…advantage linked to employment"* as envisaged by Article 6(b) of the Directive. He also submitted that because Regulation 32 is a derogation from the general rule against age discrimination set out in Regulation 3, therefore the scope of Regulation 32 and the scope of "*benefit"* should be narrowly construed.

135. The grant of a certain number of points to a particular worker under the length of service criterion is not the award to that worker of facilities or services. But in my view it is the award of an "advantage", in the sense that the points may give a worker a higher score overall in the exercise being carried out and thus make it less likely that he will be made redundant. It seems to me that this therefore falls within the phrase used in Article 6(b) of the Directive, ie. it is a "*…certain advantage linked to employment"*, because the points are automatically given to a worker in accordance with the number of years he has worked for Rolls-Royce. So, I accept Mr Edwards submission that the length of service criterion in the two Collective Agreements is a "*benefit"* within Regulation 31(1).

The effect of Regulation 32(2)

136. This conclusion makes it necessary to consider Regulation 32(2). This provision is, with respect, drafted in an inelegant and obscure manner. I understand its effect, when taken with the first phrase of Regulation 32(1), to be as follows: if a worker, "B", has a length of service that exceeds 5 years, but his length of service is less than that of "C", but "B" is put at a disadvantage (as against another worker, "C") in relation to the award of any benefit to him by his employer ("A") because of his shorter length of service, then the use of this criterion of length of service will only be lawful (for the purposes of Part 2 or 3 of the Regulation) if it reasonably appears to "A" that the way that he uses that criterion fulfils a business need of his undertaking. Examples of "*business need*" are set out. They include the encouragement of loyalty or motivation, or the rewarding of experience of some or all of "A's" workers.

137. It seems to me that the words of Regulation 32(2) require an investigation into the state of mind of the employer at the time that he uses the criterion of length of service in relation to the award of a benefit – in this case the points. That follows, I think, from the use of the present tense in the phrase "*…it must reasonably appear to A that the way he uses the length of service criterion…"*. Therefore there would be two stages to the enquiry in the present case. The first stage would involve a factual enquiry: at the time that Rolls-Royce used the criterion, did it appear to Rolls-Royce that its use of the criterion of length of service in awarding points to potential redundancy candidates would be fulfilling a business need of Rolls-Royce?

138. However, if I am right that the test involves a consideration of Rolls-Royce's state of mind when it actually uses criterion, then this exercise obviously cannot be undertaken in advance of Rolls-Royce awarding the points to potential redundancy candidates. I think that this creates a major problem in the present proceedings. Rolls-Royce states, through paragraph 11 of the witness statement of Ms Foord, that it cannot justify the way it would use the criterion of length of service in relation to the award of points in any potential redundancy assessment exercise. Therefore, it is argued, the requirement of Regulation 32(2) cannot be fulfilled, because Rolls-Royce cannot say that the use of the length of service criterion "reasonably appears" to it to fulfil a business need. Therefore, the use of the length of service criterion cannot be declared lawful.

139. Even if it were possible to reach an answer to that first question and the answer is: "yes, it does appear to Rolls-Royce to fulfil a business need", the next question is: did it, at the relevant time, "reasonably appear" to Rolls-Royce that this was so? That, in my view, involves a judgment by the court of whether, objectively speaking, in the circumstances that existed when the criterion was used, Rolls-Royce could objectively (ie. "reasonably") arrive at the conclusion that its use of the length of service criterion did fulfil a business need for Rolls-Royce. That may involve a consideration of what other employers, or trade unions or perhaps third parties, might think concerning the exercise. Again, it seems to me that the court is not in a position to give a definitive answer to this question on the material before it.

140. Therefore, on the issue of the construction and effect of Regulation 32, I would answer only the issue of construction of Regulation 32(1). In my view the grant of points to potential redundancy candidates in accordance with the length of service criterion set out in the appendices to the Collective Agreements constitutes a "*benefit*" for the purposes of Regulation 32(1).

Regulation 3(1)(b)

141. It has been stated by both parties before the court that the length of service criterion in the Collective Agreements does not offend Regulation 3(1)(a), but it offends Regulation 3(1)(b). Both parties appear to agree, therefore, that the length of service criterion is, on the face of it, an "indirect" age discrimination which has to be justified for it to be lawful. I have taken Article 2(b) of the Directive into account in construing Regulation 3(1)(b). Despite that and giving Regulation 3(1)(b) as broad a construction as I think it can reasonably bear, I have difficulty with this view of the parties.

142. For the purposes of Regulation 3(1)(b), the length of service criterion is a "*criterion"* that Rolls-Royce ("A" in the Regulation) applies to an employee ("B") and also applies equally to persons who are not of the same age group as "B". Let me call those persons "CC". The questions that have to be posed are: (i) does the application of the length of service criterion to both B and CC put (or would it put) persons of the same age group as B at a disadvantage when compared with the other persons CC; and (ii) does it in fact put "B" at a disadvantage compared with CC. For the purpose of answering the questions it is required (by Regulation 3(2)) that a "*…comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other"*. If that condition is fulfilled then when (for example) the length of service criterion is applied to "B" who is aged between 40 – 45 and it is applied to "CC" who are in the age group 50 – 55, then the "*relevant circumstances"* of "B" must be the same as those for the group "CC". The relevant circumstance for these purposes must be the length of service completed by each, ie. B and CC. But if that is so then "B" is not put at a disadvantage to group "CC".

143. I think that this analysis is borne out by the structure of the Regulation. If Regulation 32 is intended to deal specifically with the possible discriminatory affect of length of service provisions, then if something fits within that Regulation, there is no need for it to fit into Regulation 3(1)(a) or (b).

144. Even if I am wrong about that and the length of service criterion does prima facie discriminate (albeit indirectly) against persons in Rolls-Royce in the position of "B", then the discrimination may still be lawful if Rolls-Royce can show that it is "*…a proportionate means of achieving a legitimate aim"*. I agree with Wall LJ that Sir Thomas Morison did not address the question of whether the criterion was a *proportionate* means of achieving a legitimate aim.

145. However, I think that the same difficulty then arises about dealing with this question as it did with Regulation 32(2). The issue of whether the provision or criterion is "*a proportionate means of achieving a legitimate aim"* must, I think, be tested at the time that it is applied by Rolls-Royce. In normal circumstances that would be when the redundancy process is operated. It cannot be, on the correct construction of Regulation 3(1), when the provision or criterion was first put into the two Collective Agreements, as both parties accept in this case. I accept that it might be when the issue is before a court, but that just emphasises the problem in this case, because the issue has not arisen in circumstances when Rolls-Royce would normally have to justify the indirect discrimination. The position of Rolls-Royce, in the position of "A", as stated in evidence, is that it believes it cannot show that the criterion is a *"proportionate means of achieving a legitimate aim"*. The Regulation is clear that it is for the employer to show that the criterion can be justified as a proportionate means to a legitimate aim. If Rolls-Royce declines to do so, should the court step in and do it for itself?

146. The position in the case of Regulation 3(1) is less of a problem than in the case of Regulation 32(2), because the test to be applied in the case of Regulation 3(1) is, I think, purely objective: there must be "objective justification".[17] In short, even if

[17] Cf: ***Health and Safety Executive v Cadman [2005] ICR 1546,*** particularly at para 25 and following of the judgment of Maurice Kay LJ.

Rolls-Royce *believed* that it did not regard the length of service criterion as being a proportionate means of achieving a legitimate aim, a court could find, after an investigation, that it is so. Wall LJ is prepared so to hold, despite any lack of proper findings of fact by Sir Thomas Morison on this issue.

147. I am not prepared to go that far. I am not prepared to hold, on an issue of fact, that the length of service criterion is, objectively and in the circumstances that are now to be applied, a proportionate means of achieving a legitimate aim. That needs full investigation by a fact finding tribunal. In my view it should not be decided in the absence of the parties that it will affect most of all: those who are potential redundancy candidates.

148. I have considered generally whether any assistance is to be gained from the opinion of the Advocate – General in the ECJ case of ***Bartsch v Bosch und Siemens Hausgerate (BSH) Alterfursorge Gmbh.***[18] The claimant, Mrs Bartsch, had married a man who was 20 years older than her. He had worked for BSH, but he died in service. His widow applied for a widow's retirement pension. BSH had "guidelines" about the provision of pensions to former employees and their widows. But it stipulated that such a pension would not be paid if the widow was more than 15 years younger than the former employee. So BSH refused to give Mrs Barsch a pension. She applied to the Labour court for a declaration that the provident fund had to pay her a pension according to the guidelines, but excluding the prohibition on younger widows. The court rejected her application and that decision was upheld by the Higher Labour Court. Mrs Barsch appealed to the Federal Labour Court on a point of law. It posed questions to the ECJ for a preliminary ruling.

149. The ECJ ruled, effectively, that EC law was not relevant in this case, because the provisions of the Directive on age and disability discrimination (Directive 2000/78) were not operative in the Federal Republic of Germany at the relevant time. So, as both sides recognised in their supplementary submissions to us, the parts of the Advocate – General's opinion which contained views on issues of justification or proportionality were not adopted by the ECJ in its judgment, because it did not need to deal with those issues. Therefore, with respect to the Advocate – General, I think that the comments are not helpful to the issues in this case.

Conclusion

150. The only issue I would be prepared to answer is on the construction of Regulation 32(1). I have concluded that the grant of points to potential redundancy candidates in accordance with the length of service criterion set out in the appendices to the Collective Agreements constitutes a "*benefit*" for the purposes of Regulation 32(1). I have considered the judgments of both Arden and Wall LJ. However, for the reasons I have attempted to give, I would dispose of this appeal by replacing the order of Sir Thomas Morison with one making a declaration as to the meaning of the word "benefit" in Regulation 32(1) as stated above, but otherwise make no order on the points raised by the parties".

LADY JUSTICE ARDEN:

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18 ***Case C-427/06;*** the decision of the Grand Chamber of the Court is at [2008] EUECJC – 427/06.

151. I agree with the judgment of Wall LJ that this Court should entertain this appeal for all the reasons that Wall LJ has given. I would add that I have read his reference to there being no "lis" to there being no immediate claim brought by an alleged victim of age discrimination. But there is a "lis" in the sense of a dispute between the respondent union ("the union") and the appellant ("the employer") as to the lawfulness of the length of service criterion in the assessment matrices provided for in the collective agreements on which individual employment contracts are based. The collective agreements are not legally enforceable agreements, but that point only matters if the parties do not comply with them.

152. In my judgment, the parties to the collective agreements are entitled to know whether it would in fact be unlawful for the employer to rely on the length of service criterion. There are strong practical reasons why the employer should want to have that dispute resolved as between it and the union. Its resolution will provide guidance to the employer in formulating any scheme of redundancy. Of course employees may challenge the scheme after the event, and further evidence may be adduced. Nonetheless, it is highly desirable that the legal system should provide some level of anterior assurance. There are large numbers of employees involved and the personal cost to them, their families and communities of redundancy is likely to be considerable, not to mention the financial cost to the employer. There has been no change of circumstances since the matter was before the judge, and in that situation it would in my judgment be wrong to deny whichever party seeks to do so the opportunity to argue that the order made was wrong. There is no dispute of fact.

153. The central issues on this appeal are (1) whether the use of a length of service criterion in the selection of employees for redundancy would constitute indirect discrimination on the grounds of age within regulation 3 of the Employment Equality (Age) Regulations 2006 (SI 2006/1031) ("the 2006 regulations") transposing art 2 of Directive 2000/78/EC ("the directive"), or alternatively (2) whether regulation 32(2) of the 2006 regulations would apply to it. The criterion is contained in individual employment contracts incorporating the terms of collective agreements, and thus falls within the scope of the directive (art 3(c)). The collective agreements were made before the directive was transposed into domestic law. The employer accepts that the agreement was fair when entered into and does not seek to resile from the collective agreements.

154. The relevant background and statutory provisions are set out in the judgment of Wall LJ and I need not repeat them.

Article 2 of the directive and regulation 3 of the 2006 regulations

155. Like Wall LJ I proceed on the basis that the length of service criterion potentially involves indirect discrimination on the grounds of age. There is an argument by the employer that the length of service criterion constitutes direct discrimination. But, as I see it, acceptance of that submission would not make any difference on the facts of this case. As to objective justification, it must be shown that the length of service criterion is a "proportionate means of achieving a legitimate aim" (reg 3, transposing art 2(2)(b) of the directive).

156. As to legitimate aim, there is no doubt that one of the legitimate aims of an employment policy is to reward experience and that this can be done through a length

of service provision (without the need to show any special justification): see *Cadman v Health and Safety Executive* [2006] ICR 1623. By analogy, a length of service criterion can in my judgment also be a legitimate aim of redundancy selection terms especially where, as here, it is part of an agreement freely come to with representatives of the vast majority of the workforce.

157. By negotiating the collective agreements, the employer was put in the commercially valuable position whereby it could implement a scheme for redundancy in a peaceful fashion. The employer obtained a package of benefits from the collective agreements, including but not limited to the agreement of the union to a particular method of redundancy selection. It accepts that the agreements were fair when made.

158. The employer's case, however, on this appeal is that its business need has changed since the collective agreements were made. Its business need now is to retain those employees who are best able to adapt to the changed environment (by inference, the financial environment in the present recession). Such ability is in the company's submission best assessed by other skills, such as versatility and contribution to the team, rather than length of service.

159. However, the question is not whether the employer would have a legitimate aim if it formulated a redundancy selection scheme in line with its current business need, but whether it would have a legitimate aim if it followed the terms of the individual employment contracts, and the collective agreements, notwithstanding its business need. In my judgment, a legitimate aim is not the same thing as a current business need. The employer's aim in adhering to the terms contained in individual employment contracts is to be able to formulate a redundancy selection scheme on the agreed basis, thus removing the scope for disagreement and dissension among the vast majority of its workforce. Those agreed terms were negotiated with the union and represent the terms on which both parties could find agreement. The employer therefore expressed itself content to adopt a redundancy selection exercise on the basis of those terms.

160. If it continues to follow those terms, it would be doing so for the purpose of obtaining the benefits that it obtained under the collective agreements. It would, as I see it, be as able to show a legitimate aim now as it was when the collective agreements were first made. It is to be remembered that all that needs to be shown is that there is a legitimate aim, not that the objective served is necessarily the best way of serving the narrow financial interests of the employer.

161. The reasons given above are, as I read the judge's judgment, substantially the same as the reasons given by the judge on this point.

162. As to proportionality, while I agree that the judge did not in terms deal with this, I consider that he had many of the relevant considerations in mind. In my judgment, it is clear that the collective agreements were negotiated between the union and the employer and that they represented a compromise of the parties' respective negotiating positions for mutual benefit. The collective agreements did not seek to take advantage of any particular group of employees. Moreover, the length of service criterion is one only of the criteria to be used, and thus younger employees could score on equal terms on the other criteria. The length of service criterion was included for the principled reason that it was employees who had served longest who

were likely to find it most difficult to find new employment. All employees, including those who now are disadvantaged by the length of service criterion, stand to benefit at some time from this criterion. All employees also stand to benefit from there being a basis of selection for redundancy which was agreed between union and employer and which could therefore be implemented more quickly and easily and at less cost to the employer. The situation where there is a collective agreement is different from the situation where the employer has a redundancy scheme that has not been negotiated on behalf of employees (as in *MacCulloch v ICI plc* [2008] ICR 1334). There is moreover no suggestion that the union would have given its consent to redundancy selection terms that did not include a length of service criterion. Finally, as the judge pointed out, the methodology agreed in the selection matrices differed from that of LIFO, which in his judgment might have been objectionable.

163. On this basis, there is no discrimination within art 2 and reg 3. The differences in treatment on the ground of age are objectively and reasonably justified. There is no need to go to reg 32, and I prefer to express no concluded view on it.

164. Reg 32 provides an employer with a defence to a claim of discrimination, and applies even if the discrimination is direct. There are two issues here: the meaning of "benefit", and the question whether the business need of the undertaking is to be determined by reference only to the view of the employer.

165. As to the meaning of "benefit", I provisionally agree with Wall LJ that an award of points based on length of service constitutes the award of a “benefit" for the purposes of reg 32. The word “benefit" is a very wide one. It is a word used when it is difficult or undesirable to place limits on the advantage that is to be caught by particular provision. I doubt whether it can be limited, as Mr Bowers submits, to something which improves an employee’s terms of entitlement.

166. As to the other issue on reg 32, the concluding words of reg 32(2) are:

> "it must reasonably appear to [the employer] that the way he uses the criterion of length of service, in relation to the award in respect of which [the employee] is put at a disadvantage, fulfils the business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding experience, of some or all of his workers)."

167. Mr Bowers argues that, as the award of points based on length of service would not now be considered by the employer to fulfil a business need of the undertaking, it is inevitable that reg 32(2) cannot be satisfied. I accept that reg 32 (2) is apparently drafted in what might be called an "employer-centric" way that makes the reasonable view of the employer determinative of the application of the provision. However, it is an entirely different matter to conclude that it is only the employer's current view that is relevant. Provisionally, it seems to me that the reasonable employer has to show that it has balanced all the relevant considerations, which would include in the circumstances of this case the fact that the length of service criterion forms part of employment contracts with employees and reflects the terms of carefully negotiated collective agreements between union and employer.

168. Reg 32 does not in my provisional judgment contemplate, as the evidence of the employer here in this case has assumed, that the employer's assertion as to the business need of its undertaking will be the end of the matter; the court has an important role to play in scrutinising the conclusion of the employer and the processes by which its conclusion was reached. No one has suggested that the present needs of the employer's undertaking were totally unforeseeable. Thus, it may be that the point now sought to be taken by the employer was one which it expressly surrendered when the collective agreements were made. Alternatively, it may be that the employer has over time received benefits under the collective agreements that have to be taken into account.

169. The reasonable employer for the purposes of reg 32(2) might well be expected to be motivated not simply by its narrow financial self-interest but also by enlightened self-interest, and thus take into account the interests of the employees generally as one of the factors to which it should have regard in determining the business need of the undertaking (compare Companies Act 2006, s 172).

170. As at present advised, I consider that it would be for the employer to decide what weight to give to the relevant matters. But the evidence on this application, in my provisional view, falls far short of what would in the event of a challenge be required of an employer in this situation wishing to take advantage of reg 32(2).

171. The judge did not make any declaration, and in my judgment, it is unnecessary and undesirable for this court to do so. A declaration might mislead non-parties as to the limited basis on which the issues in this action have been determined.

172. The judge was concerned about another procedural matter, namely the use of Part 8 proceedings in the High Court rather than proceedings in the Employment Tribunal with lay assessors. There has been no appeal on this point. In my judgment, the judge was right to express reservations but nonetheless, having regard to all the circumstances, to hear the case.

173. For these reasons, I would dismiss the appeal.