Neutral Citation Number: [2012] EWCA Civ 330

Case No: A2/2010/2844

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Underhill (President), Ms K. Bilgan and Dr B. V. Fitzgerald MBE LLD FRSA
Appeal No: UKEAT/0489/09/RN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE RIMER
and
MR JUSTICE RYDER

- -

Between :

NIGEL WOODCOCK	**Appellant**
- and -	
CUMBRIA PRIMARY CARE TRUST	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

- -

Mr Paul Gilroy QC and **Mr Deshpal Panesar** (instructed by **DLA Piper UK LLP**) for the **Appellant**
Mr Andrew Short QC and **Ms Keira Gore** (instructed by **Capsticks Solicitors LLP**) for the **Respondent**

Hearing date: 7 December 2011

- -

Judgment
As Approved by the Court

Lord Justice Rimer :

Introduction

1. This appeal, by Nigel Woodcock, is against an order of the Employment Appeal Tribunal ('EAT') dated 12 November 2010 dismissing his appeal against a judgment of the Carlisle Employment Tribunal ('ET') dated 12 August 2009 dismissing his claim for age discrimination. The EAT panel comprised Underhill J (the President), Ms K. Bilgan and Dr B.V. Fitzgerald MBE, LLD, FRSA. The ET panel comprised Employment Judge Garside, Mr S.R. Abbas and Mr M. Jackson. Elias LJ, on the papers on 17 January 2011, granted permission to appeal on four grounds and refused permission on a fifth. Smith LJ, on a renewed oral application on 15 March 2011, granted permission on the fifth ground.

2. The respondent is Mr Woodcock's former employer, the Cumbria Primary Care Trust ('the Trust'). On 23 May 2007, when Mr Woodcock was just short of his 49th birthday (17 June), the Trust gave him 12 months' notice of dismissal on redundancy grounds. It gave such notice without first engaging in any consultation with him. The ET found that, in so giving the notice (and subject to the Trust's claimed justification for such treatment), the Trust's treatment of Mr Woodcock was discriminatory on the grounds of age. That was because, whereas a like dismissal notice given to an appropriate comparator would have followed consultation, the Trust's notice to Mr Woodcock, in not doing likewise, was timed so as to ensure that it was given before his 49th birthday. If it had been given after that birthday, it would not have expired until after Mr Woodcock was 50. In such event, upon attaining 50 and being still in the Trust's employment, he would have been entitled to take an early retirement at an enhanced pension. The timing of the notice deprived him of that benefit. That benefit could, however, only have been enjoyed by the incurring by the Trust of substantial additional cost; and the Trust's aim in its timing of the notice was to achieve a dismissal on redundancy grounds that would save such additional cost.

3. The central issue in the proceedings was whether the Trust's discriminatory treatment of Mr Woodcock was justifiable as being, in the words of the relevant regulation, 'a proportionate means of achieving a legitimate aim'. If it was, then Mr Woodcock suffered no age discrimination. The ET held that it was and the EAT agreed. Mr Woodcock has challenged that conclusion before this court. The arguments in the appeal turned largely on the role that considerations of 'cost' may play in the justification of treatment that would otherwise amount to discrimination on age grounds. The treatment found to have occurred in this case was in the nature of direct discrimination. Whilst such discrimination, unlike indirect discrimination, is not ordinarily justifiable, in the case of age discrimination it can be (to put it perhaps a little more accurately, direct treatment that is justified will not be discriminatory at all).

Age discrimination

4. The applicable provisions are in the *Employment Equality (Age) Regulations 2006* (SI 2006/1031). Regulation 3, headed 'Discrimination on grounds of age', provides:

> '(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.'

5. Part 2 of the Regulations, headed 'Discrimination in Employment and Vocational Training', is the relevant Part for present purposes. Regulation 7 provides, so far as material:

'(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 –

…

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

6. The Regulations gave domestic effect to Council Directive 2000/78/EC. The source of the provision in regulation 3 under which, in short, direct age discrimination may be justified is Article 6, which provides as follows:

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

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'

The facts

7. I gratefully take the essential facts primarily from the succinct summary in the judgment of the EAT, delivered by Underhill J, although I have in part supplemented them from the ET's written reasons (which were sent with the judgment to the parties on 12 August 2009) and from the documents.

8. Mr Woodcock was born on 17 June 1958. He left university in 1980 and became employed by the NHS. He is an able manager and in 1992 achieved the status of Chief Executive. On 16 June 2003 he became the Chief Executive of the North Cumbria Primary Care Trusts. That was not a separate legal entity but was a single management structure serving three PCTs in North Cumbria. His employment contract included a 12-month dismissal notice period.

9. An NHS re-organisation entitled *Commissioning a Patient-led NHS* was announced in 2005. This led to a reduction of the number of PCTs in the North West from 42 to 24 by the merger, or reconfiguration, of several existing PCTs due to take effect as from 1 October 2006. As from 1 July 2006, there was to be a new Strategic Health Authority for the entire North West ('the NW SHA'); and it was proposed to have a single PCT covering the whole of Cumbria. Mr Woodcock's post as Chief Executive of the North Cumbria PCTs was destined to disappear in the re-organisation.

10. Elaborate arrangements were put in place for the handling of potential consequential redundancies among senior management. Mr Woodcock and 20 other Chief Executives whose roles had been lost were entitled (in fact, subject to immaterial exceptions, they were required) to apply for a Chief Executive role in the 12 new reconfigured PCTs. Responsibility for assisting those who were unsuccessful was assigned to the Chief Executive of the NW SHA in conjunction with their current PCT chairman.

11. With effect from 6 February 2006, Mr Woodcock was seconded to the Cumbria and Lancashire Strategic Health Authority ('the C&L SHA'), which was handling the re-organisation in relevant respects. His secondment was to a temporary role, with responsibility for implementing the transition from the old to the new PCTs: it did not change his substantive position as Chief Executive of the North Cumbria PCTs and was without prejudice to his application for a Chief Executive role in one of the new PCTs.

12. Mr Woodcock made the short-list for appointment as a new Chief Executive but was unsuccessful. Mr Farrar, the Chief Executive of the new NW SHA, who had chaired the interviewing panel, broke the news to him informally on 26 July 2006. They met again on 9 August 2006, when Mr Farrar gave him some feedback about his interview and they had a discussion about his future. The EAT quoted what the ET said about this and so shall I:

> '21 … At this meeting Mr Farrar explained that Mr Woodcock had not succeeded in obtaining a new post because his interview had not been good enough. Mr Woodcock says that Mr Farrar said that he had relied very much on the view of Mr Butler and Mr Minns respectively chief executive and acting chief executive of the predecessor SHA. Mr Farrar asked Mr Woodcock whether he wanted to leave the NHS or look for suitable alternative employment. Mr Woodcock confirmed that he wanted to use his experience and skills to remain in the NHS. Mr Farrar indicated that [it would] be easier for him to make an application to become chief executive after 12 months or so had passed and things had quietened down. It was, therefore, pragmatic for Mr Woodcock to remain seconded to the SHA and not to return to work at the new Cumbria PCT. Mr Farrar did not think he had mentioned a specific period before Mr Woodcock should apply for a chief executive post. He agreed in oral evidence the reason for advising delay was that Mr Woodcock had gone through the assessment and interview for a chief executive's post and had failed. Mr Farrar's view was that a period of time needed to elapse before a further application was made. He put the chance of success of a new application for a period of three months after the interview as improbable. For a period of three to six months unlikely. Between six to twelve months a possibility.'

13. The EAT noted an apparent ambiguity between Mr Farrar's advice referred to in the fifth sentence and that contained in last three sentences. It inferred that the fifth sentence may just have been a summary of Mr Woodcock's evidence to the ET as to what Mr Farrar had said. The ET's only express finding on any difference between the respective accounts was in paragraph 66, where it found that Mr Farrar's advice to Mr Woodcock at various meetings 'was that he should not apply for chief executive jobs until he had built up further qualities which he could refer to in his CV.'

14. Mr Farrar wrote to Mr Woodcock on 11 August 2006, confirming that he had not been selected and informing him that he was formally placed at risk of redundancy and that a letter would follow from his employer PCTs. His transitional role for the C&L SHA would continue for the time being. Mr Farrar recorded that he had discussed what Mr Woodcock might want to do in the longer term and that they were to meet again.

15. On 4 September 2006 the chairmen of the three North Cumbria PCTs of which Mr Woodcock was the Chief Executive wrote to him confirming that he would 'now be placed formally at risk of redundancy'. That letter did not constitute notice of redundancy but told Mr Woodcock that, should such notice become necessary, he would be given formal notice in accordance with his contractual entitlement. This reflected a departure, favourable to Mr Woodcock, from the practice recommended by the NW SHA's human resources department. That practice reflected a policy that included a guarantee that, as a result of the re-organisation, no-one's employment would be terminated earlier than 30 June 2007; it also provided that, in the case of employees (like Mr Woodcock) with a 12-month notice entitlement, any such notice ought to be given so as to expire at the end of that employment guarantee period. No such notice, however, had been given to Mr Woodcock. The letter of 4 September told him that his 'extended employment guarantee period remains until 30 June 2007'.

16. The new PCTs were created with effect from 1 October 2006, whereupon Mr Woodcock's transitional role of assisting the C&L SHA came to an end. His employment, and the employer obligations of the three PCTs of which he had been Chief Executive, transferred to the new Cumbria Primary Care Trust (i.e. the respondent, 'the Trust'). The Trust's Chief Executive was Sue Page. Gill Mordain was its 'Human Resources Lead'.

17. Mr Woodcock continued to discuss his position with Mr Farrar. Their discussions were informal ones: they were not redundancy consultations. On Mr Farrar's suggestion, in the autumn of 2006 Mr Woodcock undertook a time-limited project for the NW SHA. In March 2007, he undertook a separate project for the Bolton, Salford & Trafford Mental Health NHS Trust. The Trust continued in the meantime to pay his salary but was obtaining no benefit from his services. Whilst it had an interest in bringing his employment to an end sooner rather than later, it had held its hand because Mr Farrar had told Ms Page that he expected Mr Woodcock to find alternative employment. By early 2007, however, the HR department of the NW SHA was suggesting that it was time that notice was given to him. In due course, it was. The appeal is concerned with the subsequent events in 2007 relating to it, as follows.

18. By March 2007 Ms Mordain had realised the importance to the Trust of giving a dismissal notice to Mr Woodcock before his 49th birthday in June 2007. On 14 March 2007, she sent this email to Ms Page:

> 'We must issue notice before June as Nigel [Mr Woodcock] is 50 in June 2008. Before we do so we must see him and follow due process. I have mentioned this to Alan. Do you think it should be Maggie [Mrs Chadwick, the Trust's chairman] and myself that meets with him?'

19. On 30 March 2007, on Ms Page's instructions, Ms Mordain wrote to Mr Woodcock asking him to attend a meeting on 10 April 2007 'to discuss your employment status' and informing him of his right to be accompanied by a trade union representative. The letter explained that his role as Chief Executive of the North Cumbria PCTs had ceased to be required. The meeting was intended to be a redundancy consultation meeting prior to a decision as to whether to give him a notice of dismissal. On the same day, Mr Woodcock and Mr Farrar had another meeting. Mr Woodcock's note of it reads:

'1. MF opened the meeting by saying that he understood that I was being served with my formal redundancy notice and that I had 12 months notice in my contract. He then asked me whether I wished to take redundancy as other colleagues had done already or was seeking continuing employment.

2. I said that I wanted to keep my options open as I felt that I was too young to finish working and that I had a lot of experience and ability still to contribute, that I had continued to be professional in my overall outlook and positive in my attitude eg, response to requests to undertake important work such as currently with Bev Humphrey at Bolton, Salford & Trafford MH Trust. However, I was fully aware that if no suitable opportunities came up in 12 months time that I was on my own and redundant.

3. I said that I was thoroughly enjoying my role in Bolton et al and realised that there was an NHS outside Cumbria! MF responded by saying that he agreed that I had been positive and professional and had a recognised proven track record in mental health eg North Lakeland role.

4. We agreed to meet again in 2-3 months time ie end of May/early June to review progress on interim work.'

20. Mr Woodcock was unavailable for the meeting on 10 April 2007 that Ms Mordain had suggested. The earliest subsequent date convenient to both sides was 6 June 2007, for which the meeting was fixed. The Trust had not, in the meantime, forgotten the point to which Ms Mordain had alluded in her email of 14 March to Ms Page. Mr Woodcock would be 49 on 17 June, 11 days after the forthcoming meeting. If he were not given notice until *after* 17 June, he would, given his entitlement to 12 months' notice, still be in the Trust's employment on his 50th birthday on 17 June 2008. In such circumstances he would be entitled to take early retirement on so-called 'enhanced terms' – in essence, 6½ added years and no actuarial reduction for early receipt. That would massively increase the cost of his retirement, the cost of funding an early retirement pension being said by Ms Page to be at least £500,000.

21. Ms Page concluded that the risk of incurring this liability was unacceptable and that notice of dismissal should be given to Mr Woodcock in advance of the meeting fixed for 6 June. The ET made these findings as to Ms Page's reasoning at the time and set out the following exchange in her cross-examination by Mr Panesar, counsel for Mr Woodcock:

'33. It was Ms Page's decision to send the dismissal letter to Mr Woodcock. Her evidence is that at the time she considered that all avenues to obtain redeployment for Mr Woodcock had failed. She accepted that there was no consultation with Mr Woodcock or in fact any discussion with him about his future in the NHS. Her decision was that [the Trust's] position had to be protected. If there had been consultation Mr Woodcock would have celebrated his birthday and by the time the 12 months notice period would have been served he would have been 50 years old and thus entitled to an enhanced payment. She had a duty to look after the financial side of the Trust which was tax payer's money. She accepted that she had no meeting with Mr Woodcock or any conversation with him at all. At the time she considered that he was delaying the arrangement

of the meeting. During cross examination she accepted that that was an assumption on her part and which was not correct.

34. The Tribunal has advantage of having a transcript of the cross examination of Ms Page [it had been taken down in shorthand by Mr Jackson, one of the lay members]. … We do not reproduce all of Mr Panesar's cross examination but the following is probably indicative of the answers he got from his questions [which opened by referring to an email from Ms Mordain to the effect that notice should be given to Mr Woodcock]:

> Mr Panesar: this advice you received was significant to his age?
>
> Ms Page: in the context of we had come to the end of the tracks with the process of trying to find suitable alternative employment within the NHS which they had set out to do more than a year before.
>
> Mr Panesar: Nigel Woodcock's age was a major consideration in the decision to issue him notice at that meeting?
>
> Ms Page: I will disagree. We had already come to the conclusion that there was no other place for Nigel Woodcock to work and we have come to an end of the tracks and at that point age was not a factor. When it got to 23 May it was becoming a factor but it would not change regarding Nigel Woodcock.
>
> Mr Panesar: it was a major factor was it not?
>
> Ms Page: I disagree because we had made the decision to start the redundancy process but what became apparent from 23 May was that meetings had to try to be arranged and we were starting to appreciate the details of having already made decisions to start notice period of redundancy. Decision was already made that Nigel was going to be made redundant. We had exhausted all options for Nigel Woodcock effectively and were sure about time it got to 23 May I was beginning to receive information that there had been delays. I became very aware at that point of his age and of the significance because of the time delay of a significant delay and the fact that contributions to salary in April were going to cost the NHS half a million pounds. We discussed options. I understood the importance of not getting to a meeting until 6 June. We felt he was blocking until 49.
>
> Mr Panesar: this was not just a major factor in the decision to issue notice to Mr Woodcock without having a meeting with him, it was the factor?
>
> Ms Page: along with the fact that we had exhausted all opportunities he was effectively to be made redundant.
>
> Mr Panesar: two factors on the table and the dominant factor was his age?
>
> Ms Page: at that point it was, but prior to that it was not a consideration.'

22. Following that decision, Ms Mordain wrote on 23 May 2007 to Mr Woodcock informing him that his position was redundant and giving him 12 months' notice of dismissal. The material parts of the letter read:

> 'Accordingly, following the various consultation meetings that have taken place with you and Mr Farrar, I am now writing to give you notice that your position is redundant and that your employment with [the Trust] will terminate on 22 May 2008 unless either ourselves or the SHA are able to secure you suitable alternative employment. In that regard we will continue to consult with you to effectively assist you in finding you suitable alternative employment.
>
> With that in mind, I have arranged a meeting with Maggie Chadwick, Chair and Ernie Benbow, HR Consultant, for 12.30 pm on 6 June 2007 …. I note that you have confirmed your availability for that meeting by your e-mail dated 14 May 2007.
>
> As confirmed in our discussion you have the right to be accompanied by a trade union representative at this meeting.'

23. It is agreed that it was inaccurate for Ms Mordain to have called the Farrar meetings 'consultation meetings'. As for the timing of the notice, the EAT observed:

> '18. We cannot forbear from observing that although the [ET's] findings as to the Trust's – essentially Ms Page's – reasons for sending the letter of dismissal when she did are clear and are not challenged, those reasons do not appear to have been very fully thought through. We can understand the concern about postponing the giving of notice until after [Mr Woodcock's] 49th birthday. But we do not see why the consultation meeting could not have gone ahead on 6 June and notice been given – assuming the consultation had not changed the Trust's mind – in the ten days between then and 17 June; and counsel were not able to suggest any reason. However it was not suggested by Mr Panesar that this point, which was raised by us in the course of argument rather than by either of the parties, was relevant to any of the issues on this appeal.'

24. The meeting of 6 June 2007 took place. Mr Woodcock attended it with Mr Keegan. It was chaired by Mrs Chadwick (chairman of the Trust), who opened it by explaining that its purpose was to start the formal process of consultation with Mr Woodcock as to his risk status and potential dismissal on redundancy grounds. The line adopted by Mr Woodcock and Mr Keegan was that any consultation was meaningless in circumstances in which a dismissal notice had already been given. They asked for its withdrawal. Mr Keegan's stance, as recorded in the minutes, was that following its withdrawal there should be a formal process of consultation ending on 3 July 2007, following which the Trust could serve a fresh dismissal notice. The Trust agreed to consider withdrawing the notice but in the event it decided against doing so. Because of an unfortunate administrative error, its decision in that respect was not sent to Mr Woodcock until 29 September 2007 and it was received by him in October. The debate at the June meeting about whether the dismissal notice should be withdrawn meant that the discussion about the possibility of suitable alternative employment did not get very far. The EAT observed that:

> ‘19 … The stance taken by [Mr Woodcock] and Mr Keegan was understandable, but it might also be thought to be somewhat theoretical, since if an alternative to dismissal emerged during consultation there would be no problem about the notice being withdrawn; there were, after all, twelve months to play with.’

25. On 19 July 2007 Mr Keegan wrote to Mrs Chadwick in reference to the meeting of 6 June. The letter read, so far as material as follows:

> ‘At the outset of the meeting you advised that this was the start of a formal process and that the position that [the Trust] found itself in was not one of its making but was attributable to the CAPLNHS process and this is a point we acknowledge. You noted that [Mr Woodcock] had applied for CEO vacancies within the North West pool and that despite the fact that he has passed the competency gateways etc, he had not been offered a CEO position. This, coupled with the fact that all CEO appointments had now been made within the Region, meant that his position was redundant. As a consequence, [the Trust] had to go through a formal process of advising him of the redundancy and to assess what [the Trust] might be able to do to assist [Mr Woodcock].
>
> For our part we concurred with your general view and specifically referred to a letter dated 23 May 2007, which had been sent to [Mr Woodcock] by Gill Mordain, Head of HR, and which purportedly served 12 months notice of termination of employment, effective from that day and to expire on 22 May 2008. We entered formal representations to the effect that the letter of notice should be withdrawn on the basis that we were only that day commencing the consultation process and that Case Law provides that notice must follow consultation and cannot be concurrent. We advised that the earliest notice could be served was 28 days on from the date of our meeting ie on or after 4 July 2007. You kindly undertook to consider these representations and to revert in due course. Until then, our working assumption is that the consultation remains open.
>
> In the interim, [Mr Woodcock] confirmed that with the support of [the Trust], he was continuing his European Programme for Senior Health Executives and would continue to co-operate fully with both [the Trust] and the SHA. …’

26. Once it was confirmed that the dismissal notice was to stand, Mr Woodcock appealed against his dismissal, but he was unsuccessful. There was no finding by the ET that when he was told that the dismissal notice was to stand, either he or Mr Keegan made any suggestion that the consultation process should continue pending its expiry. There was, however, no reason in principle why it could not. The dismissal notice had contemplated that consultation could take place during its running and, at October 2007, it was still not due to expire for another eight months. Mr Gilroy told us, on instructions, that Mr Keegan did in fact pursue with the Trust the question of alternative employment, although we do not know what that amounted to. Upon his departure from the Trust in May 2008, Mr Woodcock received a payment of £220,000 in accordance with the contractual redundancy payment terms applying to his employment.

27. Mr Woodcock’s subsequent claims to the ET were for compensation for unfair dismissal and for discrimination on the grounds of age. The ET found the dismissal to

have been fair and dismissed the unfair dismissal claim. It found that the Trust had *prima facie* discriminated against Mr Woodcock on grounds of age but also found such treatment to have been justified. It therefore also dismissed the age discrimination claim.

28. Mr Woodcock appealed against both dismissals. The EAT allowed his appeal against the dismissal of his unfair dismissal claim. The reason for that was that, as had been conceded before the ET, the Trust had not followed the (now repealed) formal dismissal procedure prescribed by Schedule 2 to the Employment Act 2002. It followed that the ET was bound to make a finding of so-called 'automatic' unfair dismissal pursuant to section 98A(1) of the Employment Rights Act 1996. The Trust did not even seek to defend the ET's decision on the unfair dismissal claim. Mr Woodcock's victory under this head was, however, valueless, since his entitlement to a basic and compensatory award was extinguished by his redundancy payment.

29. The real issue before the ET, the EAT and now this court was Mr Woodcock's age discrimination claim. Was the Trust's treatment of Mr Woodcock in giving the dismissal notice when it did, and in advance of any formal consultation with him, 'a proportionate means of achieving a legitimate aim' for the purposes of regulation 3 of the 2006 Regulations? If yes, Mr Woodcock suffered no discriminatory treatment on the grounds of age. If no, he did.

The ET's decision on the age discrimination claim

30. The ET's conclusion on this claim was set out in paragraphs 77 to 84 of its reasons. It needs to be set out in full:

> '77. We should deal with the events that occurred before May 2007. We can identify no discrimination in what happened leading up to the final decision to dismiss. Restructuring of the Primary Care Trusts was done on a national basis and had no relevance to age. The appointment procedure for chief executives in the restructured primary care trusts was transparent and we can detect no age discrimination at all in the process. Unfortunately Mr Woodcock was not at his best at the interview. The discussions with Mr Farrar do not indicate any discrimination. The failure of [the Trust] to carry out any meaningful consultation in the ten months' period from the at risk letters had no connection with Mr Woodcock's age. Ms Mordain wanted [the Trust] to engage with Mr Woodcock but others delayed. It is the final decision to issue the notice we consider to be discriminatory.
>
> 78.We accept that by May 2007 no one had been able to come up with alternative employment arrangement for Mr Woodcock. It is clear that he could not be chief executive of [the Trust] as that post was filled. He had not applied for and therefore was not eligible for any directors post. They had all been filled. The only alternative would have been a lesser job within the organisation. Mr Woodcock's evidence is clear that he would not have accepted such job. He was looking for alternative employment in other Primary Care Trusts within the North West region. There were none available in May 2007. Those that had become available he had not applied for. He had a twelve months notice period built into his contract of employment. Notice should have been given to expire on 30 June 2007. The decision by Ms Page to issue a dismissal notice on 23 May 2007 was

because of Mr Woodcock's age. Ms Page admitted such in cross examination, that at that stage, age was a significant factor in the dismissal of Mr Woodcock. It is clear that if Mr Woodcock had been 48 on 17 June 2007 there would have been no problem because he could not have achieved with his 12 months notice period his fiftieth birthday. The significant factor was that he was to reach the age of forty nine on 17 June 2007. Any notice on or after that date would make him fifty years old on the expiry of his notice. He would then be entitled to enhanced pension and redundancy payments.

79.We have not been referred to any particular comparator. No doubt there are some. A hypothetical comparator can be constructed. It will be an employee of [the Trust] employed as chief executive (or higher management) whose job had been made redundant and who had not found alternative employment and is dismissed without consultation having taken place and subject to a one year notice period.

80.What was the discrimination act? It was, in our opinion, the act of dismissal without proper consultation by [the Trust]. Why was Mr Woodcock dismissed? We conclude he was dismissed because of his specific age, that is his impending forty ninth birthday. The comparator who was forty eight on 17 June 2007 or who had attained his forty ninth birthday on 17 June 2006 would not be dismissed because of their age. The decision to dismiss Mr Woodcock was his age. He was directly discriminated because of his age.

81.Is the discrimination act justified? We have to decide whether there was a legitimate aim. The aim was to bring about Mr Woodcock's dismissal for redundancy and to avoid the additional costs to [the Trust] of his attaining the age of fifty before the end of his notice period and thus being entitled to enhanced payments. If triggered the enhanced payment would amount to a considerable sum of money.

82.The avoidance of cost is not in itself a legitimate aim, *Cross v. British Airways Plc.* A discriminatory act to avoid an employee receiving a windfall can be a legitimate aim: *Loxley v. BAE Systems.* The aim of [the Trust] was to bring an end to Mr Woodcock's employment because he was redundant and alternative employment had not been offered.

83.We find that the dismissal of Mr Woodcock prior to consultation being carried out was a legitimate aim. Was it, however, proportionate? We are satisfied that Mr Woodcock wanted a chief executive job and did not consider any other job suitable. He had been aware of the possibility of a redundancy dismissal for ten months. He would have been given notice to expire on 30 June 2007. That is he should have been given notice at the latest in May 2006. By [the Trust] delaying giving him notice he achieved an extra years employment which otherwise in his position did not [sic]. He was paid a large redundancy payment to which he was entitled through his position and work with the NHS.

84.The reasonable need of [the Trust] was to bring about the end of Mr Woodcock's employment without incurring cost to the taxpayer. Mr Woodcock was redundant, there was no job for him. The discriminatory effect on Mr Woodcock was that he did not have a consultation meeting. At the stage [the

> Trust] eventually applied its mind to Mr Woodcock's continued employment [sic]. Consultation would have achieved nothing. It was a chief executive job Mr Woodcock wanted. There was none. We find it was a proportionate [sic]. The discriminatory act is justified under the Regulations.'

The EAT's decision on the appeal

31. The EAT's reasoning for dismissing the appeal was full and instructive and so I shall explain and cite from it reasonably fully. There were five grounds of appeal, of which grounds 3 and 4 related to the unfair dismissal appeal, to which it is unnecessary to refer.

32. The EAT first summarised its interpretation of the ET's reasoning as follows. It was not the dismissal decision itself that was discriminatory, but its timing: in particular, the giving of it prior to the planned consultation meeting on 6 June 2007. The timing was decided upon in order to ensure that Mr Woodcock did not reach pensionable age whilst still in the Trust's employment. Had he achieved such age, the Trust would have incurred an additional costs liability and the Trust's aim in giving the notice when it did was to avoid that liability. That aim was legitimate. The EAT (in paragraph 27) understood the ET's reasons to have been that:

> '… it is legitimate to avoid incurring costs unnecessarily and that there was no need to postpone giving notice of dismissal beyond [Mr Woodcock's] 49th birthday because he was clearly redundant and no alternative job had been found: in those circumstances the chance of taking early retirement in the final weeks of his notice period would be a "windfall" for him. … [the ET] was evidently taking the decision [in *Loxley v. BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] ICR 1348] as authority for the proposition that it is in principle justifiable to deprive a person of a benefit on the grounds of his age if that benefit was one which he had no legitimate right to expect. …'

33. Ground 1 of the appeal to the EAT was that the EAT's decision in *Cross v. British Airways plc* [2005] IRLR 423 was authority for the proposition that cost alone cannot be a legitimate aim for the justification of discrimination, whereas the Trust had relied by way of justification solely on the costs consequences of permitting Mr Woodcock to remain in its employment until he was 50. The EAT noted that the orthodox interpretation of *Cross* was that, whilst cost alone cannot justify a discriminatory act, cost plus some other factor (the 'cost plus' approach) may do so. The EAT expressed an obiter view that a rule that rejected a 'cost alone' justification but accepted a 'cost plus' justification could tend to involve both parties and tribunals in 'artificial game-playing – "find the other factor" – of a kind which is likely to produce arbitrary and complicated reasoning'. It said:

> '32. … If the matter were free from authority it would seem to us that an employer should be entitled to seek to justify a measure, or a state of affairs, producing a discriminatory impact – or, in the case of age discrimination, an act done on discriminatory grounds – on the basis that the cost of avoiding that impact, or rectifying it, would be disproportionately high. That would not mean that employers would be able always or easily to avoid liability for indirect discrimination simply by pointing to the cost of avoiding or correcting it. There is an almost infinite variety of cases of "*prima facie* discrimination". In many cases

> the discriminatory impact in question may be such that the employer must avoid or correct whatever the cost. But there may equally be cases where the impact is trivial and the cost of avoiding or correcting it enormous; and in such cases we cannot see why the principle of proportionality should not be applied in the ordinary way. We are not convinced that the single phrase in [*Hill and Stapleton v. Revenue Commissioners* [1999] ICR 48, at para 40 (p. 70)] on which this doctrinal structure is built – "*solely* because [avoiding discrimination] would involve increased costs" – is only explicable in the way that it was understood in *Cross.* As Mr Short submitted, it need mean no more than that it was not enough for an employer to say that avoiding discrimination would involve increased expenditure: he must show that the extent to which it would do so would indeed be disproportionate to the benefit in terms of eliminating the discriminatory impact.'

34. Having offered that view, the EAT did not apply it. It expressed its reluctance to depart from the established position in the EAT as accepted by two previous Presidents (Burton J and Elias J, as he then was) and concluded that it anyway did not need to decide whether to do so since its view was that the ET had in fact adopted the 'cost plus' approach. The EAT said:

> '33. … This was not, on [the ET's] findings and reasoning, a case where the only justification advanced for the Trust's decision to give notice before the meeting of 6 June was the perceived cost of deferring it; and indeed this seems to be the point that Ms Page was trying to make in the exchange at para 16 above [quoted in [21] above]. It is an entirely legitimate aim for an employer to dismiss an employee who has become redundant. [Mr Woodcock], whose job had in practice disappeared in early 2006, and who had known since July that year that he had not been selected for a successor post, can have had no legitimate expectation that notice would not even have been given by May 2007. In those circumstances the chance of getting within striking distance of his 50th birthday while still in employment was indeed a windfall. The prevention of that windfall benefit, and the avoidance of the corresponding loss to the Trust, was a legitimate aim going beyond the mere wish to reduce costs. Thus, although in the events which happened it was the fear of the potential costs consequences of [Mr Woodcock] remaining in employment on his 50th birthday which motivated the actual choice of date, it would be artificial to regard that factor in isolation. In our view it would be wrong if an employer who had, as a matter of pure discretion exercised in the employee's interests, allowed an employee to remain in employment until close to an "age-critical" date were then held to have unlawfully discriminated against him by taking into account the imminence of that date in deciding when to bring the employment to an end.'

35. Ground 2 was, according to the notice of appeal to the EAT, focused on the proportionality of the Trust's treatment. It was to the effect that, even if cost considerations were in principle admissible by way of justification, they cannot justify the deprivation of an employee's right to be consulted about a proposed dismissal for redundancy. Whilst the EAT saw the general merit of that proposition, the facts of the case put the 'loss of consultation' point in a different context, for the following reasons: (1) Mr Woodcock had already had a far longer period before notice was given than he was reasonably entitled to expect – an extension of almost a year; (2)

whilst during that period he had had no formal consultation, he 'had had the substance of a consultation process, as regards the crucial question of alternative employment', having had the benefit of his discussions with Mr Farrar, who was better placed to give him information as to his options than anyone at the level of the Trust; and Mr Woodcock also knew the score (see his note of the meeting of 30 March 2007, quoted in [19] above); (3) it was only a chapter of accidents that deferred the timing of the consultation meeting to a point so close to the danger zone. If the meeting had taken place when first proposed, there would have been no question of any notice being given after his 49th birthday. This was not a case of the employer artificially accelerating the procedure: it had been slowed down through no-one's fault or design; (4) the ET had found that, as at 23 May 2007, there was no suitable alternative employment for Mr Woodcock (see paragraphs 75 and 78 of its reasons); the meeting of 6 June 2007 would not have prevented his dismissal; (5) the dismissal notice anyway did not bring the consultation process to an end. The duty to consider alternative employment continued during the period of notice (*Mugford v. Midland Bank plc* [1997] ICR 399) and was more than a formality, as the Trust recognised, and 'if there was indeed still a chance of alternative employment the notice period gave plenty of opportunity for it to be explored … Consultation is concerned with substance and not only with taking the right steps in a ritual dance'.

36. The EAT's view was, therefore, that:

> '37. … [the ET] was entitled to find in those very particular circumstances that it was justifiable for the Trust to accelerate the final giving of notice if doing so would prevent it incurring a disproportionate liability in pension costs. The Trust had only become vulnerable to that potential liability because the redundancy process had been extended, to [Mr Woodcock's] benefit, for far longer than he had been entitled to expect; to put it another way, [Mr Woodcock] had no legitimate expectation at the time that the redundancy situation arose that he might still be in employment on his 50th birthday if alternative employment had not been found. The detriment to [Mr Woodcock] of being deprived of a consultation meeting before, rather than shortly after, notice had been given could in the circumstances reasonably be judged by [the ET] to be insignificant'.

37. The EAT dealt next with two arguments arising in the same context. The first was that the Trust could not advance a case of justification when Ms Page's belief that Mr Woodcock had been deliberately dragging out the consultation process was erroneous. The EAT rejected that, holding that the relevant question was whether the Trust's actions were objectively justified.

38. The second argument was that it was not because of inertia that Mr Woodcock had not obtained or applied for alternative employment by the date of the dismissal notice: he had been following Mr Farrar's advice to lie low for a while, whilst also taking on the short-term projects. Mr Farrar's evidence was not, however, that he had told Mr Woodcock not to look for alternative employment for either 12 months or indeed any length of time, and the EAT referred to the passage from the ET's reasons that I have quoted at [12] above. The ET was in any event well aware of the point and it did not regard it as undermining its conclusion on the justification issue. The EAT agreed. Whatever Mr Farrar's advice had been, Mr Woodcock could have had no complaint if he had received a notice of dismissal, after due consultation, by, at the latest, the end

of March 2007, and his own note of 30 March 2007 showed that he acknowledged that.

39. Ground 5 of the appeal was that some of the ET's findings, being those in paragraphs 75 and 78, and recapitulated in paragraphs 83 and 84, were perverse: namely, (a) that consultation would have achieved nothing, (b) that there was no suitable alternative employment for Mr Woodcock, and (c) that it was only a Chief Executive's post that he was interested in. Finding (c) was the crucial one, since there was no challenge to the finding that there were no available Chief Executive jobs. In fact, the ET's finding at paragraph 78 was that Mr Woodcock would not have accepted a job below the level of Chief Executive or Director (being the level next below that of Chief Executive). The EAT recorded in paragraph 43 that ultimately Mr Panesar felt unable to challenge that finding by the ET, and the EAT rejected the perversity challenge.

The appeal to this court

(a) The Trust's treatment of Mr Woodcock generally

40. Mr Gilroy QC, leading Mr Panesar, devoted a material part of his submissions to a generalised criticism of the Trust's conduct in relation to Mr Woodcock, whom he promoted as a longstanding, able and loyal employee of the Trust (and his predecessor employers) who deserved better treatment than he was given. There were times in the course of his submissions when he came close to embracing the line that by 2007 Mr Woodcock had earned something in the nature of an accrued right to remain in the Trust's employment until he was 50, so that he could benefit from the enhanced pension benefits to which he would then become entitled and for the enjoyment of which he had acquired a legitimate expectation that the Trust was required to respect.

41. I do not question Mr Woodcock's merits as an able and loyal employee, who had given long and valuable service to the NHS. His case must, however, be viewed in a proper perspective, which I do not regard Mr Gilroy's submissions as having properly recognised; and that perspective provides an important backdrop to the assessment of the age discrimination case to which the next section of this judgment is specifically devoted.

42. Mr Woodcock's long and able service with the NHS did not entitle him to a job for life, or even to the expectation of a job for life. Employment in a particular post will commonly carry with it the risk of redundancy and Mr Woodcock enjoyed no special immunity from the risk that applied to his. He knew by February 2006, when he stopped working as Chief Executive of the North Cumbria PCTs, that his post would disappear in October 2006 and that he would either have to find alternative employment with the Trust or face being made redundant. He was, with others in a like position, the beneficiary of an abundance of collective consultation concerned with the processes for applying for posts in the new PCTs. He applied in 2006 for appointment to one of the new Chief Executive posts. He underwent a transparent selection process but had the misfortune to learn in July 2006 that he had been unsuccessful. He knew that, despite this, he had guaranteed employment until 30 June 2007; and that, as he was entitled to 12 months' notice, he could expect a dismissal notice expiring shortly after that date. In fact he was not given such a notice but Mr Farrar wrote to him on 11 August 2006 informing him that he was formally at risk of redundancy and warning him that a letter would follow from his employer PCTs. That

letter followed on 4 September 2006. It informed him that he would 'now be placed formally at risk of redundancy' but that his 'extended employment guarantee period remains until 30 June 2007'.

43. The Trust became Mr Woodcock's new employer in October 2006. He had no meetings with the Trust about alternative employment, but he did have meetings with Mr Farrar, who was probably better placed than anyone in the Trust to assist him in this respect. That was not a formal consultation process but was in practice probably more valuable than any consultation that Mr Woodcock might have had with the Trust. By March 2007, however, no suitable alternative employment had been found. Mr Woodcock acknowledged in his own note of his meeting with Mr Farrar on 30 March that 'if no suitable opportunities came up in 12 months time I was on my own and redundant'. He was, therefore, under no illusion that his job with the Trust was for life – or even until he was 50. He foresaw being 'on his own' whilst still 49.

44. The Trust gave Mr Woodcock his 12 months' dismissal notice on 23 May 2007. Importantly, the notice only provided for the termination of employment on 22 May 2008 *unless* either the Trust or the NW SHA could secure suitable alternative employment for him; and it informed him that the Trust 'will continue to consult with you to effectively assist you in finding you suitable alternative employment'. The first such consultation step was the meeting already fixed for 6 June 2007. Instead, however, of treating it as the opportunity to open a consultation programme with the Trust, which could, if necessary, continue over the following 11 months, Mr Woodcock adopted the stance that consultation against the background of an already served dismissal notice was inappropriate: he wanted the notice withdrawn so that a short period of consultation could take place, with liberty for the Trust to serve a fresh notice on or after about 4 July 2007.

45. That was, with respect, unconstructive and pointless. There was no reason why the notice needed to be withdrawn before consultation could take place. The 12 months' notice it had given meant that there was an unusually long period in which consultation could take place. It is well recognised that consultation over a proposed dismissal on redundancy grounds can continue until the employment is terminated. In *Mugford v. Midland Bank plc* [1997] IRLR 208, His Honour Judge Clark, giving the judgment of the EAT, said this:

> '40. Finally, it should be noted that consultation can continue until the employment is terminated. See *Stacey v. Babcock Power Ltd* [1986] IRLR 3, applied in [*Walls Meat Co Ltd v. Selby* [1989] ICR 611], per Balcombe LJ, 610F.
>
> 41.Having considered the authorities we would summarise the position as follows:
>
> (1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.
>
> …

(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.'

46. There was an unfortunate delay in the communication to Mr Woodcock (in October 2007) of the Trust's decision that it was not going to withdraw the notice. There was no finding by the ET that any steps were thereafter taken by either side to consult, although I have noted what Mr Gilroy told us as to Mr Keegan's efforts. What the ET did find was that Mr Woodcock did not apply for any other job during the notice period. More importantly, it found, in paragraph 84, that Mr Woodcock was redundant and that there was no job for him. Although he was given his dismissal notice prior to any consultation meeting, the ET also there found that consultation would have achieved nothing. That was because it was a Chief Executive job that he wanted, whereas there was no such job was available.

47. Ground 5 of Mr Woodcock's grounds of appeal asserts that those findings in paragraph 84 were perverse. I shall digress to deal with that ground now, because its outcome is informative as to the general considerations I am now discussing as well as to the disposition of Mr Woodcock's appeal generally.

48. The basis of the perversity case is that it is said that it was clear that Mr Woodcock wanted to stay in the NHS and that, had even a cursory consultation taken place and he had been informed that he had a choice between taking a non-Chief Executive role and being dismissed, he would have made the choice to remain in the NHS. It is said that the evidence showed that there were plenty of jobs in the NHS for a person of Mr Woodcock's skills. Whilst the ET found that consultation would have achieved nothing, because Mr Woodcock was only interested in Chief Executive jobs and would not have done anything else, it is said that no reasonable tribunal properly directing itself to the law could properly have arrived at that conclusion. It is said that at no time did Mr Farrar or anyone from the Trust tell Mr Woodcock prior to the dismissal notice or the meeting of 6 June 2007 that he was going to be dismissed if he did not take a non-Chief Executive job.

49. There are, I consider, major difficulties with that line of argument. Mr Woodcock's own note of 30 March 2006 (see [19] above) shows that he knew the vulnerability of his position. The dismissal notice, when served, told him that he would only be dismissed 'unless either ourselves or the SHA are able to secure you suitable alternative employment. In that regard we will continue to consult with you to effectively assist you in finding you suitable alternative employment'. He was therefore squarely told the score and knew that, if he wanted to stop the axe falling on 23 May 2008, he had to consider all the options open to him at the Trust, including setting his sights lower than obtaining a Chief Executive or director post; and, in that connection, he was told that the Trust would continue to consult with him. The meeting of 6 June 2007 was the first opportunity for that, when he preferred instead to take the legalistic stance that there could be no consultation without the prior withdrawal of the notice. I have referred to the interest that he subsequently showed in relation to consultation. He also chose to apply for no jobs that came available in the Trust. The thrust of the points made in support of the perversity argument appears to

me to go not to the mounting of any arguable challenge to the soundness of the ET's findings so much as to a demonstration that Mr Woodcock may not have looked after his own interests as well as he might now wish he had done.

50. I regard this ground of appeal as manifesting a triumph of hope over reality. A central factual issue before the ET was what jobs Mr Woodcock was interested in and whether he was interested in any jobs below the level of Chief Executive. That issue was one upon which he gave oral evidence, upon which he was cross-examined and upon which the ET made its findings. We have not been provided with any notes of his oral evidence, or even with his witness statements. I wholly fail to understand how in those circumstances this court can be expected to question the ET's findings of fact about the only type of post that Mr Woodcock was looking for and as to the value (if any) of any consultation.

51. As to those findings, the ET found, in paragraph 73, that by the end of May 2007 'it was clear to everyone, as it must have been clear to Mr Woodcock, that the chances of obtaining further employment in the senior position he wanted were remote'. The ET further found, in paragraph 75, that:

> '… The meeting on [6 June 2007] did discuss alternative employment as can be see from the notes. … Mr Woodcock was still looking for a senior position and his preferred option was a chief executive post. There were no posts with [the Trust], the chief executive posts and director posts had been filled. There were no other posts available. Mr Woodcock had a year's notice. It is indicative of the situation that he did not apply for any post during his notice period.
>
> 76.We are satisfied that as at [6 June 2007] the application of any procedure statutory or otherwise would have made no difference to Mr Woodcock's situation. He would have been dismissed for redundancy.'

The ET also made clear in paragraphs 78 and 83 its finding that Mr Woodcock would not have accepted any job at a level lower than a director, whereas all the directors' posts had been filled.

52. There is no principled basis upon which this court can re-open the findings of the ET in paragraph 84 that consultation with Mr Woodcock would have achieved nothing. Jobs beyond the Trust were not in its gift and there were no jobs available in the Trust of the sort that, as the ET found, Mr Woodcock wanted. This ground of appeal might have been arguable if Mr Woodcock had been able to show that he gave apparently credible and unchallenged evidence to the ET that, at and following May 2007, he was prepared to consider applying for a range of Trust jobs below the level of director. We have been shown no such evidence. To establish perversity in respect of the ET's findings, Mr Woodcock must make out an overwhelming case that the ET reached conclusions that no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached (see *Yeboah v. Crofton* [2002] IRLR 634, at [93], per Mummery LJ). Mr Woodcock does not even get close to making such a case. I would dismiss ground 5 of his appeal.

53. Against this background - and leaving aside the issue of age discrimination - I find it difficult to identify any general unfairness in the Trust's conduct towards Mr Woodcock. Whilst the Trust's dismissal notice preceded the holding of any formal

consultation between itself and Mr Woodcock, on the facts found by the ET this visited no practical disadvantage upon him. He had in practice had the benefit of valuable, although informal, consultation with Mr Farrar; and, if he wanted it, the dismissal notice offered him the opportunity of some 50 weeks of further consultation with the Trust following the meeting of 6 June 2007. He had also had the benefit of an unusually generous period in which to identify alternative work between first becoming aware of the proposed re-organisation of the PCTs and the expiry of his termination notice – in all, some 30 months; and his employment also continued for some 22 months after he had learnt that his application for appointment as Chief Executive of a new PCT had failed. Not many employees who are made redundant have that sort of time with which to play.

54. Considerations of age discrimination apart, I would therefore conclude that, contrary to the thrust of a material part of Mr Gilroy's submissions, the Trust treated Mr Woodcock with a proper degree of fairness. The only reason that his unfair dismissal claim succeeded was because of the Trust's failure to go through the, now repealed, formal ritual prescribed by Schedule 2 to the Employment Act 2002.

(b) Age discrimination

55. I turn to age discrimination, to which the remaining four grounds of appeal are directed. The legal proposition upon which the first two grounds depend is that the orthodox position shown by the authorities, in particular *Cross and others v. British Airways plc* [2005] IRLR 423, is that considerations based on cost alone, or on economic or financial factors alone, cannot justify treatment that is discriminatory on the grounds of age. Regulation 3 of the 2006 Regulations shows that in order for justification to be established the alleged wrongdoer must show that his treatment complained of was 'a proportionate means of achieving a legitimate aim'. That requires the showing of two things: (1) that the treatment was directed at achieving 'a legitimate aim'; and (2), if so directed, that it was a proportionate means of doing so. Mr Gilroy's submission was that the Trust failed to negotiate the first gateway because it claimed to justify its treatment solely on cost grounds. If wrong on that, he submitted that the Trust also failed to negotiate the second one.

56. I turn to the authorities. *Cross* was the reserved judgment of the EAT delivered by Burton J (the then President) and discussed a number of issues, including whether a provision, criterion or practice indirectly discriminatory on the grounds of sex was justifiable, the ET having held that it was. The rival arguments were (1) by Mr Allen QC, that the saving or avoidance of costs cannot be relied upon as justification; and (2) by Mr Underhill QC (as he then was), (a) that if necessary, cost considerations alone can be a sufficient justification (for which, as President of the EAT, he offered obiter judicial support in his judgment in this case), but (b) that he was content to support the ET's conclusion on the basis that it had correctly applied a 'cost plus' approach.

57. In his very full judgment, Burton J referred to, amongst others, various decisions of the Court of Justice to which Mr Gilroy and Mr Short referred us, namely: *Hill and Stapleton v. Revenue Commissioners and Department of Finance* C-243/95; [1998] IRLR 466; *Kütz-Bauer v. Freie und Hansestadt Hamburg* C-187/00; [2003] IRLR 368; *Steinicke v. Bundensantalt für Arbeit* C-77/02; [2003] IRLR 892; and *Schönheit v. Stadt Frankfurt am Main* and *Becker v. Land Hessen* C-4/02 and C-5/02; [2004]

IRLR 983. In paragraph 62 of his judgment, he also referred to four earlier decisions (two of the Court of Justice, one of the House of Lords and one of the Court of Appeal) which had been cited as showing that 'economic considerations, either the same as or analogous to costs, have been permitted or envisaged as justification'. Those four cases were respectively: *Jenkins v. Kingsgate Ltd* [1981] IRLR 228; *Bilka-Kaufhaus v. Weber von Hartz* [1986] IRLR 317; *Rainey v. Greater Glasgow Health Board* [1987] IRLR 26; and *Allonby v. Accrington & Rossendale College* [2001] IRLR 364. Burton J followed his reference to them with these observations:

> '63. It seems to us, as a matter of obvious common sense (and in accordance with the principle of the concept of proportionality), and by way of example drawn from these cases, that, albeit that, in the weighing exercise, costs justifications may often be valued less, particularly if the discrimination is substantial, obvious and even deliberate, economic justification such as the saving, or the non-expenditure, of costs (which must, for example, include the avoidance of loss) must be considered. It would, in our judgment, need clear reasoning and binding authority to prevent that occurring.'

58. Burton J then embarked on a review of the subsequent European authorities that were said to outlaw reliance on cost or economic considerations as justification. In paragraph [70] he identified the jurisprudence as having two strands to it. One strand was directed to showing that member states, with a 'notionally bottomless purse' cannot be permitted to justify on the grounds of cost a social policy which is obviously discriminatory. This found its origin in *De Weerd, Nee Roks v. Bestuur van de Bedrijfsvereniging voor de Gezondheid* C-342/92; [1994] ECR 1-571 and was endorsed in paragraph 60 of the court's judgment in *Kütz-Bauer,* in paragraph 67 of its judgment in *Steinicke* and in paragraph 85 of its judgment in *Schönheit.* The other strand related to the basis upon which an employer might seek to justify any claimed discrimination. The origin of that was *Hill and Stapleton,* which Burton J explained as follows:

> '65. … This was a case relating to a comparison between full-time and part-time civil servants in Ireland. Five justifications were put forward by the Irish Revenue Commissioners and Department of Finance, as recorded in the opinion of La Pergola A-G at paragraph 39 (477). The first four, to which the letters (a) to (d) were assigned, were non-economic justifications and, on their facts, were dismissed by the A-G. He then turned to (e), which justification was said to be that "the present practice ensures that the incremental cost of job-sharing staff is the same as that of full-time staff, thus making the cost of work done by job-sharers the same as the cost of work done by full-time staff". The A-G opined at paragraph 44 (477) "nor, lastly, am I persuaded by the justification concerning the administration's financial needs", for reasons there given. The full Court's judgment deals with the justification put forward, at paragraphs 36ff on p. 481. It too rejects the first four justifications, and then, at paragraph 40, states as follows:
>
> > "So far as the justification based on economic grounds is concerned, it should be noted that an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs."

It consequently rejected the justification claim. This is the first place in which the word "solely" arises in this context in a judgment of the European court so far as we have been told. It would appear to arise in the context of the four other justifications being rejected.'

Burton J pointed out that the approach of the Court of Justice in the paragraph quoted from *Hill and Stapleton* was endorsed by it in paragraph 61 in *Kütz-Bauer* and paragraph 68 of *Steinicke.*

59. Burton J's conclusion on the issue before him was as follows:

'72. … We note the authorities in paragraph 62 above [which I have listed in [57] above]. As to the European decisions relied upon by Mr Allen, it is clear to us that paragraph 61 of *Kütz-Bauer,* and the word *solely,* derive from *Hill,* where it can be clearly seen how *solely* arises, ie on the basis of the European Court's decision in that case that, if the only justification is cost, then the justification cannot stand, having dismissed all four other justifications. Paragraph 61 therefore falls to be contrasted with paragraph 60 in *Kütz-Bauer,* because paragraph 61 is derived from *Hill,* as the citation *expressly* says, while paragraph 60 is expressly derived from *Roks*. Further it is clear to us from the structure of the paragraphs that the use of word "not" at the outset of the second paragraph (as also in the second paragraph in the pair, upon their repetition in *Steinicke*), represents the making of a *further* proposition, and not simply a repetition of the earlier proposition. We conclude that the European Court has laid down a perfectly comprehensible structure. A national state cannot rely on budgetary considerations to justify a discriminatory social policy. An employer seeking to justify a discriminatory PCP cannot rely *solely* on considerations of cost. He can however, put cost into the balance, together with other justifications if there are any. …' [Emphases as in the original]

60. Burton J therefore there recognised the existence of the two strands of the European jurisprudence and interpreted the principle applicable to justification by employers as being what is known as the 'cost plus' approach. That approach was followed by the EAT in *Redcar & Cleveland Borough Council v. Bainbridge and others* [2007] IRLR 91, in a judgment delivered by the then President, Elias J, as he then was (see paragraphs 90 to 93).

61. Mr Gilroy asserted, that the 'cost plus' principle endorsed in *Cross* and followed in *Redcar & Cleveland* remains the correct principle. He cited the decision of the Court of Justice in *Fuchs and Kohler v. Land Hessen* C-159/10 and C-160/10; [2011] All ER (D) 97, one post-dating the decision of the EAT in the present case, as recent support for it. He referred us to the following paragraphs:

'73. As is apparent from paragraph 65 of the present judgment, in the context of the adoption of measures relating to retirement, EU law does not preclude the Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general prohibition of age discrimination.

74.In that regard, while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that

> the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.
>
> 75.In the light of the foregoing, the answer to the first question is that Directive 2000/78 does not preclude a law, such as the HBG, which provides for the compulsory retirement of permanent civil servants – in this instance prosecutors – at the age of 65, while allowing them to continue to work, if it is in the interests of the service that they should do so, until the maximum age of 68, provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means.'

62. Mr Gilroy's submission came down to the short one that, as 'cost plus' is the golden rule, the problem in the way of the Trust's claimed justification is that it cannot identify any 'plus'. Its aim in giving the dismissal notice when and how it did was a naked attempt to save and avoid costs that it would otherwise incur. The authorities, said Mr Gilroy, show that mere cost saving or avoidance cannot be promoted as justification for what would otherwise be discriminatory treatment on age grounds. Mere cost saving or avoidance cannot therefore be a 'legitimate aim' for the purposes of regulation 3(1). If, contrary to that submission it could be, the treatment applied in this case did not amount to a proportionate means of achieving such aim.

63. Mr Short QC, in his submissions in response, invited us to accept (a) the two strands of the European jurisprudence to which I have referred; and he said that the cited passages in *Fuchs* relate to the first strand, not to the second one concerning the basis upon which employers may justify; (b) that, on a correct understanding of the principles, there is no 'bright line' preventing reliance upon cost based justification in the absence of a 'plus' factor; (c) that if, however, 'cost plus' is the correct approach, it should be given a broad interpretation; (d) that the ET and EAT were entitled to find that this was a 'cost plus' case; and (d) that they were also entitled to find that the treatment complained of was legitimate and proportionate. As regards the *Fuchs* case, he submitted that the more relevant paragraph is paragraph 52, in which the court referred to paragraph 46 of its judgment in *R (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] IRLR 373, which I shall cite together with paragraph 47:

> '46. It is apparent from Article 6(1) of Directive 2000/78 that the aims which may be considered "legitimate" within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.

> 47.It is ultimately for the national court, which has sole jurisdiction to determine the facts of the dispute before it and to interpret the applicable national legislation, to determine whether and to what extent a provision which allows employers to dismiss workers who have reached retirement age is justified by "legitimate" aims within the meaning of Article 6(1) of Directive 2000/78.'

64. In this case the Trust's discriminatory treatment that the ET held had to be justified was the giving of the dismissal notice on 23 May 2007 without prior consultation (paragraph 80 of its findings). The discrimination lay in the fact that, by contrast, a dismissal notice given to, say, a 46 year old employee would have been preceded by consultation.

65. It is apparent from Article 6(1) of the Directive and from its domestic implementation in regulation 3(1) that it is possible for an employer to justify treatment that, absent justification, would amount to direct age discrimination. It can do so, in the language of the latter, if the treatment is 'a proportionate means of achieving a legitimate aim'. Mr Gilroy's submission is that the saving or avoidance of costs alone cannot be a legitimate aim. It can only be so if it is linked to a non-cost factor. Thus a consideration that, by itself, is inadmissible as justification becomes admissible if so linked; and, in such a case, it can play a part in the proportionality assessment.

66. There is, it seems to me, some degree of artificiality about such an approach to the question of justification. As Elias J observed in the *Redcar & Cleveland* case, [2007] IRLR 91, at paragraph 91, 'Almost every decision taken by an employer is going to have regard to costs.' Regulation 3(1), however, says nothing of the extent to which considerations of cost may feature in the justification exercise. It provides merely that what would otherwise be discriminatory treatment may be justified if it was 'a proportionate means of achieving a legitimate aim'. The relevant question must therefore be whether the treatment complained of was such a means. Accepting, as I make clear I do, that the guidance of the Court of Justice is that an employer cannot justify discriminatory treatment 'solely' because the elimination of such treatment would involve increased costs, that guidance cannot mean more than that the saving or avoidance of costs will not, without more, amount to the achieving of a 'legitimate aim'. That is entirely unsurprising. To adopt a simple example given by Mr Short, it is hardly open to an employer to claim to be entitled to justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B. Such treatment of A could not, without more, be a 'legitimate aim'.

67. If the Trust's treatment of Mr Woodcock is correctly characterised as no more than treatment aimed at saving or avoiding costs, I would accept that it was not a means of achieving a 'legitimate aim' and that it was therefore incapable of justification. It would fall foul of the limitations upon justification explained in cases such as *Hill and Stapleton*. On the unusual facts of this case, I would not, however, regard that as a correct characterisation. The dismissal notice of 23 May 2007 was not served with the aim, pure and simple, of dismissing Mr Woodcock before his 49th birthday in order to save the Trust the expense it would incur if was still in its employ at 50. It was served, and genuinely served, with the aim of giving effect to the Trust's genuine decision to terminate his employment on the grounds of his redundancy. The EAT had no doubt that the dismissal of an employee on such grounds is a legitimate aim - 'It is an entirely legitimate aim for an employer to dismiss an employee who has become redundant'. I agree; and it cannot in my view cease to be a 'legitimate aim' simply

because, if there is no dismissal, the employer will continue to incur costs that such dismissal is directed at saving.

68. I also agree with both the ET and the EAT that it was a legitimate part of that aim for the Trust to ensure that, in giving effect to it, the dismissal also saved the Trust the additional element of costs that, had it not timed the dismissal as it did, it would be likely to have incurred. In considering the timing of the steps it needed to take towards dismissing Mr Woodcock for redundancy it was obviously legitimate for the Trust to have that consideration in mind, as it clearly did as early as March 2007. It would, in my view, have been irresponsible of the Trust not to have done so. Mr Woodcock had, by 2007, no right, entitlement or expectation to the enjoyment of the enhanced benefits that he would have enjoyed had he remained in the Trust's employment until he was 50. Had he in fact so remained so as to enjoy them, he would have been the beneficiary of a pure windfall. He could and would not have had any reasonable hope or chance of doing so if (a) he had been given notice to expire at the end of (or shortly after) June 2007, as ought to have happened in accordance with the guidance of the NW SHA; (b) he had been able to attend the meeting on 10 April 2007, as the Trust had originally intended, and he had been given notice at or after that meeting; (c) it had been possible to arrange a subsequent meeting before June 2007, and he had been given notice after it; or (d) he had been given notice on or shortly after the meeting that was eventually fixed for 6 June 2007. If any of these things had happened, he could have had no possible grounds for complaint on age discrimination grounds.

69. The only difficulty generated by the case is that, on the ET's findings, the dismissal was tainted with discriminatory treatment on the grounds of age. That was because the difficulties in arranging an earlier consultation meeting with Mr Woodcock resulted in the Trust taking the view in May 2007 that, because his 49th birthday was fast approaching, it needed to cut a procedural consultation corner in order to ensure that the notice expired before his 50th birthday. (In fact it was wrong about this: it could have given its dismissal notice immediately after the meeting of 6 June 2007; had it done so, it is difficult to see what complaint Mr Woodcock could have had).

70. In my view that consideration goes, however, only to the proportionality of the treatment adopted by the Trust. That required the striking of an objective balance between the discriminatory effect of the treatment of Mr Woodcock and the needs of the Trust. The ET found that, in the circumstances, the treatment was proportionate (paragraphs 83 and 84 of its reasons). It was ground 2 of Mr Woodcock's appeal to the EAT that focused exclusively on proportionality, and it relied upon the fact that the Trust's procedure deprived him of his right to consultation in advance of the dismissal notice. Underhill J explained why, in what he described (and I agree) as the 'very particular' circumstances of the case, the EAT agreed that that consideration did not undermine the proportionality of the Trust's treatment. I have explained the EAT's reasoning at [35] and [36] above.

71. Mr Gilroy submitted that the Trust's action in removing Mr Woodcock's right of consultation so as to save costs was so patently a disproportionate action that the Trust cannot get home on the proportionality element of the exercise. I am not persuaded by that. Both the ET and EAT explained why, in the very particular circumstances to which Underhill J referred, the Trust's treatment was proportionate to the effect upon Mr Woodcock. The issue for us is whether, in making the proportionality assessment

that it did, the ET erred in law. I agree with the EAT that it did not. On the contrary, I regard its decision as a well judged one. Ultimately, the essence of the case is (a) that the Trust was fully entitled, and had effectively resolved, to terminate Mr Woodcock's employment prior to his 50th birthday; (b) the implementation of that intention was delayed through no fault of its own but through a chapter of accidents; and (c) whilst the consultation 'corner cutting' in theory deprived Mr Woodcock of an opportunity, in fact it deprived him of nothing of value, because, as the ET found, consultation would have achieved nothing.

72. Mr Gilroy also submitted, as ground 4 of the appeal, that the decisions below were flawed or perverse in failing to take into account Ms Page's admittedly erroneous assumption that Mr Woodcock had been purposely trying to delay the commencement of the consultation process. The EAT dismissed this ground on the basis that the question for the ET was whether the Trust's treatment of Mr Woodcock was *objectively* justified. The EAT said:

> '39. … It is irrelevant to that exercise that Ms Page's subjective motivation, while in fact largely corresponding to the justification advanced, may have been to some extent been [sic] contaminated by a misunderstanding of one aspect of the facts. The justification would have been equally good, or bad, if she had accepted that the delays were nobody's fault: the fact remained that the (from her point of view) dangerous date was fast approaching'.

73. Mr Gilroy said that if, as the EAT held, it was legitimate in assessing the proportionality of the Trust's treatment to take account of the various factual matters which the EAT enlisted in support of the Trust's proportionality case (see [35] above), it must be legitimate also to have regard to Ms Page's understanding now in point. There may be something in that, but it does not take Mr Woodcock anywhere. There was no suggestion that, had Ms Page not been labouring under this misunderstanding, the course of events would or might have been any different. I agree with the EAT's disposal of this point.

Disposition

74. In my judgment, all Mr Woodcock's grounds of appeal fail. I would dismiss the appeal.

Mr Justice Ryder :

75. I agree.

Lady Justice Arden :

76. I also agree.