PO-8991

Ombudsman's Determination

Applicant	Mr Y
Scheme	Civil Service Compensation Scheme (Northern Ireland) (**the Compensation Scheme**)
Respondent	The Department of Finance and Personnel for Northern Ireland (**DFP**)

Complaint Summary

1. Mr Y has complained that when he was dismissed from the Civil Service in Northern Ireland by his employing department, the Department of Regional Development (now the Department for Infrastructure) (**DRD**), under the inefficiency sickness absence procedure, he was unfairly denied compensation under the Compensation Scheme because of his age. He was over age 60 and the benefit was progressively withdrawn under a taper from ages 57 to 60, and no benefit was payable on dismissal for inefficiency absence past age 60.

2. Mr Y has submitted that the failure by DFP, as administrator of the Compensation Scheme, to pay him compensation under the Compensation Scheme, and to administer the Compensation Scheme on the basis that no cut-off age applies, amounts to unlawful discrimination on the grounds of age, and is in breach of the Employment Equality (Age) Regulations (Northern Ireland) 2006 (Age Regulations (NI)) (regulations 3 and 12).

3. Mr Y has also submitted that DFP's failure to pay the benefit is in breach of the non-discrimination rule imposed on the Compensation Scheme by the Age Regulations (NI) Schedule 1, paragraph 2(2).

Summary of the Ombudsman's Determination and reasons

4. The complaint is upheld because:

    - DFP has not discharged its burden of proof to show that Mr Y's treatment and application of the cut-off for the payment of a benefit at age 60 can be objectively justified;

- the means adopted by DFP to give effect to a legitimate aim go beyond what is necessary to achieve this aim; and

- the application of a cut-off at age 60 for the payment of the compensation benefit is in breach of the non-discrimination rule, and rule 5.1 of the Compensation Scheme, applying the cut-off date at age 60, should be disregarded when determining the benefit payable.

5. DRD previously confirmed that if it had discretion to pay compensation under the inefficiency sickness absence scheme it would have awarded Mr Y 100% compensation, having regard to the then applicable guidance issued in relation to the Compensation Scheme. However, no decision on the level of benefit can have been made given that the Compensation Scheme was being administered on the basis that no benefit can have been paid after age 60.

6. I have directed that DFP, as administrator of the Compensation Scheme should contact DRD, as Mr Y's employing department, so that DRD can confirm the level of benefit that should be payable in Mr Y's case on the basis that no cut-off age applies.

Detailed Determination

Material facts

7. Mr Y was employed by DRD, which is part of the Northern Ireland Civil Service. He was a member of the Principal Civil Service Pension Scheme (NI) (Classic Section) (**PCSPS** (**NI**)). Mr Y's normal pension age under the PCSPS (NI) was age 60.

8. Mr Y took partial retirement in 2011 (at age 61) and reduced his paid employment to three days a week.

9. Mr Y went on long-term sick leave in February 2014 at age 64. He never returned to work.

10. On 1 April 2015 Mr Y was notified by DRD, as his employing department, that, subject to three months' notice, he would be dismissed under the Civil Service Inefficiency Sickness Absence Procedure (**IESAP**) with effect from 1 July 2015.

11. Mr Y was over age 65 at the date of his dismissal on 1 July 2015. He did not qualify for incapacity retirement under the PCSPS (NI) because entitlement to this benefit ceased at age 65.

12. Section 11 of the Compensation Scheme sets out the details of the compensation available to members when being dismissed for inefficiency. Rule 11.1(a)(iii), by reference to rule 3.3, provides that the maximum payment is equal to two years' pensionable earnings. Any compensation payable is subject to rule 5.1 which provides as follows:

> "Subject to rule 5.1a, for a civil servant, or a person who at any time has opted out of the 1972 Section who is within three years of the pension age, the lump sum compensation payable under rule 2.3, 2.6a, 2.8, 3.2a, 11.1 or 11.3 will be reduced by one thirty-sixth for each month of service within three years of the pension age, counting any part of a month as a full month".

Summary of Mr Y's initial position

13. When he was dismissed from the Civil Service he was denied compensation under the Compensation Scheme solely because of his age.

14. The provisions of the Compensation Scheme prevent him being paid compensation on dismissal over age 60, which is unlawful discrimination on the grounds of age and is in breach of the Age Regulations (NI) (regulations 3 and 12 and Schedule 1 (Pension schemes)).

15. The failure to pay the benefit is in breach of the non-discrimination rule imposed on the Compensation Scheme by the Age Regulations (NI) (Schedule 1, paragraphs 2(1) and 2(2)).

16. The denial of a lump sum payment in these circumstances amounts to direct age discrimination.

Summary of DFP's initial position

17. DFP, as administrator of the Compensation Scheme, does not accept that the Compensation Scheme is age discriminatory and breached the Age Regulations (NI).

18. Direct age discrimination is permitted on the basis that non-payment of the benefit is objectively and reasonably justified as a proportionate means of achieving a legitimate aim (in accordance with regulation 3 of the Age Regulations (NI)). The aim used to objectively justify the withdrawal of compensation at age 60 relied on by DFP is that:

> "compensation provides a financial cushion to those who lose their jobs. There is less need for a financial cushion where an employee is able to draw a pension during the time they are looking for new employment".

19. Mr Y was already in receipt of his Civil Service pension, and would also have become eligible for his state pension during his long-term absence from work, and the payment of these pensions is an objective justification for not paying compensation to Mr Y.

20. DFP can only pay to a member the amount to which he is entitled under statutory regulations. There is no provision for a compensation payment to members over normal pension age.

Adjudicator's Opinion dated 6 August 2018

21. One of our Adjudicators reviewed various age discrimination cases where similar objective justification arguments were put forward by the employers. These included Odar v Baxter Deutschland GmbH (C-152-11) (Odar), Dansk Jurist-org Okomforbund v Indenrigs – og Sundhedsministeriat (C-546/11) (Dansk), the previous Deputy Pensions Ombudsman's Determination in Johnson (80333/1) (Johnson) and the Industrial Tribunal's case of Barlow v Gallaher Limited (case reference 924/15) (Barlow). The Adjudicator then issued his Opinion. He was of the view that:

    - Mr Y had not demonstrated why the payment of the compensation benefit did not amount to a windfall (the Barlow case could be distinguished);
    - the difference in treatment could be objectively justified, and
    - DFP can only pay a benefit in accordance with the Compensation Scheme, which did not provide for the benefit as Mr Y was over age 60.

Mr Y's response

22. Mr Y did not accept the Adjudicator's Opinion. Mr Y's wife submitted various supplementary arguments on his behalf. In particular, she made the following points, citing a number of cases in support of her submissions:

    - DFP's stated justification does not provide justification for the direct discrimination on grounds of age and, to the extent it may be capable of providing such justification (which was denied), the approach adopted is not proportionate and necessary;
    - section 11 of the Compensation Scheme has not been subject to an equality impact assessment because it predates both (1) the provisions on equality under section 75 of the Northern Ireland Act 1998 (wholly in force at 1 January 2000), and (2) age discrimination legislation which came into force in relation to pensions from 1 December 2006;
    - the policy on dismissal for inefficiency under the Compensation Scheme rules has not been amended since the implementation of the Northern Ireland Act 1998, so it has not been policy-screened. DFP has confirmed that any future amendment to section 11 will be subject to equality screening in accordance with Departmental policy;
    - there is a non-discrimination rule incorporated into the Compensation Scheme which imposes a duty on DFP not to discriminate against members on grounds of age;
    - it is not enough for DFP to say that it has to abide by the Compensation Scheme rules; rules which are age discriminatory must be objectively justified, and those that cannot be justified cannot lawfully be applied;

- DFP needs to discharge the burden of proof that the aim of the Compensation Scheme to provide a financial cushion to those who lose their jobs in the run up to retirement or to find an alternative employment is a legitimate aim (Mr Y having not previously questioned the legitimacy of the aim), and DFP has not done this;

- if a legitimate aim is established, it is for DFP to provide evidence that the method adopted to achieve that aim is a proportionate means of achieving it, and DFP has not done this; and

- if a legitimate aim is established, a discriminatory rule cannot be lawfully applied if there is a less discriminatory means of achieving that aim. There are other less discriminatory methods of achieving the aim put forward by DFP, as demonstrated by the changes made to the redundancy benefits payable under the Principal Civil Service Pension Scheme following the Wallis decision (discussed in paragraphs 28, 40-46 below).

DFP's response

23. DFP maintained its position that:

- the Compensation Scheme benefits are not in breach of the age discrimination legislation because the difference in treatment can be objectively justified on the grounds previously submitted;

- DFP is required to administer the Compensation Scheme in accordance with the rules; and

- accordingly, Mr Y is not entitled to compensation.

24. DFP also submitted, in a letter dated 24 May 2019, that the various cases cited on behalf of Mr Y, in support of his complaint, are not relevant to the current case, except for one case: the Employment Tribunal (**ET**) decision of Rhodes v Secretary of State for Justice (case number 2203298/2010) (**Rhodes**). Rhodes concerned a claimant who was dismissed for medical efficiency at age 60 in May 2010, under the Civil Service Compensation Scheme (**CSCS**) in England and Wales.

25. DFP noted that the ET considered three issues in the Rhodes case:-

- Whether a person who has reached pension age is in materially the same circumstances as a person who has not reached pension age for the purposes of comparison: DFP submitted that a person who has reached pension age is not in materially the same position as a person who has not reached pension age for the purposes of the comparison, as no reduction is applied to the pension for early payment.

- Whether the respondents were able to show that the treatment was a proportionate means of achieving a legitimate aim (justification): DFP noted that in Rhodes the respondents satisfied the ET only in relation to the fact that there

was other employer-funded income available to the claimant in the form of the pension, having reached pension age, and the fact the trade unions reached an agreement in relation to the CSCS. The ET bore in mind that it was for the respondents to establish justification, and on the evidence provided they had not done sufficient to discharge the burden. Therefore it was the unanimous judgment that if the ET had decided the first point incorrectly, the respondents failed to show that the treatment was a proportionate means of achieving a legitimate aim.

- Whether, as a question of fact, the first respondent would have decided that a compensation payment was appropriate in the particular circumstances of the claimant's dismissal: DFP pointed out that the ET had concluded in Rhodes that it did not have sufficient evidence to say whether the employer would or would not have exercised its discretion to award compensation had the claimant been in materially the same circumstances as a person who had reached pension age. Therefore, the ET was unable to determine the issue. However, should the ET be wrong in relation to the first issue, it would be necessary for the ET to hear further evidence in order to determine the second issue.

Mr Y's further Submissions

26. In response to DFP's submissions stated in a letter dated 24 May 2019, further detailed submissions were made by Mr Y in a letter dated 20 October 2019. These covered similar ground to earlier submissions summarising age discrimination legal principles but also contained a comprehensive analysis of various age discrimination cases in support of Mr Y's complaint.

27. Mr Y noted that:

- in the later case of (1) Budgen & (2) Smith v (1) Ministry of Justice & (2) Department for Business Innovation & Skills UKEAT/0308/12/RN, UKEAT/0309/12/RN (**Budgen & Smith EAT 2014**) the Employment Appeal Tribunal (**EAT**) reached the opposite conclusion to the ET in Rhodes on the issue of whether a member being paid a reduced pension on retirement before normal pension age was a legitimate comparator;

- DFP had accepted in its response that the Rhodes judgment applies in Mr Y's case and it has acknowledged that the ET was unanimous in finding that the respondents had failed to objectively justify Mr Rhodes' treatment; and

- so, DFP's position was absurd and unsustainable.

28. Mr Y also submitted that:

- there is no material difference between Mr Y's case and the decision in Wallis v Cabinet Office & others (case number 2201982/2008)) (**Wallis**), when a 'cliff edge' was held to be discriminatory on grounds of age in relation to a redundancy benefit payable under the CSCS;

- there is also no material difference between Mr Y's case and Rhodes, where it was held in relation to the application of a 'cliff edge' to the payment of the same benefit payable on dismissal on grounds of medical efficiency, subject to the issue of whether there was a valid comparator, that the burden of proof had not been discharged to demonstrate that the application of a 'cliff edge' at age 60 was objectively justified; and

- following the Budgen & Smith EAT 2014, decision, which ruled that a younger member who had a reduction applied to his pension was a valid comparator to a member with no reduction applied to his pension, it was irrational to maintain that the structure could be objectively justified in Mr Y's case.

29. Neither Mr Y nor DFP referred in their original submissions to the ET decision of Budgen & Smith v Ministry of Justice and Department for Business Innovation & Skills (case numbers 2203353/2011/220349/2011) on 12-15 January 2015 (**Budgen & Smith ET 2015**), which followed Budgen & Smith EAT 2014, on comparators to the facts, and concluded that the new CSCS benefit structure could be objectively justified.

30. Neither Mr Y nor DFP referred to the more recent case of Elliot v Parliamentary and Health Service Ombudsman on 22-23 September 2019 (case number 2200464/2018) (**Elliot 2019**), which came to the opposite conclusion. The decision was published in November 2019 and is currently being appealed.

31. It is appropriate for me to consider both of those ET decisions below.

Age Discrimination – The Law

32. In Northern Ireland (unlike England and Wales) the statutory regulations have not been amended following the Equality Act 2010.

33. Under regulations 3 and 12 of the Age Regulations (NI) (see Appendix):

- it is unlawful for the manager of an occupational pension scheme (such as DFP) to directly or indirectly discriminate on grounds of age if a complainant can show that they have been treated less favourably than a real or hypothetical comparator whose relevant circumstances are not materially different to theirs; and

- unless the respondent can show the treatment, provision, criterion, or practice to be a proportionate means of achieving a legitimate aim.

34. All occupational pension schemes contain a non-discrimination rule which will override the rules of the scheme to the extent of any inconsistency with age discrimination requirements (Schedule 1 paragraphs 2(1) and (2)) of the Age Regulations (NI)) (See Appendix).

35. In the case of direct age discrimination, the aim must contain a social policy element to count as a legitimate aim. The principles to be applied in determining justification are helpfully summarised in McCulloch v ICI plc [2006] IRLR 848 (**McCulloch**), by the then President of the EAT, Mr Justice Elias, who said that:

- the burden of proof is on the respondent to establish justification (British Airways plc v Starmer [2005] IRLR 862, EAT);

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

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

- it is for the ET to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure, and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context (Hardy).

36. To show that the actions were proportionate, a respondent does not need to show that it had no alternative course of action: rather it must demonstrate that the measures taken were reasonably necessary in order to achieve the legitimate aim (Barry v Midland Bank [1999] ICR 859 (HL)).

37. The actions will not be considered reasonably necessary if the respondent could have used less discriminatory means to achieve the same objective (Kutz-Bauer v Freie und Hansestadt Hamburg [2003] IRLR 368 (ECJ) and Dansk).

38. Proportionality has been held to involve a "balancing exercise" between the importance of the legitimate aim pursued and the extent of the discriminatory effect. In R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, the Court of Appeal held that the balancing exercise involves a three-stage test:-

- First - Is the objective sufficiently important to justify limiting a fundamental right?

- Second - Is the measure rationally connected to the objective?

- Third - Are the means chosen no more than is necessary to accomplish the objective?

39. However, in Lord Chancellor and Secretary of State for Justice and another v McCloud and others UKEAT/007/17, and Sargeant and others v London Fire and Emergency Planning Authority and others EAT/0116/17, the Court of Appeal held that the government has a margin of discretion in relation to both legitimate aims and the means of pursuing these, but the confines of the margin are determined by the courts on a case-by-case basis.

Age Discrimination – The Case Law on the CSCS and the Compensation Scheme

40. It is important when considering age discrimination complaints relating to pensioner and compensation schemes: to apply the law to the particular benefit structure; consider any objective justification defence, having regard to the particular circumstances of the case; and carry out the balancing exercise referred to above. It can still be helpful, however, to look at the approach which has been taken in other age discrimination cases concerning the CSCS and the Compensation Scheme.

41. The key cases concerning the CSCS and the Compensation Scheme are as follows:-

- Wallis in 2008;
- Johnson in January 2011;
- Rhodes in May 2011;
- the ET decisions in Smith v Department for Business & Skills and Budgen v Ministry of Justice on 13 March 2012, that found that a member who had a reduction applied to his pension was not a valid comparator with a member who had no reduction;
- Budgen & Smith EAT 2014, which overturned the first instance decisions in Budgen v Ministry of Justice and Smith v BIS on the issue of whether a member with a reduction applied to their pension was a valid comparator with a member with no reduction;
- Budgen & Smith ET 2015, which considered whether the new redundancy benefit structure adopted in the CSCS was objectively justified following the EAT decision on the issue of comparators; and
- Elliot 2019, which distinguished the Budgen & Smith ET 2015, decision on the issue of whether the same redundancy benefit structure in the CSCS for members over age 60 could be objectively justified in the case of the particular complaint. It held on the facts that the approach could not be objectively justified. However, the decision has subsequently been appealed to the EAT, and the outcome of that appeal is not yet known.

42. It is difficult to reconcile Budgen & Smith ET 2015 and Elliot 2019. The ET in both cases applied the same legal principles on age discrimination to a similar set of facts but reached opposite conclusions on whether the new CSCS benefit structure was discriminatory. This was the structure which had been introduced following Wallis, to address the age discrimination issues with the old structure identified in Wallis.

Wallis - old CSPS redundancy benefits (ET)

43. In Wallis the ET considered, among other things, whether having a taper from age 57 to age 60 for the payment of redundancy benefits (and then a complete cut-off of the benefit from age 60) under the CSCS provisions in force at the time was a legitimate aim, and if so, whether having a taper was a proportionate means of achieving a legitimate aim that could be objectively justified.

44. The Civil Service Commission sought to justify the aim of the tapering provision on virtually identical grounds to the current case:

> "… as being a proportionate financial cushion or bridge to retirement and receipt of unreduced pension".

45. It was argued in Wallis that those individuals who were aged between 57 and 60 had very nearly reached normal retirement age, so they did not need the redundancy payment. However, due to changes in working practices many more employees work beyond normal retirement age. It was recognised that those employees who were older when they were made redundant would find it more difficult it is to obtain alternative employment, and those aged between 57 and 60, may find it increasingly difficult to find work, and are therefore more in need of a lump sum compensation payment, rather than less. The ET was not satisfied that in the circumstances the financial cushion defence was a legitimate aim (a bridge to retirement to avoid a 'cliff edge'), but even if it had been, it was not a proportionate means of achieving a legitimate aim.

46. DFP has argued that the decision in Wallis is not directly comparable to Mr Y's case, as he is over normal pension age and is entitled to an unreduced pension without a taper being applied and can draw a state pension as well. However, in Wallis consideration was also given to those employees who were over age 60 who were made redundant after 1 December 2006. It was concluded by the ET in Wallis that those employees should also receive the un-tapered lump sum of six months' salary if they were subsequently dismissed while still working. They had as much need for the compensation payment as someone under age 60.

Johnson - (Decision of the Deputy Pensions Ombudsman PO-80333/1)

47. Mr Johnson complained that his lump sum compensation paid on redundancy was reduced by the CSCS because he was within three years of normal retirement date and a taper was applied. The Deputy Pensions Ombudsman, following Wallis, held that there was no objective justification for applying the taper, and applying the taper was in breach of the non-discrimination rule.

Rhodes - (ET)

48. Rhodes concerned a dismissal of a member of the PCSPS on grounds of medical inefficiency under the equivalent provision of the old CSCS in England and Wales, which is being considered in Mr Y's case in relation to the Compensation Scheme. It was argued that the failure to provide any lump sum as he was over age 60 at the date of dismissal was age discriminatory. The ET held that:

- the claim failed because the individuals covered by the CSCS under age 60 were not valid comparators for age discrimination purposes (as they were not entitled to an unreduced pension); and

- if it had reached the opposite conclusion on the issue of comparators, the case was borderline on the issue of justification, and it was unanimously of the opinion that the employer had not discharged the burden of proof in demonstrating that the 'cliff edge' approach adopted was a proportionate means of achieving a legitimate aim.

49. In other words, Rhodes raised doubts whether an identical benefit structure to the benefit structure being considered in Mr Y's complaint could be justified (it was borderline), and the ET was of the unanimous view that the administrator had failed to discharge the balance of proof that the approach could be justified.

Changes made to the CSCS and the Compensation Scheme following the Wallis decision

50. Following the Wallis case, the CSCS and Compensation Scheme redundancy compensation regulations were reviewed and there were consultations with the trade unions about the introduction of a new compensation scheme. In England and Wales, the unions eventually agreed to a scheme that provided for 21 months' compensation for those made redundant voluntarily, and 12 months' compensation for those made redundant compulsorily, with a cap of six months for those over age 60. This did not reduce when the individual reached state pension age. The same structure was later adopted in Northern Ireland.

51. There was not an equivalent review of the provisions relating to dismissal on grounds of medical inefficiency under the CSPS and the Compensation Scheme. CSP has stated that this was because the scheme was set up before 1 December 2006 when age-discrimination requirements came into force, and CSP will carry out an equality assessment when they review the regulations next time they are updated.

52. As noted by Mr Y, new redundancy compensation arrangements were introduced in England and Wales on 12 December 2010 and in Northern Ireland in April 2014, under the CSCS and the Compensation Scheme, respectively. These addressed the age discrimination issues with the earlier benefit structure. Under the new redundancy benefit structure in the CSCS:

- individuals could be paid redundancy compensation of up to one month's salary for each year of service (up to 12 months' salary for compulsory redundancies and 21 months' salary for each year of service for voluntary departures);

- the maximum lump sum payable was reduced to six months in the 15 months before age 60 (so there is still a taper);

- for civil servants over normal pension age the lump sum compensation was reduced to six months (but compensation did not cease at state pension age); and

- the lump sum could be applied to waive all or part of the actuarial reduction which would otherwise be applied to the pension if it came into payment before age 60.

53. In other words, civil servants over normal pension age are still entitled to a benefit, but a lower benefit than those below age 60. This addresses the 'cliff edge' issue identified as age discriminatory in Wallis. Also, although the compensation is capped at six months, a lump sum is still paid on redundancies on or after age 60, so the impact of redundancy is cushioned. There is a better integration between the new structure and the PSCS (NI).

Budgen & Smith ET 2010 decisions and Budgen & Smith EAT 2014 decisions

54. The compliance of the new redundancy benefit structure introduced for civil servants in England and Wales in 2010 was challenged in the ET in Budgen & Smith ET 2010. The ET considered as a preliminary issue in both cases whether younger members who had a reduction applied to their pension were comparators to those with no reduction. The ET found that they were not comparators. The decisions were appealed, and the appeals considered together by the EAT in Budgen & Smith EAT 2014. The EAT overturned the initial first instance ET decision on the comparator issue in Budgen & Smith 2010 and held that:

- the members below age 60 were valid comparators (following the approach taken in the Court of Appeal in Lockwood v Department for Work and Pensions and Cabinet Office [2013] EWCA Civ 1195 (**Lockwood**)); and

- the cases should be remitted to the ET to look again at the legitimate aim defence.

55. The EAT in Budgen & Smith EAT 2014, did not follow the approach taken in Rhodes on the comparator issue.

56. In January 2015, a new ET in Budgen & Smith ET 2015, considered the legitimate aim defence in relation to the new compensation structure of the CSCS. This was the new structure that had been introduced following the Wallis decision to address the 'cliff edge' problem with the old structure.

57. In Budgen & Smith ET 2015, the ET had regard, among other matters, to the following issues:

- the extensive supporting evidence and data had been provided by the Ministry of Justice and the Department for Business Innovation & Skills to justify a general rule under which there was a taper up to age 60 and the lower benefit paid on or after age 60;
- the new redundancy structure had been introduced to remedy discrimination identified in Wallis by having a cut-off at age 60;
- the new scheme had been introduced following consultation with the trade unions, which was a factor relevant to whether it could be objectively justified; and
- when considering whether an appropriate balance had been struck between the needs of the organisation and the discriminatory impact of the measure, the fact that those retiring before age 60 are likely to be worse off than those retiring on or after age 60.

58. The ET concluded that:

> "Our overall assessment is that this was a scheme that had a clearly defined legitimate aim of providing a financial cushion to alternative employment and/or to take account of the decrease in income on obtaining a retirement pension. While it is valid to compare those in their 50s to those over 60 so that their difference in treatment constituted prima facie direct discrimination, in considering justification one has to take into account the fact that those taking voluntary redundancy in their 50s are generally retiring longer before the age at which they would have wished to retire than those who are 60 or above. Those retiring at a younger age than the Claimants are likely to suffer greater financial loss. While a person might retire between 50 and 60 and immediately obtain work at higher pay with equal or even better pension provision that is unlikely. A scheme with clear rules has to focus on the likelihood of various outcomes. It is appropriate to reflect the likely worse financial situation of those retiring below 60 in a scheme that provides less compensation to those above 60 who can retire without having to make a payment if they wish to receive a pension which has not been actuarially reduced and to take account of the fact that the difference tapers as employees move towards 60. We conclude that the comparators the Claimants rely upon are likely to be worse off than they are and we consider that the scheme operated is reasonably necessary ……".

Elliot 2019

59. In Elliot 2019, an individual claimed that the fact that she was aged 64 and was paid less compensation (six months) on voluntary exit under the CSCS than a member below age 60 (who would have received up to 21 months' compensation) was age discriminatory, and could not be objectively justified. This case considered very similar issues to those considered in Budgen & Smith ET 2015 (following the Budgen

& Smith EAT 2014 decision on comparators) and reviewed the same authorities, but concluded that:

- to provide a proportionate cushion to those who lost their jobs was a legitimate aim, and there was significant authority that there is less need for a financial cushion to those in receipt of a guaranteed source of income from an occupational pension scheme in retirement;

- the decision to implement the aim was within the margin of discretion available to the respondent and this aim was within a reasonable and appropriate margin of discretion; but

- the means adopted was not a proportionate means of achieving a legitimate aim.

60. The ET reached its decision on whether the means adopted was proportionate having regard to the following points:

- the conclusion in an earlier case that it is "notorious" that men and women remain in large and increasing numbers members of the active labour force and may well require income from earnings to maintain their standard of living, and noted that "the idea that the simple fact" that receipt of a pension can justify a difference in treatment "will not do". Statistical evidence is required "to begin to justify" a difference in treatment;

- it was for the respondent to show that its decision to impose this particular pension age cap was a proportionate means of achieving the legitimate aim: was it an appropriate and necessary means of achieving this aim; and

- the ET was required to carry out a balancing exercise between the importance of the legitimate aim pursued and the extent of the discriminatory effect. It is for the respondent to justify the difference in treatment by reference to local conditions and the circumstances of its employees "looked at as a whole".

61. On the facts, having regard to possible comparators, the simple fact that employees under age 60 cannot take a full Civil Service pension was not sufficient to justify the difference in treatment, because the financial situation was much more complex. The ET considered in this case that the adoption of a pension age cap would have a significant adverse effect on the claimant and those in her position who chose to work in the Civil Service beyond age 60. The ET distinguished Budgen & Smith ET 2015, considering that the comparators chosen in their case were not appropriate in the Elliot case. The ET therefore decided it was appropriate to depart from the findings in the earlier decision.

62. The ET concluded that there were two potential schemes which could potentially be objectively justified, namely:

- a flat rate percentage reduction to the standard tariff voluntary exit payment paid on redundancy at age 60 and over; and

- a stepped percentage reduction to the standard tariff voluntary exit payment on redundancy for each year of employment aged 60 and over.

63. It is understood that this case is being appealed to the EAT, and the EAT will hear the appeal later this year.

Case law summary

64. To sum up, we have:

- an ET decision (Wallis) in relation to a particular redundancy benefit structure with a taper from ages 57-60 and a cut-off at age 60, where it was held that the financial cushion objective justification failed on the grounds that the method adopted to give effect to the aim was not proportionate;

- another ET decision (Rhodes) relating to payment of compensation on grounds of medical inefficiency (the same benefit as in the current case) where the ET was of the view (if it was decided that it was wrong as a matter of law on the issue of comparators) that it was borderline whether there was an objective justification for applying a cut-off at age 60, and in any event the respondents had not discharged the burden of proof in demonstrating objective justification;

- other decisions relating to the revised redundancy benefit structure introduced to address the issues identified in Wallis with a hard cut-off (Budgen & Smith EAT 2014 and Budgen & Smith ET 2015), where it was held that a financial cushion can be a legitimate aim in relation to a redundancy benefit payable under the CSCS and that the means of giving effect under the particular benefit structure was a proportionate means of achieving that legitimate aim;

- in this structure, however, there was no hard cut-off, just a tapering down of the benefit offered in the period up to age 60 with a lower benefit still being paid after age 60 to cushion the impact of redundancy or transition to retirement. The ET considered whether an appropriate balance had been struck between the needs of the organisation and the discriminatory impact on the complainants; and

- the recent decision in Elliot 2019 (which is being appealed) where on very similar facts to Budgen & Smith ET 2015 the ET found that the same voluntary exit payment structure was age discriminatory and could not be justified because of the disproportionate impact on those who continued working after age 60. However, a better integrated stepped reduction in the amount of compensation payable may be justified.

Applying the law to the facts – Preliminary Decision

65. I issued a preliminary decision to the parties in March 2020 (the **Preliminary Decision**). In this, I reached the following preliminary conclusions.

Overriding effect of non-discrimination rule

66. The Compensation Scheme includes and takes effect subject to a non-discrimination rule so, to the extent that any provision is not consistent with the requirements of the Age Regulations (NI) (regulations 3 and 12), it will need to take into account any benefits which accrue or are payable (if they do not accrue) on or after 1 December 2006.

67. DFP is correct that it can only pay benefits in accordance with the rules of the Compensation Scheme. However, those rules must take into account the non-discrimination rule so, if and to the extent a provision is age discriminatory, DFP must pay benefits on a non-age discriminatory basis (in other words, paragraph 2 of Schedule 1 to the Age Regulations (NI) effectively overrides the Compensation Scheme rules).

Is there direct discrimination on grounds of age? Are there any comparators?

68. Mr Y is not eligible for consideration for a payment under the Compensation Scheme because he has reached age 60.

69. The Compensation Scheme directly discriminates against Mr Y if he can show that there are other members who will be paid compensation under the Compensation Scheme and who can be treated as comparators.

70. The other categories of members who will receive a pension under PCSPS (NI) and compensation under the Compensation Scheme on termination of employment on grounds of IESAP, and are potential comparators to Mr Y, include:-

- PCSPS (NI) Classic members whose contracts of employment are terminated between ages 50 (if they joined before 6 April 2006) (or 55 if they joined on or after 6 April 2006) and 57 who will be able to take a pension (reduced for early payment) and will also be eligible to receive lump sum compensation under the Compensation Scheme;

- PCSPS (NI) Classic members whose contracts of employment are terminated between ages 57 and 60 who will also be able to take a pension (reduced for early payment) and will also be eligible to receive lump sum compensation under the Compensation Scheme (reduced for early payment before age 60 under the taper);

- PCSPS (NI) Classic members whose contracts of employment are terminated between ages 50 (or 55) and 57 who, on a previous reduction of their working hours opted to take an immediate pension (reduced for early payment) and who will also be eligible to receive lump sum compensation under the Compensation Scheme; and

- PCSPS (NI) Classic members whose contracts of employment are terminated between ages 57 and 60 who, on a previous reduction of their working hours opted to take an immediate pension (reduced for early payment) and who will

> also be entitled to lump sum compensation under the Compensation Scheme (reduced for early payment before age 60 under the taper).

71. DFP has argued (citing Rhodes) that these categories of members are not comparators because their pension is reduced for payment if they retire before normal pension age. This analysis, however, is not sustainable following Lockwood, Donkor v Royal Bank of Scotland UKEAT/0162/15, and Budgen & Smith EAT 2014. These cases demonstrated that relevant circumstances intrinsically related to the comparator's age should be disregarded and cannot be used to argue that the circumstances of the comparator are materially different if the reason for the difference is on grounds of age.

72. It must therefore be correct (as submitted by Mr Y) that the reasoning in Rhodes, relied on by CSP, to demonstrate that Classic members who can draw a reduced pension are not comparators can no longer be good law.

Does the objective justification argument advanced by DFP include a social policy element?

73. The objective justification advanced by DFP in support of the differential treatment of Mr Y on grounds of age is that:

> *"…*the aim of the compensation scheme is to provide a financial cushion to those who lose their jobs and provide an income whilst they seek new employment. There is less need for that financial cushion where an employee is able to draw a pension during the time they are looking for new employment".

This does, in my view, contain a sufficient social policy element to be treated as a legitimate aim for the purposes of justification of the direct discrimination. There are a number of EAT and other court decisions where this type of legitimate aim has been accepted in similar circumstances, including Rhodes, Odar, Lockwood, Budgen & Smith EAT 2014 and Budgen & Smith ET 2015.

What evidence has DFP provided to demonstrate objective justification?

74. Mr Y is correct that as a matter of law it is for DFP to discharge the burden of proof that the potentially discriminatory treatment is objectively justifiable.

75. In Mr Y's case, DFP had not at the time the Preliminary Decision was issued provided any supporting statistical or other convincing evidence to demonstrate that the means adopted are a proportionate means of achieving a legitimate aim. DFP merely asserted that the purpose of the compensation scheme is to provide a financial cushion and provide an income while the individuals seek new employment. DFP has confirmed that no equality discrimination assessment or policy screening of this structure has been carried out.

76. The contrast between the supporting evidence provided in both Budgen & Smith ET 2014, and Elliot 2019, and the current complaint is striking. In both of those earlier cases very detailed supporting evidence was submitted by the respondents in

an effort to justify the direct discrimination. In this case, however, DFP has not submitted detailed evidence.

77. I considered that Mr Y's complaint should be upheld on this basis alone. However, I also went on to consider the other arguments raised by Mr Y.

Ability of DFP to justify the approach

78. For similar reasons to those discussed in Wallis, I concluded it would be hard for DFP to objectively justify this approach generally in relation to Classic members following:

- the move by the Civil Service to flexible retirement, and its abandonment of the default retirement age;
- the introduction of contractual terms where employees can continue to accrue benefits after normal pension age or take benefits and continue working; and
- the lack of any supporting equality assessment to justify the treatment.

79. The fact that a member is entitled to immediate pension benefits (and may be in a better financial position than younger members) may indeed be a relevant factor which DFP might consider when coming up with a different benefit design (see Budgen v Smith EAT 2014 decision). However, the automatic ending (the 'cliff edge' issue) of the Compensation Scheme benefit from age 60 (with a taper from ages 57-60) is, for the reasons discussed in Wallis, hard to justify given the ending of entitlement to the benefit is poorly integrated with the benefit design of the PCSPS (Classic) or the employee's contractual retirement rights.

80. The benefit design also does not have regard to the fact that different Classic members may have had different earnings histories and built up different pension entitlement to support them in retirement. Members may have been relying on being able to continue to work beyond age 60 to provide a reasonable standard of living. In cases of ill-health inefficiency retirements, it is equally arguable that it will be harder to find a new job than in the case of redundancy, so there is arguably more (not less) need for the compensation payment. So while there may be a lesser need for compensation due to the ability to access the occupational pension from age 60 and the state pension from age 65 (in Mr Y's case), it does not follow that there is no need for compensation to cushion the loss of the job at all, given that members may have been relying on being able to continue to work in retirement to sustain their level of income. This is relevant to whether an appropriate balance has been struck between the needs of the organisation and the discriminatory impact of the benefit structure.

Are there potentially less discriminatory means of giving effect to the legitimate aim?

81. In his submissions, Mr Y noted that a less potentially discriminatory redundancy compensation scheme, which does not have a 'cliff edge' cut-off, was introduced for civil servants in Great Britain in 2010, and Northern Ireland in November 2014, to address any potential age discrimination issues following the Wallis decision.

82. As noted in paragraph 58 above, it was held by the ET in Budgen & Smith ET 2015, that this particular structure could be objectively justified, but extensive supporting statistical evidence was provided to the ET in that case, demonstrating that an appropriate balance had been struck between the needs of the organisation and the individuals affected. There had also been an equality assessment and consultation with the trade unions before adopting this structure.

83. In Elliot 2019, on similar facts, it was held the same voluntary exit compensation structure could not be objectively justified in the circumstances of the case and the identity of the comparators. However, a better integrated structure with a reduction in the level of compensation payable from age 60 may be justifiable.

84. I mentioned earlier that Elliot 2019, is being appealed. I did consider delaying issuing my Determination until after the EAT issues its decision in relation to that appeal. However, the legal principles applied and the authorities reviewed in both the Budgen & Smith ET 2014, decision and the Elliot 2019, decision are broadly the same. The ET reached different conclusions on the particular facts as to whether (a) the burden of proof had been discharged, and (b) the particular benefit structure adopted could be objectively justified in the particular case, and on the issue of who was an appropriate comparator.

85. It would also have been possible, in my view, to come up with other alternative benefit structures which are less discriminatory and there are also other possible tapered structures described in Elliot 2019, which might also be justifiable. However, a complete ending of benefit at age 60, without any further consideration of the impact on different categories of Classic members does, in my view, go beyond the minimum necessary to give effect to the legitimate aim, as there is no cushion or bridge to retirement at all once the member passes that age. The structure has identical age discrimination ('cliff edge') problems as in the Wallis decision, which resulted in the CSPS and Compensation Scheme being revised.

Has an appropriate balance been struck?

86. In the current case, I was not satisfied at the time of the Preliminary Decision that the means adopted for pursuit of the aim struck an appropriate balance between the potentially discriminatory effect of the measure and the impact on Mr Y. The means chosen are more than is necessary to accomplish the objective. While there may be other benefit structures which may be objectively justified, the particular benefit structure cannot, as it does not strike an appropriate balance between the stated legitimate aim of providing a financial cushion in the run up to retirement, or obtaining a new job, and the means adopted to achieve it. In my view, this would be the case whether or not Elliot 2019, is successfully appealed.

87. Accordingly, in Mr Y's case, the restriction in rule 5.1 to the amount of benefit paid under rule 3.3, is in breach of age discrimination requirements.

88. My findings in the Preliminary Decision were broadly as follows:

- The financial cushion justification advanced by DFP may provide a legitimate aim for tapering down of a benefit in relation to Mr Y, but only if such treatment can be objectively justified in the particular circumstances of the case.

- DFP had, in Mr Y's case:

    - failed to discharge the burden of proof that the benefit structure adopted is a proportionate means of achieving a legitimate aim; and
    - failed to demonstrate that an appropriate balance has been struck between the needs of the organisation and the discriminatory impact on Mr Y, and the rule does no more than necessary to give effect to the legitimate aim.

If rule 5.1 is treated as having no effect, rule 11 provides that the maximum compensation is an amount calculated in accordance with rule 3.3. Under rule 11, DRD has a discretion as to whether to pay the benefit in full or in part.

Additional Submissions of the parties following the issue of the Preliminary Decision

89. Following the issue of the Preliminary Decision, both parties took the opportunity of making further submissions.

Mr Y's additional submissions on the decision making process

90. Mr Y pointed out that it is DRD as Mr Y's employing department that makes the decision as to the amount of compensation payable when the Age Regulations (NI) so permit, and drew my attention to the guidance applicable at the time on IESAP.

91. DRD would have exercised any discretion (if the Age Regulations (NI) had so permitted) having regard, among other things, to the guidance for employing departments on IESAP.

92. The IESAP states that:

> "9.1 Departments have discretion to pay compensation in cases of dismissal on grounds of Inefficiency. Departments will consider whether compensation should be paid and, if so, how much. In doing so they will assess in percentage terms the extent to which the inefficiency is caused by factors beyond your control and the efforts you have made to remedy the inefficiency and/or underlying causes of it. Guidance for assessing compensation in such cases is attached at Annex 1.
>
> 9.2 The amount of compensation payable will be calculated by applying the percentage determined by the Department to the maximum that could be paid under the Civil Service Compensation Scheme (Northern Ireland). Details of the maximum amounts of compensation that can be paid are set out in Section 11 and Rule 3.3 of the Civil Service Compensation Scheme (Northern Ireland). If a Department decides not to pay compensation, or to pay less than the maximum, you will be informed when notice of dismissal is given."

93. Mr Y noted that further clarification of the role of the employing Department was provided by Mr Savage (DRD HR) in his email to Mr Y dated 19 June 2015. In this email, Mr Savage also confirmed that DRD would have paid Mr Y 100% of the compensation due to him but for the Scheme Rules. Mr Savage stated:

> "In accordance with paragraph 9.1 the Department does indeed consider whether compensation should be paid. I would, however, point out that the paragraph, (only part of which you quote below) goes on to state that: "In doing so they will assess in percentage terms the extent to which the inefficiency is caused by factors beyond your control and the efforts you have made to remedy the inefficiency and/or the underlying causes of it." This paragraph clearly means that the Department will consider how much of a percentage of any compensation due should be paid i.e. whether any compensation due should be paid in full or a percentage withheld. (Mr Y's emphasis). In Mr [Y]'s case the Department would have paid 100% of any compensation due, however, under the rules of the scheme he was not entitled to any compensation as previously explained by Civil Service Pensions."

94. It would appear that if DRD had discretion at the time (if no cut-off had applied) they would have regard to whether the inefficiency was due to factors caused by factors beyond Mr Y's control, and would have concluded that 100% compensation would be payable. Given however that DRD was proceeding on the basis that there was a cut-off at age 60 (as this was the basis on which DFP was administering the Compensation Scheme) I cannot see how DRD can have made a decision at the time to award 100% compensation. All we have is an indication of how it would have exercised the discretion if it had not been proceeding on the basis, as advised by DFP, that the benefit was not payable after age 60 in Mr Y's case. If I find in favour of Mr Y, DRD will still need to determine the level of benefit.

DFP's additional submissions on whether I should defer issuing my Determination

95. DFP made further submissions to the effect that I should not determine the matter at all given that Elliot 2019, is being appealed and there is another ET case on a similar issue being heard later this year, and DFP needed time to produce figures to justify objectively the approach it had taken. I carefully considered the request but concluded that it was not in the interests of justice to defer issuing my Determination given how advanced the case was. I had previously concluded that it was difficult to reconcile Elliot 2019, with the earlier decisions but, even if Elliot 2019, was reversed, it would not affect my analysis of the age discrimination position.

96. I did however give DFP more time to collect additional evidence on the issue of objective justification, including some further extra time from what I would normally have granted to reflect the Coronovirus situation.

97. Mr Y has objected to DFP being given the opportunity of making further substantive submissions in response to the Preliminary Determination, claiming that it allowed DFP to submit an amended defence. Mr Y submitted that it was in breach of established legal principles that litigants only have one opportunity to submit an

expanded or alternative opportunity, 'one bite of the cherry', to present their case. They should not be permitted to re-run their arguments if they fail the first-time around.

98. This misunderstands the nature of the Ombudsman procedure, which is designed to provide a comparatively quick, inexpensive form of justice for complainants without the same level of formality as court proceedings. To the extent that my procedure is not laid down in the Pension Schemes Act 1993 (**PSA 93**), or any rules issued by the Secretary of State under section 145(2) of PSA (NI) 93 (see The Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure Rules) (Northern Ireland) 1995 (167) - NI Statutory Rules, I have discretion (section 145(4) of the PSA (NI) 93), as to the process subject only to compliance with principles of natural justice.

99. In complicated cases, under the procedure I normally adopt I will issue a preliminary decision and give both sides an opportunity to comment on it before making a Determination (or, if new points then emerge, issue a further draft preliminary decision). I have given both DFP and Mr Y considerable latitude to make additional submissions, and I have given Mr Y an opportunity to respond to the supplementary arguments that have been submitted by DFP. I am satisfied that the process I have adopted has been fair to both parties and is consistent with principles of natural justice.

Supplementary Submissions by DFP

100. The supplementary submissions made by Ms C (Head of Civil Service Pensions Policy and Communications Enterprise Shared Services) on behalf of DFP set out a much more cogently argued case as to why the treatment could be justified. For the first time DFP sought to provide statistical supporting evidence justifying the potentially age discriminatory impact of the relevant provisions of the Compensation Scheme:

100.1 Justification - DFP accepted that when a prima facie case of discrimination has been established the burden of proof is on DFP to establish justification. Normally some evidence must be provided to justify disparate treatment although concrete evidence is not required.

100.2 Legitimate Aim – there is sufficient legal authority to support the proposition that the receipt of a pension is a guaranteed source of income, which means that there is less need for a financial cushion on retirement, and it has been accepted by the Pensions Ombudsman that the aim of the scheme to provide a financial cushion upon retirement is a legitimate aim;

100.3 Proportionate Means – the next question to be determined is whether the means adopted was a proportionate means of achieving the legitimate aim. The leading case on proportionality is Homer v Chief Constable of West Yorkshire Police [2012] 1RLR 601. In Homer the Supreme Court held that to

be proportionate a measure has not only to be both an appropriate means of achieving a legitimate aim but also reasonably necessary in order to do so.

100.4 Appropriate – it is necessary to approach the question of proportionality with a full appreciation of the context. In doing so, it should be recognised that DFP's decision involves a requirement to balance several competing interests as well as the overall financial cost to the public. DFP then drew my attention to various relevant contextual matters including:

100.4.1 The purpose of the Compensation Scheme is to provide a proportionate financial cushion to those who lose their jobs on the basis of inefficiency and have no other form of income. I would note that DFP has sought to reformulate the purpose of the Compensation Scheme - in its original submissions DFP argued that the aim was to provide a proportionate financial cushion for those who lost their jobs on the basis of inefficiency, without reference to other income. The issue of availability of a pension was however relevant to the extent that the financial cushion is required;

100.4.2 It is appropriate for DFP to take account of member's different positions when determining need for compensation on dismissal for inefficiency – see Loxley and Odar;

100.4.3 An employee can be dismissed for inefficiency at any stage of his or her career. The Compensation Scheme has to recognise that at some point employees become eligible for a guaranteed form of income by way of a pension, the great majority of which will have to be paid by the employer;

100.4.4 Where a pension is immediately payable, there is less need for that financial cushion than would be a requirement for a younger member of the Compensation Scheme, where the pension would not yet be accessible;

100.4.5 The taper arrangements and cut-off at age 60 (normal pension age within the Classic Scheme) are appropriate in the context of the Compensation Scheme to ensure it is fair and affordable; and

100.4.6 Costs associated with providing compensation to all would be considerable, and there would be risk to the sustainability of the Compensation Scheme if such a proposal were accepted.

100.5 Reasonably necessary – The gravity of the effect on those discriminated against must be weighed against the importance of the legitimate aim in assessing the necessity of the measure chosen. A balancing exercise must be carried out and conditions and circumstances of the members of the Compensation Scheme looked at as a whole. In this regard DFP asked me to consider the following:

100.5.1 It is necessary for the Compensation Scheme to provide compensation to some in need of assistance to alleviate hardship upon dismissal. There is less need for a financial cushion when the individual is in receipt of an unreduced pension (and in the case of Mr Y an additional state pension);

100.5.2 No scheme will achieve absolute justice across the board, and age based differential treatment is unavoidable in the context of the Compensation Scheme. It is structured in a way to provide a taper of compensation and a cut-off at normal retirement age. For example, if Mr Y had been 59 years and 11 months on dismissal, he would have qualified for a compensation payment of only £126.02. To pay Mr Y a larger amount would discriminate against a younger member;

100.5.3 The Pensions Ombudsman must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure. DFP has no record of any other members who have been dismissed for inefficiency over age 65. Mr Y is therefore in a unique position. DFP's view is that apart from Mr Y the likelihood is that anyone edging towards dismissal at this age would have retired under normal retirement age;

100.5.4 Furthermore, at 31 March 2020 there were 29,265 members of the Compensation Scheme. Of those, 671 members were aged at least 60 and 215 aged at least 65, who could be affected by Rule 5.1 of the Compensation Scheme. To put it into perspective, 2.129% of active scheme members are age 60 or over and 0.73% are age 65 or over. Accordingly, DFP submits that the majority of members of the Compensation Scheme at the time would benefit from the payment of compensation on dismissal for inefficiency and that the application of the rules of the Compensation Scheme (with its cut-off which excludes certain members from receiving compensation) is a proportionate measure over the whole Compensation Scheme;

100.5.5 As a whole, the Compensation Scheme is fair and proportionate, and not awarding compensation beyond state pension age is necessary, as the Compensation Scheme has to be affordable both for employers and the tax-payer;

100.5.6 If there was no cap, there would be a risk of increasing the incentive to staff not to retire but instead to hold on in the hope of receiving a compensation payment. That is not part of the aim of the Compensation Scheme, and could result in its abuse. Mr Y was already over normal pension age, and the option of compensation was unavailable as his full pension and lump sum was paid on leaving. He was not fit to return to work or seek other employment, yet he is seeking to qualify for normal pension and lump sum and also a lump sum compensation payment under the Compensation Scheme.

100.6 DFP appreciates that several cases have been upheld on the wider issue of the cliff edge cessation of compensation payments and public sector pension schemes may in the near future consider amendments to their scheme to address this issue, such as extending some form of compensation to member's state pension age rather than scheme pension age. However, Mr Y would still not qualify for a compensation payment as he had reached his state pension age on 13 January 2015, before he was dismissed on 1 July 2015.

100.7 DFP concluded that it is required to identify and apply policies which rise above narrow sectional interests in order to promote the objectives of the Compensation Scheme for the Civil Service as a whole. It is reasonable for DFP to adopt a policy to protect the interests of younger members and the organisation as a whole and to serve the stated aim of the Compensation Scheme. DFP has to take into account that there can be competing demands, and that there must be fair and rational allocation of resources. Compensation cannot be unlimited, and the impact on the claimant has to be balanced against this. Mr Y's personal circumstances are that he was medically unfit, and he was not likely to become fit to return to work. He did not qualify for incapacity benefit, but he did qualify for employer-funded income by way of an unreduced pension and lump sum. DFP submits that he did not need a financial cushion to allow him to look for work or ease him into retirement, which is the purpose of the Compensation Scheme.

100.8 DFP then submits that the approach adopted by the ET in Budgen & Smith (2015), in which it was held that a financial cushion was a legitimate aim and was objectively justified as a proportionate means of achieving the legitimate aim, is properly applicable in the particular circumstances of the case. DFP submitted that the benefit structure was similar with no hard cut-off age and a tapering down of the benefit up to normal retirement age 60. I would point out that this is not strictly correct. The structure in Budgen was introduced to address the age discriminatory structure of the previous cliff edge structure, which had been held to be unlawful, and although there was a reduction in the level of benefit at age 60, a benefit was still payable after age 60 with no further tapering down on grounds of age. This was the structure which was then subsequently found to be age discriminatory in Elliot 2019.

100.9 DFP also submits that the Pensions Ombudsman should not rely on Elliot 2019, as it was subject to appeal and the ET conclusion may well be overturned. This however ignores the fact that I was not relying on Elliot 2019, in my Preliminary Decision and would have reached the same conclusion whether or not it is successfully appealed. This was one of the reasons I concluded that I should proceed and determine the dispute while the appeal was outstanding.

100.10 DFP concludes that the inefficiency scheme properly targets the under 60's for assistance, and does so in a manner which is proportionate in the circumstances.

<u>Mr Y's further submissions in response</u>

101. Mr Y made some further submissions in response, but these cover similar ground to Mr Y's earlier submissions. Mr Y refers again to the legal principles contained in the McCulloch v ICI decision, and the McCloud and others Court of Appeal decision. The McCulloch decision confirms that it is for the respondent to justify age discrimination and the McCloud decision requires justification to be supported by evidence. Mr Y submits again that DFP:

101.1. has failed to provide evidence that the discriminatory measures it employed correspond to a real need within the Northern Ireland Civil Service and are proportionate; and

101.2 has failed to provide evidence that an objective balance has been struck between the discriminatory effect the scheme rules had on Mr Y and the needs of the Northern Ireland Civil Service.

Conclusions on the additional submissions on objective justification

102. In its additional submissions, DFP has sought for the first time to provide evidence that the cut-off of the compensation on dismissal on grounds of inefficiency can be objectively justified and corresponds to a real need within the Northern Ireland Civil Service. Whether it has done so is disputed by Mr Y.

103. Any objective justification is going to necessarily be an after event justification as, on the evidence I have received, the Northern Ireland Civil Service has never carried out a discrimination or equality impact assessment on the inefficiency scheme, although it has carried out such an assessment on other benefits. Age discrimination laws have applied since 1 December 2006, so the Northern Ireland Civil Service has had more than 13 years to carry out such an assessment. Also, it appears that no age discrimination assessment was carried out of the applicable Compensation Scheme following the Wallis decision and the subsequent changes made to the Compensation Scheme in relation to redundancy payments to address the age discriminatory issues identified with the cliff edge structure. The cliff edge issue relating to the inefficiency benefit is virtually identical.

104. DFP has, however, for the first time (it appears) in response to Mr Y's complaint, now carried out some research on the effect of the cliff edge structure on members of the Compensation Scheme in relation to their incapacity benefits. It identified that 2.29% of active scheme members are aged 60 or over. DFP submits that the majority of members will benefit from the Compensation Scheme and also notes that Mr Y is in a unique position as it has no records of any member being dismissed or inefficiency over age 65. DFP's own statistical information undermines its argument that "compensation cannot be unlimited and the impact on the claimant has to be balanced against this" and arguments that the Compensation Scheme is not sustainable if compensation is payable to the over 60's.

105. On DFP's own evidence, the current structure with a hard cut-off at age 60 (which I would note is not comparable to an Elliot 2019 type structure, where there is a stepping down of benefit at age 60 but a lower benefit of six months' salary continues to be paid after age 60) does not appear to be a proportionate means of achieving the stated aim to cushion the impact of dismissal, and has a disproportionate impact on people in Mr Y's position who are affected by the cap after age 60, compared with those members who are under age 57 and who can be paid the benefit in full even though they may have other sources of income. Many other members will have other sources of pension, including any member dismissed over age 55 on grounds of

inefficiency who will still be entitled to draw an actuarially reduced pension. Until age 57, there will be no scaling down of the compensation on dismissal on grounds of inefficiency.

106. Accordingly, having regard to the above and the additional submissions of both parties, I remain of the view, that DFP has:

106.1 failed to discharge the burden of proof that the benefit structure adopted is a proportionate means of achieving a legitimate aim; and

106.2 failed to demonstrate that an appropriate balance has been struck between the needs of the organisation and the discriminatory impact on Mr Y, and the rule does no more than necessary to give effect to the legitimate aim.

Effect of disapplication of rule 5.1

107. If rule 5.1 is treated as having no effect, rule 11 provides that the maximum compensation is an amount calculated in accordance with rule 3.3. Under rule 11, DRD has a discretion as to whether to pay the benefit in full or in part.

108. DRD has already indicated that it would have exercised its discretion to pay 100% compensation if rule 5.1 had not applied. It cannot, however, ever have exercised that discretion given that DFP had been administering the Compensation Scheme on the understanding that a cut-off applied under rule 5.1. A decision still needs to be made by DRD to determine the maximum amount of benefit payable under Rule 11.

109. Any exercise of discretion by DRD under rule 11 of the Age Regulations (NI) to pay up to the maximum benefit in Mr Y's case must, of course, take effect subject to the same non-discrimination rule discussed in paragraphs 66 and 67 above. The amount of compensation payable to Mr Y can only be less than the amount which would have been paid to a comparable younger member, who other than age is in the same circumstances as Mr Y, if it can be demonstrated that any policy adopted in exercising the discretion, under rule 11 in Mr Y's case, is a proportionate means of achieving a legitimate aim.

Maladministration – Additional Submissions by DFP

110. DFP has also made additional submissions in response to my Preliminary Decision about the appropriateness of making an award for maladministration in relation to its decision-making process involved in operating the Compensation Scheme in accordance with its rules.

111. DFP submits that maladministration, by definition, is an administrative act that is based on improper considerations or conduct. It arises from a departure from the required standard of competence of a reasonable person exercising his or her duty. DFP submitted that if a civil servant is to act strictly in accordance with the rules of the Compensation Scheme, no matter how unjust the results are for the citizen, no maladministration can arise in a government context. Furthermore, it was not

accepted that my proposed award of £2,000 was appropriate and in the circumstances could serve mostly as a punishment or penalty to DFP.

112. In particular, this is not a chronic situation and there are no repeated or compounded errors by DFP in the administration of the Compensation Scheme. No evidence has been submitted that Mr Y's wellbeing has been affected, or that he has suffered serious detriment to health. Mr Y has not been prevented from making any informed decisions at critical times, for example, a decision to retire early or resign from employment that he might not otherwise have taken. DFP submits that it has always responded to Mr Y and sought to explain the rationale of its decision-making process.

113. There are various cases confirming that the Ombudsman is best placed to determine what amounts to maladministration, and is the sole body responsible for determining what standards of maladministration are to be expected within a pensions context, and a court will not generally interfere unless the decision was wrong in law or unreasonable on Wednesbury type principles (Wild v Smith [1996] PLR 275 at paragraph 28; Police and Crime Commissioner for Greater Manchester v Butterworth [2017] 001 PBLR (020) at paragraph 40, and Metropolitan Police Commissioner v Hoar [2002] 47 PBLR at paragraph 20).

114. I accept that the payment of benefits in accordance with the rules and the applicable law (without more) cannot generally amount to maladministration. This however is not what has happened in Mr Y's case. The Compensation Scheme has not been administered in accordance with requirements of age discrimination legislation that the Compensation Scheme rules take effect subject to a non-discrimination rule. The Compensation Scheme has not been administered in accordance with the non-discrimination rule and the law. Maladministration (in the context of my jurisdiction) is not confined to improper considerations or conduct but is a much wider term and potentially includes infringement of a legal right or breach of law.

115. Also, if it had been demonstrated that the Northern Ireland Civil Service had carried out a non-discrimination assessment and had received and acted upon proper legal advice that the relevant provisions of the Compensation Scheme were age discrimination compliant, it is unlikely I would have found maladministration (without more). It is not maladministration to administer a scheme on the basis of apparently competent legal advice which subsequently turns out to be wrong (see Glossop [2001] 53 PBLR -[2001] PLR 263, for a review of the authorities on this point). However, that is not my understanding of what has happened here.

116. In my view, as administrator of the Compensation Scheme, DFP should have carried out an assessment of compliance within a reasonable time of the age discrimination legislation coming into force. This should have determined whether the age discriminatory benefits under the Compensation Scheme were covered by one of the applicable exemptions or could be objectively justified. The failure to conduct such an assessment amounts to continuing maladministration in the period from 1 December 2006, until the objective justification assessment was in fact carried out in relation to this benefit as a consequence of Mr Y's complaint.

117. Under the general approach I take when assessing awards for non-financial injustice as a consequence of maladministration, each case is assessed on its facts and merits, but relevant factors can include:

- if it was obvious that there was maladministration and whether the complaint could have been avoided or resolved at an earlier stage;
- how well the respondent handled the applicant's complaint and the internal dispute resolution procedure;
- whether any maladministration (and distress and inconvenience arising from it) occurred on a single occasion or on many occasions, and how long it took for the respondent to correct this; and
- the level of distress and inconvenience that was suffered.

118. If an age discrimination assessment had been carried out at an earlier stage, this would have identified that steps were necessary to bring the Compensation Scheme into compliance with age discrimination requirements so there would have been no complaint process at all, let alone one taking five years in total to complete.

119. Also, during the complaint process itself, my view is that no real attempt was made to provide any concrete evidence or statistics supporting the Northern Ireland Civil Service's arguments that the difference in treatment on grounds of age could be made until very late in the process. This has lengthened the complaint process, adding to the distress and inconvenience of Mr Y.

120. Mr Y, in my view, has suffered severe inconvenience and as a result of having to go through a five year complaint process (which should not have been necessary at all if there had been no maladministration) and is entitled to a separate award for non-financial injustice he has suffered, in addition to compensation for financial loss suffered as a consequence of the age discrimination.

Conclusions

121. The rules of the Compensation Scheme applicable to Mr Y take effect subject to an age non-discrimination rule imposed by the Age Regulations (NI), Schedule 1, paragraph 2(2). DFP, as administrator of the Compensation Scheme, has a legal obligation to ensure that the Compensation Scheme is administered in accordance with the non-discrimination rule.

122. The application of a taper under rule 5.1, between ages 57 and 60, after which no benefit is payable under regulation 11 and 3.3 of the Compensation Scheme on terminations on grounds of medical efficiency, is directly discriminatory on grounds of age in the circumstances of Mr Y's case. It is in breach of the non-discrimination rule imposed by the Age Regulations (NI), unless it can be objectively justified as a proportionate means of achieving a legitimate aim.

123. The financial cushion justification advanced by DFP may provide a legitimate aim for tapering down of a benefit in relation to Mr Y, but only if such treatment can be objectively justified in the particular circumstances of the case.

124. DFP has, in Mr Y's case:

- failed to discharge the burden of proof that the benefit structure adopted is a proportionate means of achieving a legitimate aim; and
- failed to demonstrate that an appropriate balance has been struck between the needs of the organisation and the discriminatory impact on Mr Y, and the rule does no more than necessary to give effect to the legitimate aim.

125. I uphold Mr Y's complaint that he has been the subject of unlawful age discrimination and this constitutes both maladministration (involving an infringement of a legal right) and a breach of law.

126. I cannot make any directions in relation to DRD as it is not party to this dispute. However, both DFP and DRD have responsibility for ensuring that the exercise of the applicable discretion under the rules is made in accordance with age discrimination requirements. DFP must therefore contact DRD to advise it that DRD has discretion (after disapplying rule 5.1) to decide how much of the benefit to pay under rule 11 of the Compensation Scheme, up to the two-year maximum specified under rule 3.3.

127. DFP, in its role as administrator of the Compensation Scheme, must also explain to DRD that any exercise of discretion by DRD, under Rule 11 of the Age Regulations (NI), in Mr Y's case takes effect subject to the same non-discrimination rule. Mr Y can only be paid less compensation than a comparable member who is younger than Mr Y if DRD can demonstrate that this is a proportionate means of giving effect to its stated legitimate aim.

128. The failure to operate the Compensation Scheme in accordance with the non-discrimination rule has also resulted in Mr Y sustaining non-financial injustice in consequence of maladministration, for which Mr Y is entitled to be compensated, given the time spent and inconvenience he has suffered as a result of having to contest this case over a long period of time, nearly five years. This dispute would not in my view have arisen if appropriate steps had been taken to ensure compliance of the Compensation Scheme with the age discrimination requirements after 1 December 2006, and in the light of subsequent case law. Under the Pensions Ombudsman's published policy on levels of awards for non-financial injustice, the level of distress and inconvenience suffered by Mr Y in my view is severe, so an award of £2,000 is merited.

Directions

129. Within fourteen days of the date of this Determination, DFP shall contact DRD and:

- ask it to determine how much of the maximum two years' lump sum benefit shall be paid to Mr Y, under rule 11 of the Compensation Scheme, on the basis that

rule 5.1 of the Compensation Scheme does not apply and ask it to provide reasons for the decision; and

- draw to DRD's attention that, in making a decision as to the amount of benefit to pay to Mr Y, DRD has to comply with the non-discrimination rule and general public law principles.

130. Within 14 days of being notified of DRD's decision, DFP shall pay Mr Y the appropriate percentage of the maximum two years' lump sum benefit as notified to it by DRD and provide a written explanation to Mr Y of the reasons for DRD's decision as notified to DFP by DRD.

131. Within 21 days of the date of this Determination, DFP shall pay Mr Y the sum of £2,000 as an award in recognition of the severe distress and inconvenience that it has caused him.

Anthony Arter

Pensions Ombudsman
12 November 2020

Appendix

Relevant legislation

Extracts from the Compensation Scheme

> "Dismissal for inefficiency
>
> 11.1 If a civil servant is dismissed for inefficiency and:
>
> (a) the employing department decides that payment of compensation would be appropriate; and
>
> (b) the civil servant has served for at least one year,
>
> Then
>
> (i)……;
>
> (ii)……..;
>
> If the dismissal occurs on or after 1 April 1998 the maximum compensation which may be paid is calculated in accordance with rule 3.3 of this scheme, subject to rule 5.1"
> ……

Broadly, under rule 3.3 there is a complicated formula for working out the benefit linked to age and length of service, and

> "…compensation is payable up to a maximum of two years' pensionable service"

Under Rule 5.1

> "Subject to rule 5.1 a, for a civil servant, or a person who at any time has opted out of the 1972 section who is within 3 years of the pension age, the lump sum compensation payment under rule 2.3. 2.6a, 2.8, 3.2a, 3.3, 11.1 or 11.3 will be reduced by one thirty-sixth for each month of service within three years of the pension age, counting any part of a month as a full month."

The Age Regulations NI

Discrimination on grounds of age

> "3(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if —
>
> (a) on the grounds of B's age, A treats B less favourably than he treats or would treat other persons, or

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

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

(ii) which puts B at that disadvantage,

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

(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."

Non-discrimination requirement:

"12(1) It is unlawful, except in relation to rights accrued or benefits payable in respect of periods of service prior to 1st October 2006, for the trustees or managers of an occupational pension scheme to discriminate against a member or prospective member of the scheme in carrying out any of their functions in relation to it (including in particular their functions relating to the admission of members to the scheme and the treatment of members of it).

(2) It is unlawful for the trustees or managers of an occupational pension scheme, in relation to the scheme, to subject to harassment a member or prospective member of it.

(3) Schedule 1 (pension schemes) shall have effect for the purposes of—

(a) defining terms used in this regulation and in that Schedule;

(b) exempting certain rules and practices in or relating to pension schemes from Parts 2 and 3;

(c) treating every occupational pension scheme as including a non-discrimination rule;

(d) giving trustees or managers of an occupational pension scheme power to alter the scheme so as to secure conformity with the non-discrimination rule;

(e) making provision in relation to the procedures, and remedies which may be granted, on certain complaints relating to occupational

pension schemes presented to an industrial tribunal under regulation 41 (jurisdiction of industrial tribunals)."

Schedule 1

Non-discrimination rule

"2(1) Every scheme shall be treated as including a provision ("the non-discrimination rule") containing a requirement that the trustees or managers of the scheme refrain from doing any act which is unlawful by virtue of regulation 12.

(2) The other provisions of the scheme are to have effect subject to the non-discrimination rule.

(3) The trustees or managers of a scheme may

(a) if they do not (apart from this sub-paragraph) have power to make such alterations to the scheme as may be required to secure conformity with the non-discrimination rule, or

(b) if they have such power but the procedure for doing so—

(i) is liable to be unduly complex or protracted, or

(ii) involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty,

by resolution make such alterations to the scheme.

(4) Alterations made by a resolution such as is referred to in sub-paragraph (3)—

(a) may have effect in relation to a period before the alterations are made (but may not have effect in relation to any time before 1st October 2006), and

(b) shall be subject to the consent of any employer in relation to the scheme whose consent would be required for such a modification if it were to be made using the scheme rules."

Exception for rules, practices, actions, and decisions relating to occupational pension schemes

"3. Nothing in Part 2 or 3 of these Regulations shall render it unlawful for an employer, or for trustees or managers, to maintain or use, in relation to a scheme, any of the rules, practices, actions or decisions set out in Part 2 of this Schedule."