Appeal No. UKEAT//0137/17/LA (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 December 2020
Judgment handed down on
12 February 2021

Before

SIR ALAN WILKIE

(SITTING ALONE)

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(1) LONDON FIRE COMMISSIONER — APPELLANTS
(2) WEST MIDLANDS FIRE AND RESCUE AUTHORITY
(3) CORNWALL FIRE AND RESCUE AUTHORITY
(4) SOUTH WALES FIRE AND RESCUE AUTHORITY

(1) MS R SARGEANT AND OTHERS — RESPONDENTS
(2) DANIEL BEBBINGTON
(3) MICHAEL BYGRAVE
(4) MARK DODDS
(5) EMMA MCEVOY
(6) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(7) THE WELSH MINISTERS

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellants	MR ADRIAN LYNCH (One of Her Majesty's Counsel) Instructed by: Bevan Brittan LLP, King's Orchard, 1 Queen Street, Bristol, BS2 0HQ
For the Respondent	For the First to the Fifth Respondents: MR ANDREW SHORT (One of Her Majesty's Counsel) and MS LYDIA SEYMOUR (Of Counsel) Instructed by: Walkers Solicitors Satins Hill Oast, Spongs Lane, Sissinghurst, Kent TN17 2AH For the Sixth and Seventh Respondents MR MARCUS PILGERSTORFER (One of Her Majesty's Counsel) and MR RAYMOND HILL (Of Counsel) Instructed by: Government Legal Department 102 Petty France, Westminster, London WC2B 4TS

SUMMARY

AGE DISCRIMINATION

1. The Employment Tribunal did not err in law in its construction of section 61 of the Equality Act 2010 or its impact on the availability of the defence provided by paragraph 1(1) of Schedule 22 of that Act.

2. Section 61 prohibits the Appellants from acting in a manner which discriminates on the grounds of age and it prioritises that obligation over other provisions in the pension scheme which would oblige them to act in that way. In this way it gives effect to the UK Government's obligations under EU Directive 2000/78. The defence provided by paragraph 1(1) of Schedule 22 of the Equality Act 2010 is not available to the Appellants.

3. Upon the proper construction of section 62 of the Equality Act 2010 the appellants have vested in them the power to pass a resolution making non-discrimination alterations to the scheme of which they are managers in respect of those members who were last employed by them. In that respect, also, they were not obliged by a statutory requirement to discriminate against the Claimants on the grounds of age and so, by that route too, are unable to avail themselves of the statutory defence provided by paragraph 1(1) of Schedule 22.

4. The provision of a cause of action against a third party for inducing an employer to breach the principles underlying the EU Directive falls a long way short of compliance with Article 16 of the Directive: to take necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished. Community law requires that the discriminatory provisions of the 2015 Scheme Regulations are to be overridden, set aside, disapplied, or amended with the consequence that the appellants are not required by an enactment to contravene the Equality Act by applying them. In that way too, if necessary, the statutory defence is unavailable to the Appellants.

SIR ALAN WILKIE

1. This litigation concerns the public sector pension reforms introduced after the Hutton Report was published in 2011. In particular, it concerns transitional protection which was made available, or denied, to existing members of the relevant schemes on the grounds of age.

2. The terms on which this protection (and equivalent protection introduced in relation to judicial pension schemes) was made available have now been established to be directly discriminatory on the grounds of age.

3. The question raised in this appeal is whether paragraph 1(1) of Schedule 22 to the Equality Act 2010 ("EA") provides the Fire and Rescue Authorities, ("the FRAs") with a defence to the claims of age discrimination because the discriminatory transitional protection provisions, which the FRAs applied in a manner which amounted to unlawful age discrimination, were contained within a statutory instrument.

THE COURSE OF THE LITIGATION TO DATE

4. There was a preliminary hearing before the Employment Tribunal (ET) on 31 May and 1 June 2016 to consider, amongst other things, whether the claims against the FRAs were defeated by paragraph 1(1) of Schedule 22. The Secretary of State/Welsh Ministers did not take the point. It had already been determined against the Lord Chancellor and Ministry of Justice in litigation relating to judicial pensions in a decision dated 5 April 2016, a decision from which there was no appeal. The Secretary of State and Welsh Ministers have been in attendance at the hearing of this appeal only in order to assist with any points that might arise but did not advance argument on the issue in this appeal.

5. By a decision dated 21 June 2016, the ET held that paragraph 1(1) of Schedule 22 did not provide the FRAs with a defence. The FRAs appeal from that decision, although not in relation to a time limit point decided against them at the same time.

6. A further preliminary hearing was held in the ET resulting in a decision dated 14 February 2017, to consider a number of issues including, in particular, whether the transitional provisions were objectively justified. The ET found against the claimants on all issues. The Employment Appeal Tribunal (EAT), following a hearing on 11-14 December 2017 with judgment handed down on 29 January 2018, allowed the claimants' appeal in part but stayed the FRAs' appeal on Schedule 22 pending the outcome of any further appeals.

7. The Court of Appeal held that the discriminatory impact of the transitional provisions could not be justified and upheld the claims of age discrimination, ***McCloud v Lord Chancellor & others; Secretary of State for the Home Department & others v Sargeant & others [2019] EWCA Civ 2844; [2019] ICR 1489 .*** The Supreme Court dismissed an application for permission to appeal on 27 June 2019.

8. The stay was lifted and the appeal set down for hearing by the EAT by Order dated 24 February 2020.

THE BACKGROUND

9. The claimants are members of the Firefighters' Pension Scheme 1992 ("FPS") or, in some cases, retained firefighter members of the New Firefighters' Pension Scheme 2006 ("NFPS") who are entitled to benefits equivalent to the benefits of the FPS: for ease, this

judgment will refer only to the FPS. For current purposes, new recruits to the fire service were not able to join the FPS after 2006 and instead joined the main section of the NFPS, which provided significantly less favourable benefits. No claims have been brought by those who joined the main section of the NFPS.

10. The Firefighters' Pension Scheme (England) Regulations 2014 and the Firefighters' Pension Scheme (Wales) 2015 (together "the 2015 Scheme Regulations") were made under the Public Sector Pensions Act 2013 ("the 2013 Act") and established the Firefighters Pension Scheme 2015 for firefighters employed in England, and the Firefighters Pension Scheme (Wales) 2015 for firefighters employed in Wales. The two schemes are materially the same, hence they are referred to collectively in this judgment as "the 2015 Scheme".

11. With effect from 1 April 2015, active members of the FPS born on or after 2 April 1971 ceased to accrue benefits in the FPS and commenced active membership of the 2015 Scheme. Their comparators are those who were also active members of the FPS prior to 1 April 2012 but who were born on or before 1 April 1967. These comparators remain active members of the FPS from 1 April 2015 until they retire, pursuant to the transitional protection provisions that are the subject of these claims.

12. There was, in addition, tapered protection for those born between 2 April 1967 and 1 April 1971 inclusive.

13. The 2015 Scheme Regulations were made respectively by the Secretary of State / Welsh Ministers.

14. Each Claimant is employed by one of the FRAs.

THE ISSUE

15. The FRAs contend that the effect of paragraph 1(1) of Schedule 22 means that they did not (and do not) contravene the age provisions of the EA in providing (and continuing to provide) younger firefighters with less favourable pension rights than their older comparators because they were and are acting "pursuant to a requirement [of an enactment]", i.e. the 2015 Scheme Regulations.

16. They rely upon the fact that those regulations were made by the Secretary of State or the Welsh Ministers rather than by the FRAs themselves.

17. They contend that it is clear from the terms of the subsection that its purpose is to provide parties, who act in discriminatory ways in terms of age, or disability, or religion/belief in relation to employment matters, a defence where they so act as a result of a requirement in "an enactment" which includes Statutory Instruments made by the Secretary for State for Communities and Local Government and by the Welsh Ministers with which these Claims are concerned.

18. In essence the FRAs submit that:-

a. they did not make or participate in the making of the 2015 Scheme Regulations (or the primary legislation on which they are based);
b. the 2015 Scheme Regulations require the FRAs to act in certain ways in regard to pensions available to their employees;
c. the effect of those Regulations is that those who qualify for protection cannot belong to the 2015 NFPS but rather, whether permanently or for a period, remain members of the 1992 FPS;
d. the effect of the above is that the FRAs are passive recipients of the requirements of the Regulations, which were made by others, and are bound to apply those Regulations;

e. that this is a classic case within paragraph 1(1) of Schedule 22;
f. the availability of this defence to the FRAs does not involve that the parties responsible for the making of the Regulations can rely on that same defence. Hence, the claimants are fully protected in that they have been able successfully to make claims against the Secretary of State and the Welsh Ministers for age discrimination.

19. The Claimants' case is that:

a. such an exception to the scope of discrimination legislation should be given a narrow construction, ***(Hampson v DoE [1991] 1 AC 171 at 181E);***
b. as the age condition in the transitional protection provisions was discriminatory, it was overridden by section 61 of the EA, alternatively EU law, so that there was no longer any requirement to apply discriminatory rules;
c. if paragraph 1(1) of Schedule 22 has the effect contended for by the FRAs, it is contrary to EU law and must be disapplied.

THE LAW

20. Paragraph 1(1) of Schedule 22 to the EA provides,

> "A person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristic specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column."

21. Insofar as is relevant: the specific provisions are Parts 3 to 7; the protected characteristic is age; and the requirement is a requirement of an enactment.

22. The right not to be discriminated against on the grounds of age originates in EU law under Framework Directive 2000/78/EEC which provides:

> "Article 1 Purpose
> The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
>
> Article 2 Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1: (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
…
Article 3 Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
…
(c) employment and working conditions, including dismissals and pay;
…
Article 6 Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."

Article 16 Compliance
Member States shall take the necessary measures to ensure that:
(a) Any laws regulations and administrative provisions contrary to the principle of equal treatment are abolished;…''

23. Sections 61 and 62 of the EA provide:

"61 Non-discrimination rule

(1) An occupational pension scheme must be taken to include a non-discrimination rule.
(2) A non-discrimination rule is a provision by virtue of which a responsible person (A)—
(a) must not discriminate against another person (B) in carrying out any of A's functions in relation to the scheme;
…
(3) The provisions of an occupational pension scheme have effect subject to the non-discrimination rule.
(4) The following are responsible persons—
(a) the trustees or managers of the scheme;
(b) an employer whose employees are, or may be, members of the scheme;
(c) a person exercising an appointing function in relation to an office the holder of which is or may be, a member of the scheme.
…
(7) A breach of a non-discrimination rule is a contravention of this Part for the purposes of Part 9 (enforcement).
(8) It is not a breach of a non-discrimination rule for the employer or the trustees or managers of a scheme to maintain or use in relation to the scheme rules, practices, actions or decisions relating to age which are of a description specified by order by a Minister of the Crown.

62. Non-discrimination alterations:

(1) This section applies if the trustees or managers of an occupational pension scheme do not have power to make non-discrimination alterations to the scheme.
(2) This section also applies if the trustees or managers of an occupational pension scheme have power to make non-discrimination alterations to the scheme but the procedure for doing so—
(a) is liable to be unduly complex or protracted, or
(b) involves obtaining consents which cannot be obtained or which can be obtained only with undue delay or difficulty.
(3) The trustees or managers may by resolution make non-discrimination alterations to the scheme.
(4) Non-discrimination alterations may have effect in relation to a period before the date on which they are made.
(5) Non-discrimination alterations to an occupational pension scheme are such alterations to the scheme as may be required for the provisions of the scheme to have the effect that they have in consequence of section 61(3)."

24. Section 120 of the EA – Jurisdiction – provides:

…
(2) an employment tribunal has jurisdiction to determine an application by a responsible person (as defined by section 61) for a declaration as to the rights of that person and a worker in relation to a dispute about the effect of a non-discrimination rule.
(3) An employment tribunal also has jurisdiction to determine an application by the trustees or managers of an occupational pension scheme for a declaration as to their rights and those of a member in relation to a dispute about the effect of a non-discrimination rule

25. Section 212(11) of the EA provides a definition of a scheme manager as follows:

"(11) "Employer", "deferred member", "pension credit member", "pensionable service", "pensioner member" and "trustees or managers" each have, in relation to an occupational pension scheme, the meaning given by section 124 of the
Pensions Act 1995."

26. Section 124 Pensions Act 1995 provides:

"Trustees or managers", in relation to an occupational pension scheme, means—
(a) in the case of a trust scheme, the trustees of the scheme, and
(b) in any other case, the managers of the scheme,"

27. Section 4 of the Public Service Pensions Act 2013 provides:

"4 Scheme manager
(1) Scheme regulations for a scheme under section 1 must provide for a person to be responsible for managing or administering—
(a) the scheme, and
(b) any statutory pension scheme that is connected with it.
(2) In this Act, that person is called the "scheme manager" for the scheme (or schemes).
(3) The scheme manager may in particular be the responsible authority.
(4) Subsection (1) does not apply to a scheme under section 1 which is an injury or compensation scheme.

> (5) Scheme regulations may comply with the requirement in subsection (1)(a) or (b) by providing for different persons to be responsible for managing or administering different parts of a scheme (and references in this Act to the "scheme manager", in such a case, are to be construed accordingly).
> (6) For the purposes of this Act, a scheme under section 1 and another statutory pension scheme are connected if and to the extent that the schemes make provision in relation to persons of the same description.
> (7) Scheme regulations may specify exceptions to subsection (6)."

28. Regulation 4 of the Firefighters Pension Scheme (England) Regulations 2014 provides:

> "4 Scheme manager
> (1) An authority is responsible for managing and administering this scheme and any statutory scheme that is connected with it in relation to any person for which it is the appropriate authority under these Regulations.
> (2) The appropriate authority in relation to a person who—
> (a) is or has been a member of this scheme; or
> (b) is entitled to any benefit in respect of a person who is or has been a member of this scheme,
> is the authority by whom the member was last employed whilst an active member of this Scheme [in relation to each of the member's pension accounts].
> (3) The appropriate authority in relation to a pension credit member is the authority responsible for the pension debit member's pension account at the effective date of the pension sharing order.
> (4) The appropriate authority is referred to in this scheme as the scheme manager."

The equivalent provisions in the Regulations for the Welsh scheme are identical.

THE FRAs' SUBMISSIONS

29. Paragraph 1(1) of Schedule 22, provides for a defence ("statutory authority") where a

> "legislative provision requires an employer to act in regard to its employees in a manner which gives rise to age discrimination."

Applying that proposition to the firefighters' claims:-

> (1) the protective provisions which constitute age discrimination (i.e. the 2015 Scheme Regulations) are enactments within the terms of paragraph 1(1) of Schedule 22;
> (2) FRAs are required to apply those legislative provisions to their staff;
> (3) hence, the FRAs, in discriminating on the grounds of age by acting in that way, are required so to act by an "enactment" and have a defence under paragraph 1(1) of Schedule 22 to these claims of age discrimination

30. This, straightforward, interpretation of paragraph 1(1) of Schedule 22, gives substantive effect to its purpose. Parliament made and enacted the Public Service Pensions Act 2013. The DCLG through the Secretary of State made the 2014 Regulations for England and the Welsh Ministers made the 2015 Regulations for Wales.

31. The FRAs were powerless in regard to the content of the laws that apply to them and their employees under the 2013 Act and the Pensions Regulations.

32. In the light of the above, it is fair and consistent with paragraph 1(1) of Schedule 22, for the FRAs to be able to rely on the defence provided by paragraph 1(1) to the claims for age discrimination. The Claimants are not left without an appropriate party against whom they can claim age discrimination despite paragraph 1(1) of Schedule 22. Those parties are, respectively, the Secretary of State and Welsh Ministers who were involved in the making of the 2015 Scheme Regulations. Those claims have been made and have succeeded. Thus, paragraph 1(1) of Schedule 22 represents a fair and proper distribution of potential liability to the firefighters' claims. There is no means by which the ET in determining remedies can do justice to the position of the FRAs, whose responsibility for the acts of discrimination is negligible when compared with that of the central government bodies which made the discriminatory 2015 Scheme Regulations. The FRAs and the central governments are jointly and severally liable. The Civil Liability (Contribution) Act 1978 does not apply to Tribunal awards. The only route by which justice can be done to the FRAs and the claimants is to permit the FRAs to avail themselves of the defence provided by paragraph 1(1) of Schedule 22, relieving the FRAs of liability and leaving central government as exclusively responsible and liable in law.

33. The FRAs contend that the decisions of the EAT and CA in respect of the justification issue serve to underscore the fact that it was central government which took the decisions resulting in the provisions in the 2015 Scheme Regulations, the application of which to their relevant employees resulted in acts by the FRAs which were discriminatory on the grounds of

age. This, it is said, strengthens the argument that the FRAs can and should in equity be able to avail themselves of the statutory defence provided by paragraph 1(1) of Schedule 22.

THE FRAs' SUBMISSIONS ON THE SCOPE AND EFFECT OF SECTION 61 OF THE EA

34. The FRAs take issue with the argument relied on by the claimants: that paragraph 1(1) of Schedule 22 is not in play because the effect of section 61 and/or section 62 of the EA means that the FRAs were not required by an enactment, the 2015 Scheme Regulations, to act in a way that was discriminatory on the grounds of age. That argument is to the effect that sections 61 and/or 62 introduce into the 2015 Schemes a non-discrimination rule which overrides the requirement to act in a discriminatory way.

35. The Claimants contend that the FRAs were not obliged to follow those provisions in the 2015 Scheme Regulations - which were age discriminatory by administering the pension schemes locally in circumstances so that the younger, unprotected, firefighters were transferred to the 2015 Scheme - because the effect of sections 61 and 62 of the EA is automatically to amend the 2015 Schemes so as to erase any discriminatory provisions. Hence, the firefighters claim, there were no laws or enactments which required the FRAs to act in an age discriminatory way.

36. The FRAs do not accept that is what section 61 (and section 62) say or mean. They contend that all section 61 does is to introduce a rule which allows "responsible persons" to be liable for discrimination in respect of pension schemes. It does not purport automatically to amend the laws applicable to a pension scheme with the consequence that the FRAs were not obliged to apply laws which were found, at the end of litigation, to have been discriminatory.

For each of the 49 English and 3 Welsh FRAs to have the power to disapply parts of the 2015 Scheme would cause chaos and would place an impractical and unfair burden on the FRAs. There would be major difficulties when a firefighter moved from one FRA to another. That cannot be what the law requires.

37. It is contended that section 61 does no more than introduce a non-discrimination rule into occupational pension schemes. All that means is that "a responsible person" can face liability if he or she discriminates against another in connection with the pension scheme. When section 61(3) states that the provisions of an occupational pension scheme have effect "subject to the non-discrimination rule" it means that the risk of liability for discrimination is part of the scheme. Section 61 does not, and does not purport to, alter automatically any rules of the pension scheme by removing any discriminatory provisions. That is not what section 61 states. The section does no more than apply the law against discrimination to decisions and actions about pensions and does not purport to alter the terms of pension schemes themselves. It would be an overambitious project for Parliament to enact that the rules of pension schemes are automatically altered in connection with something which is so often as uncertain as alleged discrimination. Only the clearest possible wording would force such an interpretation on a Court or Tribunal whereas, in fact, section 61 simply does not say anything like that

THE FRAs' SUBMISSIONS ON THE SCOPE AND EFFECT OF SECTION 62 OF THE EA

38. The FRAs submit that section 62 provides a power (not a duty) to trustees and managers of a pension scheme to alter the scheme but, it is contended, the FRAs are neither "trustees nor managers" of the 2015 Schemes as those words are used in Sections 61 and 62 of the EA.

39. Section 62 contains a power for certain persons to make "non-discrimination alterations" to a pension scheme. Those persons are confined to "the trustees or managers" of an occupational pension scheme. The terms of section 62, it is said, support the submission that section 61 does not provide for an automatic amendment to and re-writing of pension schemes. If section 61 had that meaning, there would be no scope for section 62, which empowers certain limited persons or bodies to do precisely that, to amend the rules of pension schemes. If section 61 automatically changed the pension rules there would be nothing for the persons or bodies identified in section 62 of the EA to amend. The pension rules would have been changed automatically.

40. An additional issue at the ET hearing on the FRAs' Schedule 22 application was whether the individual FRAs, the firefighters' employers, were "managers" of the pension scheme within sections 61 and 62 of the EA and could, as a result of section 62, amend the scheme to be rid of any discriminatory provisions. It was argued on behalf of the Claimants that the effect of section 62 was that the FRAs were not required by an enactment to act in a discriminatory way and so fell outside paragraph 1(1) of Schedule 22 because they were empowered to change the pension scheme rules. However, fire and rescue authorities are not, the FRAs contend, "managers" within sections 61 and 62 of the EA and so, contend the FRAs, they do fall within the statutory defence.

41. The ET, in its reasons, set out the statutory and regulatory provisions identifying the "managers" of the firefighters' pension schemes in the pension legislation. This suggests that the ET accepted the claimants' submissions that the FRAs were managers of the pension scheme within sections 61 and 62 of the EA. The FRAs had argued before the ET that they had

no such power and that the meaning of "trustees or managers" in sections 61 and 62 of the EA was different and more restricted than the definition of those words in other provisions and other contexts. The FRAs contend that it was an error of law for the ET to have decided that the word "manager" as used in sections 61 and 62 of the EA included the individual FRAs for the following reasons:-

(1) the definition of "managers" in the 2015 Scheme Regulations relates to the provisions in the Public Service Pension Act 2013 and not the meaning and scope of the word in sections 61 and 62 of the EA which are expressly linked to section 124 of the Pensions Act 1995;

(2) the issue before the ET was what did the words, "trustees or managers" mean in section 62 of the EA;

(3) Section 212(11) of the EA deals with the interpretation of those words for that Act and directs the reader to the definition in the Pensions Act 1995**;**

(4) the definition of "trustees or managers" in section 124 of the Pensions Act 1995 makes it clear that the words refer to the trustees of the scheme (i.e. the whole pension scheme) if it is a trust scheme, and to the managers of the whole scheme in other cases.

42. The effect of the above is that the words "trustees or managers" in sections 61 and 62 of the EA refer to the most senior levels of management in regard to a whole pension scheme. An illustration of the seniority of the role lies in Section 40 of the Pensions Act 1995 which deals with the duties of trustees and managers of pension schemes in regard to investment. Sections 61(4)(a) and (b) of the EA distinguish between "trustees and managers" on the one hand and "employers" on the other in identifying the different persons and bodies which fall within the scope of "responsible persons". Section 62 refers only to "trustees and managers" and not "employers". The significance of the above is that the individual FRAs are not "trustees or managers" of the claimants' firefighters' pension scheme within section 61 and 62 of the EA, so

A the FRAs fall outside of section 62 of the EA. As a result, the FRAs are not empowered to alter the terms of the scheme and therefore that is no answer to the FRAs' submission that the FRAs were obliged to apply the Regulations, including the protective provisions.

B

THE FRAs' SUBMISSIONS ON DIRECT EFFECT OF THE DIRECTIVE

C 43. The ET appears to have accepted that, even if, in terms of the UK domestic law, the FRAs have a defence as described above, it is of no effect because it is inconsistent with EU law and the EU's prohibition of age discrimination through EU Directive 2000/78 is directly applicable to the respondents in these proceedings, including the FRAs, because they are

D emanations of the state.

44. Leaving aside the issue whether an alleged EU right can be directly relied upon in a UK

E ET, the FRAs contend that there is nothing in EU law which prevents the FRAs from being entitled to rely on the defence under paragraph 1(1) of Schedule 22. The UK fully met its duties to implement the EU Directive on discrimination by allowing the claimants to proceed against the bodies who shared responsibility for making the laws of which the claimants

F complain. That enabled those who had to apply the law, including protective measures, such as the FRAs, to rely on paragraph 1(1) of Schedule 22. As the UK has fully met its duties to implement the Directive consistently with EU law**,** it is contended that the Claimants cannot

G rely on the "direct effect" of the EU Directive. It has been fully and properly implemented, whilst allowing for bodies such as the FRAs to rely on the defence in paragraph 1(1) of Schedule 22.

H

45. Those responsible for legislating for the prohibition of age discrimination in the UK, but with the inclusion within those laws of a defence of statutory authority, were aware of the approach of the EU. It is a necessary inference that those responsible for the UK law were of the view that the terms of paragraph 1(1) of Schedule 22 (and the original provisions to the same effect that were contained in the Employment Equality (Age) Regulations 2006) were compliant with EU law.

46. This contention is supported by the fact that section 51of the Sex Discrimination Act 1975 and section 41 of **the Race Relations Act 1976** originally included widely drafted immunities from liability. Section 51 of the 1975 Act was challenged by the EU and the result was that

> (1) the provisions in section 51 were removed and replaced by more limited provisions dealing with the protection of women required by the biological features of women relating to pregnancy and maternity;
>
> (2) The Employment Act 1989 repealed the existing section 51 and substituted other provisions which did not apply to discrimination in the area of employment and introduced a new specific provision relating to the taking of steps to protect women that did apply to employment; and
>
> (3) the above steps were taken in order to comply with the Equal Treatment Directive

47. EU Directive 2000/43 prohibited race discrimination. That Directive was to be implemented into member states' laws by 19th July 2003. In regard to that:-

> (1) with effect from 19th July 2003 the UK enacted the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626);

(2) those Amendment Regulations introduced amendments to section 41 of the Race Relations Act 1976 whereby the widely drafted defence permitted by that section did not apply in the area of employment.

48. The above history is evidence upon which to infer an awareness by the UK of the EU provisions and their relevance to UK provisions providing a defence of statutory authority. The above also reveals the commitment of the UK to abide by its EU legal duties in regard to the above.

49. Age discrimination was prohibited in the UK by the Employment Equality (Age) Regulations 2006 which came into force on 1st October 2006. EU Framework Directive 2000/78 prohibited age discrimination (as well as discrimination on the basis of religion or belief, disability and sexual orientation) in the area of employment**.** Compliance with Directive 2000/78 was required by 2nd December 2003 but member states could request a (maximum) extension of 3 years before implementation i.e. until 2nd December 2006. The UK obtained that extension.

50. The UK Employment Equality (Age) Regulations 2006 included at Regulation 27 a provision that nothing shall be unlawful which is done to comply with a requirement of any statutory provision. That applied to the area of employment.

51. It is contended that the UK took the view that the defence of statutory authority as found in what is now paragraph 1(1) of Schedule 22 of the EA was valid and effective in the context of the EU's prohibiting age discrimination. The UK acted in the knowledge that the UK law had been amended in regard to differently worded defences relating to statutory authority in the sphere of race and sex discrimination.

52. The FRAs contend that any court or tribunal taking note of the above should be very slow to conclude that the UK had misunderstood the situation, or ignored the EU, in introducing these provisions as to age discrimination and to accept a submission by the claimants that the UK provisions in paragraph 1(1) of Schedule 22 are void and ineffective because of EU law and Directive 2000/78 or are otiose as a result of the direct applicability of that Directive.

53. As to whether it is right to suggest that the defence relied on by the FRAs under paragraph 1(1) of Schedule 22 is void because of EU law or that the equivalent of that defence does not apply upon the correct interpretation of the Directive itself in claims made in the UK, it is contended that the availability of the defence under paragraph 1(1) of Schedule 22 to the claims for age discrimination is consistent with EU principles for the following reasons:-

(1) EU law does not bypass or render irrelevant the central question as to the identity of the discriminator which is permissible, and necessary, to identify that party so as to determine the scope of liability. The party making the Regulations, and discriminatory provisions they contain, is not the FRAs; it is the DCLG and Welsh Ministers; there is nothing in EU law that prevents UK law giving effect to this consideration through paragraph 1(1) of Schedule 22 nor to prevent that principle applying equally to the application of EU law; further,

(2) so long as there is an effective remedy against an appropriate party in respect of a claim for discrimination that relates to EU law, EU law allows member states a discretion as to how to allocate responsibility. That principle dovetails with the EU principle that member states are empowered to determine their own arrangements in regard to the structure of responsibility as between their state organs;

(3) the above principles apply both in terms of considering EU law on the basis that its terms have direct effect and in terms of considering EU law in regard to

interpreting provisions within UK law consistently with the EU if that is possible.

54. As to (1) above it is contended that for any discrimination in regard to the rules set out in the 2015 Scheme Regulations the responsible party is the DCLG and Welsh Ministers, not the FRAs. It was the DCLG and Welsh Ministers who made the Regulations. The FRAs are simply the employers of the firefighters and are obliged to apply the terms of those Regulations

55. The Claimants are able to, and have, included claims against the DCLG and Welsh Ministers which have succeeded by reason of the decision of the Court of Appeal on the issue of justification. Those claims for age discrimination give the Claimants a sufficient remedy. In those circumstances EU law would not create any obstacle to the FRAs being able to rely on the defence under paragraph 1(1) of Schedule 22 to the claims for age discrimination. Indeed, reliance on that defence would be consistent with the appropriate identification of the discriminator which itself is permitted by EU law.

56. The same conclusion results from a reference to the principle concerning the discretion accorded to member states by the EU in terms of the allocation of responsibility between the state organs. So long as potential claimants have proper access to a full and sufficient remedy against an appropriate party, the EU will not intervene with the decision of member states as to the identification of those parties, for example as between employers and those with overarching responsibility for the rules to be applied by those employers. That remains true even if those employers are emanations of the state within EU law and is true both in regard to the direct effect of EU provisions and the effect of EU provisions on the interpretation of UK legislation.

57. The above principles are captured in the Judgment of the CJEU in the case of ***R (Horvath) v The Secretary of State for Environment, Food and Rural Affairs [2009] ECR 1-6355.*** That case was not concerned with employment issues but the principles contained in it are of general application. At paragraphs 49-50 of the Judgment the CJEU set out the following principles:-

> "49 It should be recalled that, when provisions of the Treaty or of regulations confer power or impose obligations upon the State for the purposes of the implementation of Community law, the question of how the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each state (Joined Cases 51/71 to 54/71 International Fruit Company and Others [1971] ECR 1107, paragraph 4).
> 50. Thus, it is settled case-law that each Member State is free to allocate powers internally and to implement Community acts which are not directly applicable by means of measures adopted by regional or local authorities, provided that that allocation of powers enables the Community legal measures in question to be implemented correctly (Case C-156/91 Hansa Fleisch Ernst Mundt [1992] ECR I-5567, paragraph 23."

It is contended by the FRAs that those principles apply to the present proceedings and reveal why EU law is no impediment to the FRAs being allowed the defence accorded to them by the UK law to the claims for age discrimination under paragraph 1(1) of Schedule 22.

58. The Claimants have made claims against the DCLG and Welsh Ministers so this is not a case where, in the event that the FRAs have a defence under paragraph 1(1) of Schedule 22, they would be left only with the unsatisfactory and insufficient remedy of a cause of action against the UK for a failure properly to implement the Directive

59. In conclusion, it is contended that EU legal principles and provisions provide no basis for the contention that the defence of statutory authority does not apply to the FRAs whether by reference to the terms of the EU law itself or in terms of interpreting UK law in the light of the EU provisions. Further, because the UK has fully implemented the EU Directive on discrimination there is no further free-standing claim based on EU law on which the claimants can rely.

60. It follows that the ET erred in law in finding that the FRAs were not entitled to rely upon paragraph 1(1) of Schedule 22 of the EA. In particular, the ET erred in law in its interpretation of sections 61 and 62 of the EA that those provisions entailed that the FRAs were not required to act in a discriminatory way in following and applying the legislative provision on protections, because section 61 removed any discriminatory provisions from the pensions rules and/or because the FRAs, as "managers" within section 62 were empowered to change the pension rules.

61. In sum, as is set out in the appellants' Grounds of Appeal, the FRAs contend that the ET erred in law in the following ways:

> "(1) Sections 61 and 62 introduce into occupational pension schemes a "non-discrimination rule". The effect of the rule is simply to import into such schemes the law as to discrimination. As is expressly clear from section 61(2) and (7) the effect is that schemes' trustees, managers and employers can be liable if they do discriminate. There is nothing in section 61 that provides that any discriminatory provisions in any scheme are automatically erased or disapplied. The unambiguous meaning of the statutory provisions show that the opposite is the case;
> (2) Section 62 wholly confirms the above. Section 62 gives trustees and managers (not employers like the FRAs) a power to make "non-discrimination alterations" to scheme rules. That power can only exist if any discriminatory provision in the scheme has not been automatically removed as a result of section 61 otherwise there would be no scope for any "non discrimination alterations";
> (3) As to section 62 and sub-paragraph (2) above, the FRAs were not trustees or managers of the 2015 Schemes, as is evidenced by Sections 2 and 4 of the Public Sector Pensions Act 2013."

The ET erred in law in its failure to accept these contentions.

62. In addition to the above, as set out in the FRAs' Grounds of Appeal, the ET erred in law in the following two ways in respect of EU law.

> **" (1) The Appellants made very full submissions to the ET that showed that, for so long as effect was given to the EU provisions, the EU would not seek to contest the allocation**

of responsibility for achieving that end within a Member State. As to the above, the Appellants referred the ET to, amongst other authorities, the CJEU decision in R (Horwath) [2009] ECR 1-6355 and the Court of Appeal decision in Foster Wheeler, the ET having referred only to the first instance decision in that case although that first instance decision was subject to an appeal which, in part, was successful.

(2)In sum, as to the implementation of EU law, paragraph 1(1) of Schedule 22 and sections 61 and 62 showed that that responsibility was placed on the DCLG and the Welsh Ministers in the present firefighters' claims and the FRAs were entitled to rely on that defence under Schedule 22. That was wholly consistent with EU law. That result was also wholly consistent with the justice of the case and, again, consistent with EU principles because it was the DCLG and Welsh Ministers who were responsible for the provisions in the 2015 Scheme Regulations which are alleged to be discriminatory, not the FRAs. It is the DCLG and Welsh Ministers who are able to provide an effective remedy for the discrimination now established. In contrast to the DCLG and Welsh Ministers, it is the FRAs who were and are passive recipients of, and are obliged to apply, the 2015 Scheme Regulations, hence their entitlement to the defence of statutory authority under paragraph 1(1) of Schedule 22.

(3) The above also reveals that the ET erred in law at paragraphs 40 and 41 of its Reasons in suggesting that the FRAs' case was that the claimants could not bring any claims for age discrimination under the Equality Act. Their case was the opposite i.e. that the claimants could bring those claims against the appropriate Respondents i.e. the DCLG and Welsh Ministers."

63. In regard to EU law the ET erred in law in its view that in some, unspecified, way the FRAs' application to the ET was inconsistent with EU law. Further, in addition to the above, the ET Judge erred in law by finding first (it is averred correctly) at paragraphs 5 and 9 of its Reasons that, (paragraph 9), "it is unnecessary for the Tribunal to determine whether the Claimants can maintain freestanding claims based on ... Directive 2008/78/EC ...", but stating at paragraph 41 of its Reasons that Andrew Short Q.C. submitted that the claimants could rely on EU law alone and adding that "I accept the submission".

INADEQUATE REASONS

64. In setting out its conclusions, the ET failed to provide any or any legally sufficient reasons. Thus:-

i. The ET failed to set out with any, or any sufficient, clarity, the Reasons why the Appellants' application to rely on paragraph 1(1) of Schedule 22 was dismissed.

ii. The ET erred in law in the following ways in regard to the failure to provide sufficient reasons:-

a. the quotation in paragraph 63 above gives no reasons for the ET "accepting" the Claimants' submissions (on an issue the ET had itself found was not before it to decide) as to EU law;

b. at paragraph 36 of the Reasons, the appellants cannot understand what principle the ET is "accepting", nor did the ET give any reasons for that acceptance;

c. at the beginning paragraph 37 the ET baldly states, without reasons, that the non-discrimination rule in Section 61 entails that FRAs are not required to act in a discriminatory way but gives no reasons for that conclusion nor does the ET deal with or give reasons for rejecting, the appellants' full submissions to it on sections 61 and 62.

In oral argument, Mr Lynch did not seek to persuade me that, if his substantive arguments did not succeed, his appeal ought to succeed on a free-standing basis arising from his contention that the ET's reasons were inadequate. Rather he relied on their inadequacy as supporting his contentions that the ET erred substantively in the ways detailed above.

THE CLAIMANTS' SUBMISSIONS
THE PROPER CONSTRUCTION OF PARAGRAPH 1(1) OF SCHEDULE 22

65. It is contended that paragraph 1(1) of Schedule 22 should not be construed so that an age discriminatory rule in a statutory scheme can be the very enactment relied upon to provide a defence to the age discrimination provisions. To contend, that where the statutory rules are the subject matter of the complaint, they also provide the statutory authority for themselves, is a bootstraps argument which would take most public sector pension schemes (and other terms and conditions set by way of delegated legislation) outside the direct scrutiny of the EA. Such a construction would be inconsistent with the clear intention that the legislation is intended to encompass the public sector in general and statutory public sector schemes in particular.

66. The "Work" provisions of Part 5 of the EA, including those relating to age discrimination and those relating specifically to occupational pension schemes, were intended

to bind the Crown and government departments as most such departments fix terms and conditions, to some extent at least, by way of subordinate legislation. Pensions are the most common example of this: for example the Local Government Pension Scheme, the Teachers' Pension Scheme and the Principal Civil Service Pension Scheme, though other terms and conditions of service in the public and government service are invariably contained in Regulations. It is contended that to exclude all such terms and conditions from scrutiny under the EA in relation to age (or disability, religion and belief) would make little sense and would denude the EA of much of its intended effect.

67. The provisions of the EA were intended to have effect in relation to statutory occupational pension schemes. The EA adopted (in section 212(1) of the EA) the definition of "occupational pension scheme" in section 1 of the Pension Schemes Act 1993 (" the PSA 1993"). Section 1 of the PSA 1993 includes statutory schemes. To exclude such schemes from scrutiny under the EA in relation to age (or disability, religion and belief) would, it is said, make little sense.

68. The FRAs' construction would permit them to continue to apply, with legal impunity, discriminatory rules in their dealings with their employees unless and until the regulations were amended. Protection from discrimination would be undermined because the state has chosen to implement pension provision by statutory instrument.

69. The contention that employees would not be unprotected because of the possibility of a claim against the Department/Ministers is an insufficient answer. The most straightforward claim would be that they have caused or induced a contravention, contrary to section 111 of the EA. However, this would not be straightforward. It could be argued that there is no

contravention of the prohibition against age discrimination to found a claim under section 111 because of the effect of paragraph 1(1) of Sch. 22. The fact that in this case the central government respondents have not taken this point is not an answer.

MODIFYING DISCRIMINATORY PENSION SCHEMES

70. The modification of occupational pension schemes so as to comply with EU law is well established in case-law and legislation. Initially, the concern was with sex discrimination contrary to (what was then) article 119 of the EC Treaty. Where the rules of an occupational pension scheme (whether contained in a contract, trust deed or legislation) failed to comply with the principle of equal pay, they were overridden by EU law so as to comply with article 119 by giving the disadvantaged group the same benefits as the advantaged group. This was the case even if the pension arrangements involved a third party in addition to the employer. This is well established in the case-law:-

a. ***Ten Oever v Stichting Bedrijfspensioenfonds Voor Het Glazenwassers- en Schoonmaakbedrijf [1995] I.C.R. 74, Advocate General***

"[57] The fundamental nature of the principle of equal pay for men and women laid down in article 119 … means that any provision which is contrary to it, whether contained in national legislation, administrative provisions or in a contract or (trust) deed governed by private law, must be overridden by that rule. To take a different view would make it all too easy for the principle of equal treatment to be circumvented by bringing in persons who are not parties to the employment relationship."

b. ***Coloroll Pension Trustees Ltd. v Russell and Others (Case C-200/91) [1995] I.C.R. 179, ECJ***

"[31] Moreover, in ***Nimz v. Freie und Hansestadt Hamburg (Case C-184/89) [1991] E.C.R. I-297, paras. 18–20,*** the court held that the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by collective bargaining or by any other constitutional procedure, and to apply to members of the disadvantaged group the same arrangements as those enjoyed by the other employees, arrangements which, failing correct implementation of article 119 in national law, remained the only valid point of reference.

[32] It follows that, once the court has found that discrimination in relation to pay exists and so long as measures for bringing about equal treatment have not been adopted by the scheme, the only proper way of complying with article 119 is to grant to the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class".

71. The ECJ has confirmed the existence of a principle of non-discrimination on grounds of age which must also be regarded as a general principle of EU law, ***(Dansk Industri v Estate of Karsten Eigil Rasmussen [2016] EUECJ C-441/14*** at paragraph 22)

72. The operation of the relevant principles was summarised by Patten J (as he then was) ***Foster Wheeler v Hanley & Others [2009] Pens LR 39 (ChD)4 at paragraphs 11 to 22.*** He said:

> "[15] It seems clear from paragraph 27 of the judgment ***[in Coloroll]*** that the Court was of the view that provisions in a scheme and in its rules which, if applied, would create unequal treatment ceased to be enforceable on the direct application of Article 119. Most obviously this would preclude the application of different retirement ages for men and women as the condition for the payment of their pension entitlement. The same basic approach applies to statutory provisions which might have the same effect in their application to the scheme. They are to be interpreted (or perhaps ***Patten J(as he then was) in*** even disapplied) so far as is necessary to give effect to Article 119: see paragraph 29
>
> …
>
> [18] The judgment in ***Coloro***l also indicates what form the imposed solution should take. The national court (see paragraphs 31-32) is required to set aside any discriminatory provisions of national law and to apply to the disadvantaged class of employees the arrangements enjoyed by the advantaged class.
>
> …
>
> [22] In summary, therefore, the following principles emerge from these three decisions of the ECJ:
>
> …
>
> (ii) As from 17 May 1990, Article 119 has direct effect and ipso facto operates to amend a pension scheme so as to eliminate discriminatory provisions relating to pension entitlement".

73. Although an appeal as to what amendment to the scheme was required by those principles in the particular case succeeded, there was no dispute as to these underlying principles, ***(per Arden LJ in Foster Wheeler v Hanley [2010] ICR 374, CA*** at paragraph 2).

74. Article 119 (now article 157 TFEU) was given effect in domestic law by the equal treatment rule introduced (in relation to service from 17 May 1990) by section 62 of the Pensions Act 1995**.** This has since been replaced by the sex equality rule in section 67 of the EA. In practice, these provisions have most often operated upon discriminatory provisions relating to retirement age in pension schemes. Rules that provided for men to have a normal pension age of 65 while women had a normal pension age of 60 are treated as providing for all

members to have a normal pension age of 60 (in relation to service after 17 May 1990) even prior to any formal or textual amendment.

75. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("the Framework Directive") operates, it is contended, in the same way in relation to age discrimination, at least in relation to emanations of the state such as the FRAs.

76. The non-discrimination rule introduced by section 61 EA to give effect to the Directive in relation to occupational pension schemes takes the same approach as the sex equality rule under section 67. Both rules have overriding effect.

77. The question for the ET was - what is meant by subsection 61(3), i.e. 'have effect subject to the non-discrimination rule'? The claimants submitted, and the ET agreed, that it means that contrary rules are overridden or modified, as a matter of law, so as to comply with the non-discrimination rule.

78. It is contended that the ET did not err in law in construing section 61 in this way. This gives effect to subsection 61(3) that is:

> a. consistent with the ordinary meaning of the language;
> b. consistent with the obligations under the Framework Directive;
> c. consistent with the approach taken in relation to sex discrimination and the sex equality rule;
> d. consistent with the views expressed in the EHRC Code of Practice at paragraph 14.41 and the IDS Handbook, Discrimination at Work, at 25.31.

79. It is further contended that, contrary to the submissions of the FRAs, section 62 supports this approach.

FIRST GROUND OF APPEAL: SECTIONS 61 AND 62 EA

80. The claimants address the argument of the FRAs that section 61 does not itself modify the discriminatory provisions and that there would be no need for the power found in section 62 if section 61 itself modified the discriminatory provisions. The claimants contend that this submission is based on a misunderstanding of the relevant provisions.

81. It is contended that the Explanatory Notes (set out by the Tribunal at ¶35 of the Decision), evidence that the purpose of section 62 is to allow trustees and managers to alter a scheme's rules such that they conform with the non-discrimination rule in section 61. A scheme's provisions are thus modified automatically by section 61, whilst section 62 gives the power to amend formal scheme documentation such that it properly reflects that modification. Sub-section 62(5) makes clear that non-discrimination alterations under section 62 are made so that the provisions of the scheme:

> "have the effect that they have in consequence of section 61(3)".

82. Section 62 remains an important power, notwithstanding the modifying effect of section 61. Members of a scheme should not have to litigate to establish discrimination whenever they want that scheme to be operated in a non-discriminatory fashion. Section 62 empowers the scheme managers to give the members that clarity, but it is section 61 which provides members with their substantive rights under the scheme as modified by operation of law.

83. The claimants contend that in ***Safeway v Newton [2020] EWCA Civ 869,*** the Court of Appeal applied this analysis to the comparable equal pay provisions in sections 62 and 65 of the Pensions Act 1995 (now sections 67 and 68 EA respectively), where the same distinction is found between the section that modifies the scheme in question and the section that enables

> "the Scheme to be amended easily so as to bring its paperwork into conformity with equal treatment. It is not an indication that the members have no sufficiently enforceable rights before those amendments take place", (per Floyd LJ at ¶46)."

84. The effect of the non-discrimination rule in section 61 was that there was no statutory requirement for the FRAs to provide discriminatory pensions under the scheme as modified. It is, therefore, an age contravention for the FRAs to breach the non-discrimination rule by enforcing, and continuing to enforce, the discriminatory rules as made by the Regulations.

85. This construction of section 61 is supported by the fact that it is consistent with the obligations of the UK under EU law. However, the claimants contend that, if it is not construed in this fashion, the modification will be made as a result of the direct effect of EU law in accordance with the line of authorities referred to above.

86. The Claimants address the argument of the FRAs that they are not scheme managers and so have no powers to modify their scheme pursuant to Section 62 of the EA. The Claimants contend that this issue is not determinative of the appeal as they say that Section 61 EA has overriding effect whether or not the FRAs were managers of the relevant schemes.

87. The Claimants contend that FRAs are expressly deemed to be "the scheme manager" in relation to any person employed by them. (regulation 4 of the 2015 Schemes Regulations). As a result, they are responsible for managing and administering the scheme. For example they are required:-

a. to fulfil structural roles, such as establishing, adjusting and closing pension accounts for each member: regulation 28 (establishment of pension accounts: general); and 29 (closure and adjustment of pension accounts on transfer out or repayment of balance of contributions); to provide financial information to the Secretary of State: regulation 125 (information to be provided to the Secretary of State); and

b. to make decisions about benefits: regulation 151 (Determinations by the scheme manager); regulation 65 (Entitlement to lower tier ill-health pension and higher tier ill-health pension); and regulation 167 (Commutation of small pensions).

88. Although the word "manager" is not used, the FRAs perform the same functional role in relation to the FPS: for example regulations LA1 (establishment, maintenance and operation of Firefighters' Pension Fund, etc); LA9 (duty to provide information); H1 (determination by fire authority); A10 (disablement); B8 (commutation – small pensions); E3 (dependent relative's gratuity) of the FPS Order 1992.

89. As such, each FRA is the manager of the scheme in relation to its employees for the purposes of the EA, defined (via section 212(11) EA) by section 124 of the Pensions Act 1995 as:-

> "the persons responsible for the management of the scheme."

90. It follows, contend the claimants, that the FRAs are the managers of the 2015 Scheme in relation to their employees for the purposes of the EA and had vested in them the powers under section 62.

91. There is no basis, contend the claimants, for restricting the definition of manager to persons responsible for the management of the entirety of the scheme. The possibility that different persons may be responsible for managing or administering different parts of a scheme, thereby making all of them "scheme managers", is expressly contemplated by section 4(5) of the Public Service Pensions Act 2013. Not only would the approach contended for by the FRAs remove multi-employer schemes from much of the protection offered by the EA, it would remove them from, or result in a poor fit with, the more general pensions legislation which is

A often directed at scheme managers (as defined by or in terms identical to the Pensions Act 1995) in schemes that are not trust based, for example:-

> a. section 50 Pensions Act 1995 (requirement for dispute resolution arrangements);
> b. section 169 Finance Act 2004 (recognised transfers);
> c. sections 13, 14A (appointment of skilled person to assist public service pension scheme), and 318 Pensions Act 2004.

B

SECOND GROUND OF APPEAL: EU LAW

C

92. This ground only arises for consideration if the FRAs succeed in relation to the construction of sections 61 and 62 as a matter of domestic law and on the direct effect of EU law in modifying the otherwise discriminatory rules of the scheme. If they do, the FRAs must

D still show that, but for an error of EU law**,** paragraph 1(1) of Schedule 22 would have been construed in the manner proposed by the FRAs.

93. The Claimants contend that the ET's construction of paragraph 1(1) of Schedule 22 was

E correct as a matter of both domestic and EU law. There was no error of EU law**.**

94. Paragraph 1(1) of Schedule 22 should not be construed so as to allow one emanation of

F the state to excuse another from compliance with the Directive. In fact, the EAT and (to some extent) the legislature, has already recognised that it is not possible to rely upon domestic law as a defence to EU based discrimination law. There was an equivalent provision to paragraph

G 1(1) of Schedule 22 in section 41 of the Race Relations Act 1976 ("RRA"). Following the Race Directive 2000/43/EC, the RRA was amended by the Race Relations Act 1976 (Amendment) Regulations 2003. These limited the effect of section 41 of the RRA to those areas with which

H European law was not concerned. This was considered *in* ***Amnesty International v Ahmed [2009] ICR 1450, EAT:***

> "56 The new point referred to at para 41 above depends on the effect of section 41(1A) of the 1976 Act [inserted by regulation 35(b) of the Race Relations Act 1976 (Amendment) Regulations 2003], to which we were not referred in the course of argument. This provides:
>
> > 'Subsection (1) does not apply to an act which is unlawful, on grounds of race or ethnic or national origins, by virtue of a provision referred to in section 1(1B).'
>
> Section 1(1B) was inserted into the Act in 2003 [by regulation 3 of the 2003 Amendment Regulations] as part of the amendments introduced in order to implement the Race Directive 2000/43. Its immediate purpose is to identify the parts of the Act to which the EU-derived formulation of indirect discrimination set out in section 1(1A) applies. Accordingly it begins "the provisions mentioned in subsection (1A) are …" One of those provisions is "Part II", being the part of the Act which proscribes discrimination in the employment field. Mr Epstein and Mr A'Zami, as we understand it, believed that because of the "pairing" between subsections (1A) and (1B) the effect of the cross-reference in section 41(1A) was limited to cases of indirect discrimination. However, that is not how we (or, we note, the editors of Harvey on Industrial Relations and Employment Law —see paras L1068 and Q119) read it: in our (fairly firm) view, the effect of section 41(1A) is to disapply section 41(1) in the case of all discrimination (direct or indirect) within the scope of the Race Directive. That is no doubt quite drastic, but it makes legislative sense: once racial discrimination came to be proscribed by EU law it could not be legitimate to rely on the provisions of domestic legislation by way of defence."

95. There are circumstances in which EU law itself limits the scope of any prohibition upon discrimination, by permitting qualifications or exclusions. For example:

a. The recast Equal Treatment Directive (2006/54/EC) states that it is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity, (Article 28 of the Directive which permits paragraph 2 of Schedule 22 of the EA);

b. Neither the Race Directive nor the Framework Directive applies to discrimination on the grounds of nationality, (Article 28 and 3.2 respectively and paragraph 1 of Schedule 23). As a result, the general exception in paragraph 1 of Schedule 23 of the EA is permissible.

96. There is nothing, contend the claimants, in the Directive that permits a blanket derogation in relation to age (or disability, religion and belief). Article 6 does permit Member states to provide that differences of treatment on the ground 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".

97. This limited derogation does not permit the blanket exclusion of the EA found in paragraph 1(1) of Schedule 22. At the highest, such a provision could be relied upon only where the particular enactment was itself justified (which is not the case here). This was the approach taken *in* ***Heron v Sefton MBC [2014] Eq LR 130, EAT*** at paragraph 21:

> "For the exception in paragraph 1(1) of Schedule 22 to the 2010 Act to apply the enactment must have direct effect upon the particular circumstances of the claimant. On the facts of this case it did not. Further, and in any event, even if it had done it would have required to have been justified."

98. One of the objectives of the Directive is to prohibit age discrimination in relation to pay in the public sector. Paragraph 1(1) of Schedule 22, it is contended, may not be construed so as to exclude claims about discriminatory terms and conditions which are set out in subordinate legislation as this would jeopardise the achievement of the objectives of the Directive and deprive it of much of its effectiveness in the public sector. Furthermore, it would arbitrarily exclude public sector employees from protection in relation to aspects of their terms and conditions. Such a construction is incompatible with the Directive: see the CJEU decision *in* ***O'Brien v Ministry of Justice [2012] ICR 955:***

> "35 In that regard, member states may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a Directive and, therefore, deprive it of its effectiveness: see Criminal proceedings against ***El Dridi*** (Case C-61/11PPU) [2011] All ER (EC) 851, para 55.
> 36 In particular, a member state cannot remove at will, in violation of the effectiveness of Directive 97/81, certain categories of persons from the protection offered by that Directive and the Framework Agreement on Part-time Work: see, by analogy with Council Directive 99/70 of 28 June 1999 concerning the Framework Agreement on Fixed-term Work***, Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud (Case C307/05) [2008] ICR 145,*** para 29."

99. Accordingly, the Claimants contend, paragraph 1(1) of Schedule 22 may not be construed so as to exclude the claim against the FRAs or, alternatively, it should be disapplied, ***(Dansk Industri v Estate of Karsten Eigil Rasmussen [2016] EUECJ C-441/14 at [36 – 37])***

100. The Claimants contend that, contrary to paragraph 11 of the Notice of Appeal, there is no inconsistency between paragraphs 9 and 41 of the ET's Reasons. The paragraphs refer to different matters. At paragraph 9 the ET was addressing the position of the Department/Ministers that they were not pursuing Issue 3.3 of the List of Issues. The ET correctly identified the issues which were live at the PH on Jurisdiction. In contrast, paragraph 41 is directed to the Claimants' submission that they were entitled to rely directly upon their rights under the Directive to bring a claim against the FRAs.

THIRD GROUND OF APPEAL: SCHEDULE 22

101. The Claimants do not make any separate submissions, relying on their submissions already made on the FRAs' contentions that the alleged errors made by the ET in respect of section 61 and EU law led it into error as to paragraph 1(1) of Schedule 22.

FOURTH GROUND OF APPEAL: INADEQUATE REASONS

102. The Claimants contend that none of the challenges to the ET's reasoning could be fatal to the decision even if upheld. In any event, the ET's reasons were sufficient. The FRAs know why they lost.

A **THE ET'S DECISION**

103. The ET starts to consider this preliminary issue at paragraph 15 and sets out all the relevant legislation as set out above.

B

104. Having summarised the submissions of the parties in paragraphs 20-22 the ET turns to its conclusions. It starts:

C

> "24.The effect of section 61(3) of the Equality Act is to insert a non-discrimination rule into the NFPS. Mr Short relies on paragraph 14.41 of the EHRC Code of Practice on Employment (2011) which provides:
>
> > 'The provisions of an occupational pension scheme shall have effect subject to the non-discrimination rule. So, for example, if the rules of the scheme provide for a benefit which is less favourable for one member than another because of the protected characteristic, they must be read as though the less favourable provision did not apply.'
>
> This is, of course, a Code of Practice and not a binding authority.
> 25 It is common ground that the NFPS treats people who were born on or after 2 April 1971 less favourably than people before born before that date on the grounds of age and also treats people who were born between 2 April 1967 and 1 April 1971 less favourably than people born before 2 April 1967 on the grounds of age.
> …
> 27 Section 61(3) of the Equality Act inserts a non-discrimination rule into the scheme. Liability rests with the responsible person. Section 62 gives the power to the trustees or managers of the scheme to make a non-discrimination alteration. The provision allows the scheme managers to bring the text of the scheme into conformity with the non-discrimination obligation. It is notable that the structure of section 62 reflects the same structure as that used in section 68 concerning the sex equality rule. As Mr Short has pointed out, there is a difference in wording between section 61 and section 67, although parallels are seen in the enforcement provisions at section 120 and 127. Mr Short attributes these differences in language to the separate development of equal pay law. That approach is supported by the decision of the Northern Ireland Court of Appeal in Perceval-Price v Department of Economic Development [2000] IRLR 380 in which Carswell LCJ stated:
>
> > " It is a well established consequence of the principle of supremacy of Community law that it is the duty of a national court, where there is a conflict between domestic law and a directly effective provision of Community law, to interpret domestic law where possible so as to accord with Community law, and where that cannot be done to disapply the conflicting provision of domestic law."

D

E

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105. In paragraphs 28, 29 and 30 the ET refers to the relevant case law***: Ten Oever, Coloroll and Foster Wheeler*** referred to above. From paragraph 31 the ET sets out its conclusions and the reasons for them:

H

A

"31. I am satisfied that section 61 must be construed so as to give effect to the directive. I must consider the effect of section 61 on the NFPS and then consider whether any enactment has been identified which requires the First to Fourth Respondents to do something which would be a contravention of part 5. It is common ground that a non-discrimination rule is inserted into the NFPS by section 61(1). Section 61(2) imposes a duty on the manager of the scheme not to discriminate in carrying out any of its functions. The manager of the scheme is required to give effect to the scheme, as modified by the non-discrimination rule unless paragraph 1(1) of Schedule 22 requires the manager to act otherwise.

B

…

34 Mr Lynch argued that the Employment Tribunal in McCloud made erroneous findings that any discriminatory provisions of the Regulations would be automatically removed by section 61 and, as a result, there could be no question of those regulations giving rise to a defence under paragraph 1 of Schedule 22. Mr Lynch argued that there is nothing in section 61 that justifies the view that that section automatically amends pension schemes if they contain a discriminatory provision. Mr Lynch argues that the definition of enactment in paragraph 1 is very inclusive and it would only be if there was a clear express provision to the effect that there was a discriminatory provision that the restriction would apply and the terms of paragraph 1 are to the opposite effect.

C

35 I must consider the meaning of "enactment" in paragraph 1 of Schedule 22. An enactment includes a statutory instrument and is defined in section 212(1) of the Equality Act as including subordinate legislation. The FRAs have submitted that they did not make or participate in the making of the Regulations or the primary legislation and that the Regulations require the FRAs to act in certain ways. They say that the power to change the rules of an occupational pension scheme so that they are no longer discriminatory is found only in section 62. However, the clear wording of section 62 allows the trustees or managers to make non-discrimination alterations to the scheme. The Explanatory Notes to section 62 provide:

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> "227. The clause gives trustees or managers of an occupational pension scheme the power, by resolution, to alter the scheme's rules to conform to the non-discrimination rule in clause 61.
> 228. They may use the power if: • they lack powers to alter the rules for that purpose, or • procedures for altering the rules, including obtaining consent, are unduly complex or would take too long"

E

36 I accept the submission of Mr Short that those adversely affected by the express provisions will not need to prove their case in order to demonstrate that those provisions were modified by the non-discrimination rule.

37 Because of the non-discrimination rule, the FRAs are not required to act in a discriminatory way by any enactment. It has been held, in relation to the equivalent provision found in the Race Relations Act 1976, by Lord Lowry in Hampson v Department of Education [1991] 1 AC 171:

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> "Given the wide sweep of these provisions, the exceptions ought therefore... to be narrowly rather than widely construed whether language is susceptible to more than one meaning."
> …

41. As Mr Short says, any provision fixed by subordinate legislation should not be excluded from scrutiny. Section 212(1) of the Equality Act adopts the definition of occupational pension scheme in section 1 of the Pension Schemes Act 1993. I see no rationale for excluding such schemes from scrutiny under the Equality Act in relation to age. Mr Short submits that one of the objectives of the directive is to prohibit age discrimination in relation to pay in the public sector and that paragraph 1 must not be construed so as to exclude claims about terms and conditions that are set out in the subordinate legislation, as this would jeopardise the achievement of the objectives of the directive and deprive it of much of its effectiveness in the public sector. He refers to *O'Brien v Ministry of Justice [20121 ICR 955* at paragraph 35 and 36. Finally, he argues that even if paragraph 1 of Schedule 22 does bar any age discrimination claim under section 61 of the Equality Act then the claimants are entitled to rely directly upon their rights under the directive. I accept that submission.

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> 42 In these circumstances, the FRAs are not entitled to rely on paragraph 1 of Schedule 22 of the Equality Act 2010 as a defence to the claims of age discrimination and accordingly, the Tribunal does have jurisdiction to consider them.

DISCUSSION AND CONCLUSIONS

106. I have considered all the extensive submissions both written and oral made by the parties summarised above including written submissions received after the oral hearing.

THE FIRST ERROR

107. The FRAs contend that they were entitled to benefit from the defence provided by Paragraph 1(1) of Schedule 22 of the EA in that they were obliged to apply the terms of the 2015 Scheme Regulations which discriminated against the Claimants on grounds of age even though the justification defence was unavailable. They did not contravene a specified provision relating to the protected characteristic of age by so acting. That is because what they did was something they were obliged to do pursuant to a requirement of an enactment. The enactments in question were s. 18(1), (5)-(8) of the Public Service Pensions Act 2013 and the Regulations made under that Act**.**

108. They contend that the ET erred by acceding to the submissions made by the Claimants. Those submissions were that, by reason of the effect of sections 61 and/or 62 of the EA, paragraph 1(1) of Schedule 22 was not in play. Section 61, properly construed, by making the terms of the 2015 Scheme Regulations subject to the non-discrimination rule, prevented them from contravening the relevant provisions of the EA. Thus, the FRAs' acts of age discrimination were neither obligatory, nor were they required by an enactment. In the alternative, section 62, properly construed, gave the FRAs the power by resolution to make non-discrimination alterations to the scheme which would have had the effect that the

provisions of the scheme were subject to the non- discrimination rule. This meant that the FRAs were not obliged to discriminate against the Claimants on the grounds of age by applying the terms of the Regulations. They had the power to avoid that by passing a non-discrimination resolution.

109. I must, therefore, construe sections 61 and 62 of the EA and, having done so, consider how, so construed, they impact on paragraph 1(1) of Schedule 22.

SECTION 61

110. Section 61 provides: (1) that an occupational pension scheme must be taken to include a non-discrimination rule and, (3), that the provisions of the scheme have effect subject to the non-discrimination rule. It provides in (7) that a breach of a non-discrimination rule is a contravention of the EA.

111. A non-discrimination rule is a provision by virtue of which a responsible person (which includes each of the FRAs) must not, among other things, discriminate against another person in carrying out any of their functions (subsection (2)).

112. In my judgment these provisions, by their proper construction, operate by making the non-discrimination rule a part of the scheme by operation of law i.e. by virtue of a statutory provision. Subsection (1) says so in terms. Such a scheme "must be taken to include" such a term. Furthermore, subsection (3) says in terms that the non-discrimination rule, which the Scheme must be taken to include by reason of this statutory provision, overrides the provisions of the Scheme. They are expressly stated to be subject to it.

113. Thus, if, as here, a provision of an occupational pension scheme, though contained in subordinate legislation, would oblige a responsible person to discriminate against another person on the ground of age, that provision is subject to the non-discrimination rule, which the scheme must be taken to include. That rule obliges the responsible person not to discriminate. Accordingly, by reason of the hierarchy of obligations provided for, the responsible person, by discriminating against that person, breaches the rules of the scheme (the non-discrimination rule having precedence) and thereby contravenes the EA (subsection (7)).

114. Applying this analysis to paragraph 1(1) of Schedule 22, the FRAs, by applying the 2015 Scheme Regulations, thereby discriminating against the Claimants on grounds of age, are not doing something they are obliged to do by the regulations. Rather, by so acting, they are in breach of the terms of the scheme, by virtue of the non-discrimination rule which the scheme must be taken to include and to which the other terms of the scheme are subject. By that breach they are in contravention of the EA. That contravention is not, however, something which they must do pursuant to a requirement specified in an enactment. On the contrary it is something which they are obliged by the terms of the scheme, including the non-discrimination rule, not to do. By doing so they are in breach of its terms.

115. It follows that I do not accept the FRAs primary contention that the ET erred in law in its construction of Section 61 or its impact on the availability of the defence provided by paragraph 1(1) of Schedule 22 of the EA.

116. Given that construction of section 61, I do not accept the contention of the FRAs that they had no option but to act in a way that, after litigation, has been found to have been unlawfully discriminatory against the claimants on grounds of age. The way in which section 61 works is clear. It prohibits the FRAs from acting in a manner which discriminates on the

grounds of age and it prioritises that obligation over other provisions which would oblige them to act in that way. In this way it gives effect to the UK Government's obligations under EU Directive 2000/78.

117. I am unpersuaded that there is any material difference in the way section 61 operates when compared to the ways the sex equality clause and rule operate in relation to sex equality under sections 66 and 67 of the EA. In particular section 67, which concerns occupational pension schemes, provides that if such a scheme does not include a sex equality rule, "it is to be treated as including one."

118. Section 67 is not couched in terms which are identical, in points of detail, to section 61. That is unsurprising as its subject matter is different. However, the sex equality rule operates in the same way as the non-discrimination rule in that it is included in the scheme by operation of law arising out of a statutory provision and is expressly given precedence over terms of the scheme which are inconsistent with sex equality.

119. Further, section 120 of the EA provided a mechanism whereby, amongst others, the FRAs could seek a declaration as to their rights and those of a member in relation to a dispute about the effect of a non-discrimination rule. This would potentially have provided the FRAs with a route out of the bind of which they complain and which underpins their contention that they were helpless recipients of legal requirements made by others and so should be entitled to the benefit of the statutory defence provided by paragraph 1(1) of Schedule 22.

120. Thus, in my judgment the FRAs have no defence to the discrimination claims and are bound by the declaratory relief provided by the Court of Appeal namely: "Pending the final

determination of the issues of remedy all existing claimants who by reason of their age would not satisfy paragraphs 12(2)(c), 12(3)(c), 13(e) or 14(e) of Schedule 2 to the 2014 English Regulations or the 2015 Welsh Regulations from 31 March 2015 are entitled to be treated as satisfying those paragraphs from that date".

121. The terms of the declaration enable the parties to litigate further on issues of remedy but make it clear that the declaration is effective from 31st March 2015 and binds the FRAs from that date. Any issues as between the FRAs and the central government as to how the entitlements of the firefighters should be financed as between them are separate from this litigation, if indeed they are susceptible to litigation at all.

122. These conclusions in respect of section 61 are decisive of this appeal. I have been addressed with argument on section 62 as being relevant to the proper construction of Section 61. I now turn to them.

SECTION 62

123. Section 62 gives the trustees or managers of an occupational pension scheme the power to pass a resolution to make non-discrimination alterations to an occupational pension scheme (subsection (3)). Non-discrimination alterations are such alterations to the scheme as may be required for the provisions of the scheme to have the effect that they have in consequence of section 61(3). Section 61(3) states that the provisions of the scheme have effect subject to the non-discrimination rule.

124. In my judgment the power thus given to the trustees or managers does not impact on the proper construction of section 61. By the terms of section 61 the scheme must be taken to include a non-discrimination rule. The non-discrimination rule is not, by virtue of section 61, made part of the "provisions of the scheme" but is included by operation of law. The scheme must, by law, be taken to include it and the "provisions of the scheme" have effect subject to it. Thus section 61(3) requires that the non-discrimination rule operates independently of the provisions of the scheme and has priority over them by virtue of statute.

125. Given the way that section 61 operates, in my judgment section 62 does no more than provide an opportunity for trustees or managers of the scheme, who do not otherwise have the power to make non-discrimination alterations to the scheme, to alter the scheme so that its provisions expressly reflect the effect which they already have in consequence of section 61(3). I do not accept the contention that section 62, by vesting this power in the trustees or managers of the scheme, is inconsistent with section 61 having the effect of directly altering the terms of the scheme. Section 61 makes it clear that the non-discrimination rule must be taken to be included in the scheme and that the provisions of the scheme are subject to it. In consequence of section 61(3) the provisions of the scheme may remain unchanged but, by operation of law, they are overridden by the non-discrimination rule. Section 62 provides the opportunity for the trustees or managers to pass a resolution and thereby make the provisions of the scheme consistent with the legal effect of the scheme which has already been altered in consequence of section 61(3). It provides a mechanism whereby the trustees or managers of the scheme can alter its provisions to bring its express terms into alignment with the effect which it already has, as subsection (5) says, "in consequence of section 61(3)".

126. Thus, in my judgment section 62 has no impact on the proper construction of section 61 and its effect which I have set out above.

127. There is a secondary issue between the parties which, though unnecessary for the disposal of this appeal, I am prepared to decide. That is whether the FRAs are managers of the scheme for the purpose of having vested in them the power to pass a resolution under section 62.

128. The EA by section 212(11) defines a number of terms including "employer" and "trustees or managers" in relation to an occupational pension scheme. It does so by reference to section 124 of the Pensions Act 1995.

129. Section 124 defines "employer" as the employer of persons in the description or category of employment to which the scheme in question relates. It defines "managers," in relation to schemes other than a trust scheme, as the person responsible for the management of the scheme. It also defines "trustees or managers" as a single phrase. It provides that the phrase means, in relation to a scheme other than a trust scheme "the managers of the scheme."

130. The section 62 power in this case falls to be exercised, if at all, by managers in relation to occupational pension schemes established by regulations made by the relevant minister pursuant to powers conferred by the Public Service Pensions Act 2013. Section 4 of that Act defines "scheme manager". It provides that scheme regulations must provide for a person to be responsible for managing or administering the scheme and any statutory pension scheme that is associated with it. That person is called the scheme manager.

131. It provides that scheme regulations may comply with the statutory requirements by providing for different persons to be responsible for managing different parts of the scheme and that references to "scheme manager" shall be construed accordingly. This appears to be designed for a national scheme whose members are employed by employers in different locations. The present schemes are a good example. The English FRAs, some of which are appellants, fall within that pattern of provisions.

132. The firefighters pension scheme regulations in these cases are identical and are contained in regulation 4 of each of the 2015 Schemes in the following terms:

> "4(1) An authority is responsible for managing and administering this scheme and any statutory scheme that is connected with it in relation to any person for which it is the appropriate authority under these regulations.
>
> (2) The appropriate authority in relation to a person who (a) is or has been a member of this scheme….Is the authority by whom the member was last employed whilst an active member of this scheme."

133. The FRAs are the respective scheme managers under the 2015 Scheme Regulations in relation to the claimants. There is no other provision in the regulations comprising these schemes which defines the managers of the scheme in any other way. They are therefore the scheme managers for the schemes pursuant to Section 4 of the 2013 Act.

134. The question is whether the FRAs are managers for the purposes of section 62 of the EA. The EA defines managers, and trustees or managers, by reference to the 1995 Act not the 2013 Act. It is argued by the FRAs that the 1995 Act definition of managers, and trustees or managers, defines managers in terms of "the persons responsible for the management of the scheme" and that this definition confines those who may be described as managers to those persons who are responsible for the scheme as a whole and excludes from that definition those who are responsible for management of different parts of the scheme. They contend that the FRAs do not fall within the 1995 definition, are not managers within the meaning of section 62

of the EA and are not vested with the power to pass a resolution making non-discrimination alterations to the scheme. It follows, the FRAs contend, that FRAs have no power to change the provisions of the scheme. The consequence of that is that if, contrary to my conclusion, section 61 did not have the effect of preventing the terms of the scheme discriminating on the grounds of age, then the statutory defence provided by paragraph 1(1) of Schedule 22 would have effect, as section 62 would not vest in the FRAs any power to pass a non-discrimination resolution to become one of the provisions of the scheme.

135. I do not accept this argument. Section 124 of the 1995 Act provides a definition of managers, and trustees or managers, of "an occupational scheme". An occupational pension scheme is defined by section 1(1) of the Pension Schemes Act 1993. It includes "public service pension schemes" which means an occupational pension scheme established by or under an enactment where all the particulars are set out in an enactment or legislative instrument made under an enactment and which cannot come into force or be amended without the approval of a minister or government department. The definition of managers and trustees or managers in section 124 of the 1995 Act applies to public service pension schemes which are a species of occupational scheme.

136. The 2013 Act provides for schemes for persons in public service which may be established by Regulations by a responsible authority. They include fire and rescue workers for England and Wales. The responsible authority is defined in section 2 as the persons who may make scheme regulations. Section 4 defines scheme manager.

137. The hierarchy of responsibility for the establishment and management of public service pension schemes is the same under the 1993, 1995 and 2013 Acts. They differentiate the establishment of the schemes from their management. Managers have no power to alter the schemes under any of the statutes. This is central to the efficacy of section 62 of the EA. The power vested by section 62 is only vested in trustees or managers of an occupational scheme who do not have power to make non-discrimination alterations to the scheme. Thus, under the Regulations, each FRA is the scheme manager in respect of members of the scheme who were last employed by that FRA. It follows, in my judgment, that they fall within the terms of section 62. They are managers responsible for managing the occupational pension scheme established by the Regulations. If they are not managers for the purpose of section 62 there does not seem to be anyone else who could be.

138. The FRAs in argument made clear that, on their construction of the statutes, the manager within section 124 of the 1995 Act is, and can only be, the Secretary of State in England and the Minister in Wales as only they can be described as managers of the schemes at the high level which, they contend, is required by that statutory provision. But those persons are precisely those who have the power to make and change the regulations containing the terms of the schemes and so cannot be the subject of the vesting of power under section 62. It is hard to see in that case how section 62 can have any effect other than as contended for by the claimants.

139. The Claimants point out that the regulations provide a comprehensive range of powers of management which are vested in the individual FRAs and which satisfy the requirement that managers, for the purpose of section 62, must manage at the highest level of the administration of the schemes. In my judgment, this provides compelling evidence that the managers under the

2013 Act are at the same level as managers under the 1995 Act and, accordingly, they are managers for the purposes of section 62 of the EA.

140. In my judgment the FRAs have vested in them the power to pass a resolution making non-discrimination alterations to the scheme of which they are managers in respect of those members who were last employed by them. In that respect, also, they were not obliged by a statutory requirement to discriminate against the claimants on the grounds of age and so by that route too are unable to avail themselves of the statutory defence provided by paragraph 1(1) of Schedule 22.

DOES THE EU FRAMEWORK DIRECTIVE FOR EQUAL TREATMENT 2000/78/EC HAVE DIRECT EFFECT IN UK DOMESTIC LAW SO AS TO DEFEAT THE STATUTORY DEFENCE UNDER PARAGRAPH 1(1) OF SCHEDULE 22?

141. By reason of my decision in respect of section 61 of the EA this appeal does not succeed. It is not necessary for me to adjudicate on this issue. I have nonetheless heard full argument and I have come to conclusions on them lest I may be mistaken in relation to section 61 and section 62.

142. Directive 2000/78 would potentially come into play if the true effect of section 61 was, as the FRAs contend, merely to apply the law against age discrimination to decisions and actions in respect of occupational pension schemes but does not purport to alter the terms of the schemes themselves. On that basis, it is argued, the FRAs were obliged, by the requirements of an enactment, to apply the schemes as contained in the regulations in a way which discriminated against the claimants on grounds of age. That would, on the face of it, contravene

A the EA but for the operation of the statutory defence contained in paragraph 1(1) of Schedule 22, which would then apply.

B 143. In that case, the Claimants have argued, the Directive applies directly against the FRAs, as emanations of the state, to disapply the terms of the scheme contained in the regulations and the statutory defence because the domestic provisions do not, thereby, carry the Directive into effect.

C

144. I first have to consider what the Directive provides and requires the member states to carry into effect. I am reminded that Articles 2 and 3 state that the principle of equal treatment

D means that there shall be no direct or indirect discrimination whatsoever on grounds, inter alia, of age and that it applies to both the public and private sectors: including employment and including pay, which includes pensions. Article 16, providing for compliance, requires member

E states to take the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

145. I am also reminded that the authorities on what this means are clear: any provision which

F is contrary to it, whether contained in national legislation, administrative provisions, or in a contract or trust deed governed by private law must be overridden by that rule (***Ten Oever***); the national court must set aside any discriminatory provision of national law without having to

G request or await its prior removal by collective bargaining of any other constitutional procedure and to apply to the members of the disadvantaged group the same arrangements as those enjoyed by the other employees (***Nimz v Freie und Hansestadt Hamburg***); once the court has found that discrimination in relation to pay exists and so long as measures for bringing about

H equal treatment have not been adopted by the scheme, the only proper way of complying with

A [article 16] is to grant the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class (***Coloroll***).

B 146. In summary: provisions in a scheme which, if applied, would create unequal treatment cease to be enforceable on the irect application of article 16; statutory provisions which might have the same effect in their application to the scheme are to be interpreted or perhaps even disapplied so far as is necessary to give effect to article16;the national court is required to set C aside any discriminatory provisions of national law and to apply to the disadvantaged class of employees the arrangements enjoyed by the advantaged class; article 16 has direct effect and ipso facto operates to amend a pension scheme so as to eliminate discriminatory provisions D relating to pension entitlement. (***Foster Wheeler v. Hanley per Patten J*** (as he then was)).

147. Applying these principles to the facts of these cases, the claimants contend that the Scheme Regulations are overridden by the requirements of article 16 and amend the terms of E the scheme so as to eliminate the discriminatory provision; the national court must, if need be, set them aside or disapply them and grant to the disadvantaged class of employees the same arrangements as are enjoyed by the advantaged class.

F

148. The FRAs contend that member states are granted a margin of appreciation on how they are to comply with the Directive pursuant to article 16. Though in a different context, it is clear G from ***Horvath*** that member states are free to allocate powers internally and to implement community acts which are not directly applicable by means of measures adopted by regional or local authorities provided that the allocation of powers enables the EU law in question to be implemented correctly. This means that it is open to a member state to provide that liability for H discriminatory acts on grounds of age may be distributed as between national government and statutory agencies such as the FRAs provided full protection is provided to those discriminated

against. In the present case the statutory defence is a means by which liability may properly be vested in the emanation of the state which is, in truth, responsible for the acts of discrimination complained of by providing the statutory defence to those who are passive recipients of the rules and who are obliged to implement provisions which they have had no power to prevent. This, coupled with the right of the claimants to sue central government for inducing breach by their employers of the EA, ensures compliance pursuant to article 16.

149. I do not accept the FRAs' submissions in this respect. ***Horvath*** concerns central government using another emanation of the state to fulfil obligations for the purposes of implementing EU law. The FRAs' argument is about central government excusing another emanation of the state from breaching a requirement of EU law arising from regulations made by central government which are in breach of the principles of the Directive. In my judgment this argument is a long way from being capable of being supported by the margin of appreciation doctrine as described in ***Horvath***. The provision of a cause of action against a third party for inducing an employer to breach the principles underlying the Directive falls a long way short of complying with the Directive by taking necessary measures to ensure that any laws regulations and administrative provisions contrary to the principle of equal treatment are abolished. It is clear that EU law requires that the discriminatory provisions of the scheme regulations are to be overridden, set aside, disapplied, or amended so that the FRAs are not required by an enactment to contravene the EA by applying them. In that way too, if necessary, the statutory defence is unavailable to the FRAs.

A SECONDARY ARGUMENT THAT THE STATUTORY DEFENCE SHOULD BE STRUCK DOWN

150. This further argument advanced by the Claimants is that the statutory defence should be struck down as it involves one emanation of the state, central government, granting a defence to others, the FRAs, for a breach of anti-discrimination law, for which central government is responsible, by requiring the FRAs to act in a way which is discriminatory in a manner prohibited by the Directive. It is said that there is authority for the proposition that it is not possible to rely upon domestic law as a defence to EU based discrimination law. It is said that the inclusion of the defence provided by paragraph 1(1) of Schedule 22 may have been an oversight in legislation brought forward hastily in the "washup" period prior to a general election in 2010.

151. In the ***Amnesty International*** case this principle was recognised in the context of race discrimination. Once racial discrimination came to be proscribed by EU law, it could not be legitimate to rely on the provisions of domestic law by way of defence.

152. The FRAs resist such a drastic conclusion in this context. The retention of the statutory defence in the EA in 2010 for limited categories of discrimination must have been in full knowledge of changes to the law in respect of sex and race discrimination made several years before and of what was said in the ***Amnesty*** case. The provisions in respect of age discrimination are more nuanced than are the race and sex provisions notably in that, for direct age discrimination, there is a defence of justification which is not available for race and sex discrimination.

153. Whilst I can see that there are powerful arguments of principle supporting the Claimants' arguments I am not required to reach a decision on this issue as the appeals will be dismissed on each of three sequential bases. This argument only arises if I were to be in error on each of

them. Accordingly, I decline the invitation to come to a conclusion on such a difficult and fundamental issue in these circumstances.

INADEQUATE REASONS OF THE ET

154. As I have indicated above, neither party has sought to argue that this ground of appeal stands as a freestanding ground of appeal. In my judgment, whilst there are some passages which may be said to be incoherent and some of the conclusions of the ET may be said to be implicit rather than clearly spelt out, there is no doubt that the ET was aware of the issues and arguments and came to conclusions which enabled the FRAs to know the bases upon which they lost and has enabled them cogently to argue all the relevant issues in this appeal. I would not uphold this appeal based on inadequate reasons whether as a freestanding ground or as a support for the grounds I have dismissed above.

FINAL CONCLUSION

155. Accordingly I dismiss the FRAs appeals against this preliminary decision of the ET on each of the grounds of appeal advanced by them.