EMPLOYMENT TRIBUNALS

Claimant: Mrs C Stephenson

Respondent: The Secretary of State for Justice

HELD AT: Sheffield **ON:** 24, 25 and 26 July 2017 (in Chambers afternoon of 26 July 2017 and also on 27 July 2017)

BEFORE: Employment Judge Little
Mrs K Grace
Mr J Howarth

REPRESENTATION:

Claimant: In person (but assisted by Mrs J Woodhouse)
Respondent: Mr S Lewis of Counsel (instructed by Government Legal Department)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of indirect age discrimination fails.

2. The Tribunal does not have jurisdiction to consider a 'stand alone' complaint of indirect sex discrimination in respect of pay.

3. The Tribunal does not have jurisdiction to determine the equal pay complaint insofar as that is a complaint about alleged breach prior to 1 June 2014.

4. Insofar as the Tribunal has jurisdiction, the equal pay complaint fails.

5. The complaint alleging an unauthorised deduction from wages also fails.

REASONS

1. The Complaints

The complaints are:-

- Indirect age discrimination
- Equal pay (and indirect sex discrimination)
- Unauthorised deduction from wages

In essence Mrs Stephenson complains that unlawful discrimination occurred when a change to the respondent's pay policy had the effect that the claimant would not reach the top of pay band 4 within ten years of qualifying (which had been her expectation at the time of qualifying) and instead would – if she remained employed that long – only get to the top within 22 years of qualification. The unauthorised deductions complaint concerned the alleged withholding of annual pay increments.

We have put the indirect sex discrimination complaint in parenthesis because, as discussed with the parties at a preliminary hearing for case management on 8 April 2016 and as further discussed on day one of this hearing, it appeared that the Tribunal had no jurisdiction to determine a "stand alone" indirect sex discrimination complaint where the less favourable treatment was in connection with pay. Instead the appropriate cause of action was limited to the complaint in respect of equal pay (see Equality Act 2010 section 70). It was acknowledged, however, that the concept of indirect discrimination can be relevant in an equal pay case as opposed to being a freestanding complaint. We deal with this further in our conclusions set out below.

2. The Issues

The issues were discussed and defined at a preliminary hearing for case management which took place on 13 September 2016. This list was reviewed at the commencement of the hearing and broadly confirmed – however Mr Lewis pointed out that in relation to the equal pay complaint the respondent contended that the claimant's employment with South Yorkshire Probation Trust had ended on 1 June 2014, and that thereafter the claimant had been employed by the National Probation Service ("NPS") with the result that any equal pay complaint prior to the alleged transfer was out of time (see Equality Act section 129 concerning time limits and the qualifying period).

3. The Evidence

The claimant has given evidence by way of a witness statement and also under cross examination. In addition the claimant had served very brief witness statements from three of her four male comparators – Ali Ullah; James Lockington and Nicholas Taylor. Each of those statements was signed but Mrs Stephenson did not propose to call them to attend at the hearing. That was unsurprising in circumstances where, during the course of a preliminary hearing on 21 April 2017, the respondent's solicitor had indicated that those statements were agreed and it had been recorded

that it would therefore not be necessary for those individuals to attend the hearing. Despite this it became apparent at the beginning of our hearing that the respondent no longer completely agreed those statements. As analysed during the course of the cross examination of the claimant (and as recorded in paragraph 60 of Mr Lewis' written submissions) there was now some disagreement as to the dates given by those witnesses e.g. their start dates and so on. Nevertheless Mr Lewis conceded that all the comparators had begun their employment prior to 1999 and all of them had reached the top of the relevant pay band several years prior to 2011 a key date for reasons explained below. In these circumstances it was agreed that there was no need for those witnesses to attend (even if they could at such short notice) because the principle which the claimant wished the Tribunal to accept was, to the extent defined above, accepted by the respondent.

The respondent's evidence was given by Mr J W Paskins of the respondent's Human Resources Directorate (Reward Team) and Mr N S Jones, also of the Human Resources Directorate.

4. **Documents**

The Tribunal have had before them a bundle comprising initially 346 pages. On the first day of our hearing there was a discussion about some documents only being served on the claimant on the preceding Wednesday. These were pages 289(f) to 289(i) and they contained statistical information (as to which see below). Mrs Stephenson objected to these documents – both as to their content, which she believed to be inaccurate, and because they had been served late. In addition Mr Lewis had prepared an "analysis" of some of the raw data enclosed in the recently disclosed documents. He had done this over the weekend and accordingly Mrs Stephenson was not aware of that documentation until the first day of our hearing. Those documents are at pages 289(j) to 289(o). Having heard both parties' submissions on this issue the Tribunal retired to consider the correct approach. We noted that there was a difference between disagreeing with the content of a document on the one hand, and on the other hand objecting to it being admitted at all. Whilst we were sympathetic towards the claimant as a litigant in person we took the view that in relation to a hearing beginning on Monday the claimant should have had sufficient time to consider four new documents which had been served on her five days previously. Further, we noted the respondent's explanation for the lateness, which was that the documents in question had recently been prepared by a statistician for the respondent. We considered that those documents were relevant and that there was no prejudice to the claimant in them being introduced. She would during the course of the hearing have the opportunity to explain why she did not agree with the information in those documents, and to question the respondent's witnesses about that.

With regard to the 'analysis' documents prepared by counsel, we considered that potentially these would be helpful to the Tribunal in determining the issues before it, but we acknowledged that there was some prejudice to the claimant in that she had only seen those documents on the first day of the hearing. We noted, however, that Mr Lewis had explained that he would only have limited cross examination questions on the statistical evidence and he would delay asking any questions about the analysis documents until the second day of the hearing so that the claimant at least had the opportunity to consider the new documents overnight. We took the view that

this arrangement was sufficient to redress what otherwise would have been prejudice to the claimant and so we have allowed these documents in as well.

During the course of closing submissions the Employment Judge noted the absence of any documentation regarding what the respondent contended had been in effect a transfer of the claimant's employment on 1 June 2014. Mr Lewis confirmed that there was no documentation in the bundle. The Tribunal noted that at the least one would expect that a letter would have been written to the claimant to explain or confirm what had happened. Mrs Stephenson said that she had received no such letter. The respondent was not contending that the transfer was strictly speaking a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") but that it was akin to such a transfer. It was then realised that the alleged transfer may have been effected by legislative means which led us to the Offender Management Act 2007 section 3 and schedule 2, the latter dealing specifically with "Staff Transfer Schemes". The Employment Judge ran off copies of the relevant parts of the Act which were discussed during the course of submissions. It was arranged that any further documentation which the respondent either had or now realised could be relevant would be provided, and during the course of the afternoon of the third day (when the Tribunal were in Chambers) we received a copy of the Offender Management Act 2007 (Probation Services) Staff Transfer Scheme 2014 and a Cabinet Office document entitled "Staff Transfers in the Public Sector – Statement of Practice January 2000 (revised December 2013)".

5. The Claimant's quest for statistical information

This is a vexed area. The claimant explains in her witness statement (paragraphs 6-17) the efforts she had made to obtain statistical data. Those attempts began in February 2016 although the claimant did not make a formal application to the Tribunal for specific disclosure until October 2016. That application was rejected by Employment Judge Lancaster on 20 October 2016 because he considered it was premature and that the application itself was somewhat vague. The claimant renewed her application at the end of January 2017 and on two occasions the respondent was invited to comment, which it did. It was not until 21 March 2017 that a member of this Tribunal, Employment Judge Little, made an order requiring the respondent to provide statistics as to the age, gender, pay point, date of commencement and length of service of all probation officers within South Yorkshire on the band 4 pay scale in the period 2010 to date. That information was to be provided no later than 31 March 2017. However, subsequently the respondent sought an extension of time which was granted (to 7 April 2017).

On 7 April 2017 the respondent's lawyer wrote to the Tribunal stating that the respondent had only been able to partially comply with the order – this was in the context of the final hearing being due to be begin on 24 April 2017. On 19 April 2017 the claimant wrote to the Tribunal complaining that the respondent had not fully complied with the order and that the information which had been provided was "incoherent and therefore meaningless". In these circumstances an urgent preliminary hearing by telephone was arranged for 21 April 2017 when EJ Little decided that, regrettably, it was necessary to postpone the hearing which would have commenced on the following Monday. The respondent's position at that stage as that it could not comply further with the Tribunal's March 2017 order because the information in question was no longer in their possession but instead was in the

possession of one or other Community Rehabilitation Company. In those circumstances a further order was made by Employment Judge Little for third party disclosure. There was some further delay before the order could be issued whilst it was determined precisely which Community Rehabilitation Company was the relevant one. In any event the third party disclosure order was issued on 24 May 2017.

The Tribunal then received a letter dated 2 June 2017 from the South Yorkshire Community Rehabilitation Company Limited. Contrary to the position of the respondent, the letter from the CRC stated that it did not hold "legacy data" relating to the former South Yorkshire Probation Trust but that all such data had been transferred to either the Ministry of Justice or the National Offender Management Service. On an explanation being sought from the respondent it said (in a letter of 22 June 2017) that it had only suggested that the third party might have the documentation and there had been no intention to mislead the Tribunal. There was now uncertainty as to where the documentation might be.

By her letter of 14 July 2017 Mrs Stephenson commented on this state of affairs. She was critical of the respondent and considered that the respondent's failure to provide the information was prejudicial to her case and had caused her a great deal of stress and inconvenience. However, it appeared from that letter that the claimant was resigned to not receiving any further information and the claimant did not make any application for a postponement. It is also to be noted that immediately after the 24 April PHCM the Claimant had sent to the Tribunal an email in which she expressed a view, not aired at the preliminary hearing, that she doubted that any further information would be provided, or if it was, she had no confidence that it would be 'useable.' She therefore requested that the Tribunal should relist the final hearing as soon as possible. In fact it had been at that morning's PHCM.

In the claimant's witness statement she invites the Tribunal to draw an inference as to why the requested information had not been provided.

Of course, in the event the Tribunal were informed on the first day of the hearing that some additional statistical information had been provided on the preceding Wednesday and we have made reference to that in paragraph 4 above.

6. **The composition of the Tribunal**

Within the order made by Employment Judge Little on 13 September 2016 it was noted that that Judge would not be a member of the Tribunal which heard the claim on its merits. This did not result from a request by one or both of the parties. Instead it was of the Judge's own volition. The rationale (not stated in the order) was that the same Judge had on 23 June 2016 made a deposit order against the claimant. However, it seems due to oversight this hearing had been listed with Employment Judge Little presiding. When this was discovered there was insufficient time to draw it to the parties' attention and seek their comments before the first day of the hearing and so it was raised on that day. I explained to the claimant that the Tribunal's Rules of Procedure which had applied up to 2004 prohibited a Judge who had conducted a deposit hearing from subsequently hearing the case on its merits. Nevertheless, it had been the practice of Employment Judge Little to avoid hearing a case where these circumstances applied, if possible. The Judge went on to explain that on

reflection, and as it was permitted in the current Procedural Rules, he saw no reason why he should not continue to hear the case with the lay members.

However, the Judge was anxious to canvass the views of the parties and in particular the claimant as a litigant in person. The Judge explained that he would not be offended if there was an objection and time was offered to the claimant so that she could have a discussion with her friend, Mrs Woodhouse, and decide what to do. However, without hesitation Mrs Stephenson explained that she had no objection to Employment Judge Little being part of the Tribunal and Mr Lewis had no objection either.

7. **The Relevant Facts**

There has not been any significant dispute concerning the relevant facts – at least the background facts.

7.1 The claimant began her employment as a trainee Probation Officer with what was then the National Probation Service on 14 October 2002. Prior to that the claimant had worked in Social Services and for a brief period she had worked in HR Administration for the Transport Executive.

7.2 The claimant underwent a two year training course and achieved a Diploma in Probation Studies and a Bachelors Degree in Community Justice.

7.3 In October 2004 on qualification the claimant was issued with a new statement of employment particulars (the original 2002 statement is at pages 118-120) and the 2004 statement is at pages 121-124. Under the heading “Conditions of Service” it was noted that those were generally as laid down by the National Negotiating Council for the Probation Services (“NNC”). The statement noted that copies of those conditions were available in the workplace. In addition there were local conditions of service. This part of the statement also includes the following:

> “Your grade and salary are as stated in the letter of appointment and as specified on your pay advice. Subject to satisfactory service your salary will rise by annual increments to the maximum of the scale.”

7.4 The claimant began at the bottom of band 4 on the pay scale. The 2004 statement does not stipulate what the “annual increments” will actually be, nor does it give any indication as to when the claimant would or might reach the top of the scale (or band).

7.5 In a letter from the National Probation Service to the claimant which apparently was undated but which she received on 10 November 2006 the claimant was informed of the outcome of the Job Evaluation exercise which had been carried out in respect of her job which was described as “probation officer based at Doncaster”. The claimant had been placed (or remained) in pay band 4. Details of the claimant's new salary, post assimilation were given. What was described as a development point – used to determine incremental progression on assimilation – was given

as SCP (Single Column Point) 92, and the new SCP itself as SCP 74. This letter is at page 125 in the bundle.

In explanatory notes which it is assumed were enclosed with that letter there is a paragraph which is headed "Applying Incremental Progression" (see page 126). This explains that once the new SCP has been determined incremental progression would take place. The number of incremental points to be advanced depended on where the new SCP lay in relation to the development point. A table set out the various options. This depended on whether the new SCP was below, on, or above the development point. Because the claimant's new SCP was below her development point the table indicated that the number of increments advanced per year would be four. By reference to the heading to the notes this was in respect of the 2006 pay award. The claimant contends that the effect of this document was that it would now only take seven years for the claimant to get to the top of the band. That, of course, assumes that for the remaining seven years there were four increments per annum. In the event, that proved not to be the case. Neither the pay award implementation letter nor the explanatory notes said anything about how long it might take an individual to get to the top of the band.

7.6 A salary review in 2007 contained a revised scheme for pay progression. This is described in a document entitled "NNC Pay and Conditions of Service Modernisation Proposal Document" which begins on page 150. In the recital to that document it is noted that the parties to it (Probation Boards Association, National Probation Directorate and two unions) had worked together to develop a fair and transparent pay and conditions structure which had the confidence and support of employees, employers and trade unions, and which met equal pay for work of equal value criteria, recognising that pay can be any benefit in cash or conditions (see page 151). Pay progression from 1 April 2007 would be three pay points per annum if the employee's SPC was below the development point. Again the claimant was in that position (see page 157). Another relevant document is "Guide to the Implementation of the new pay and grading structure and review of salaries in 2006/2007", which begins at page 194 in the bundle.

7.7 The modernisation proposal document also made provision for a situation where an employee's service was unsatisfactory, in which case increments could be withheld. That is introduced at paragraph 4.10 on page 158. Paragraph 4.11 provides various safeguards which would apply to pay progression. Whilst on the face of it that might suggest that those were safeguards with regard to pay progression generally, we are satisfied that the proper construction of that document is that it means safeguards in the context of pay progression being withheld because of performance issues. The claimant had referred to one of the bullet points within paragraph 4.11 which provides that pay progression could not be deferred unless there has been a prior discussion, but it is clear that that is in the context of an employee where there are concerns about performance in terms of knowledge or skill. Of course no-one has ever suggested that the claimant's performance was in any unsatisfactory.

7.8 On 21 February 2007 the claimant was issued with a further statement of employment particulars and a copy is at pages 128-132. The employer is now described as the South Yorkshire Probation Board. Under the heading of "Salary" the following paragraph appears:

"Subject to satisfactory performance, annual increments are paid to those employees with not less than six months' service on 1 April each year until the maximum point of the scale is reached."

7.9 From 1 April 2008 there was a pay award of 2% and from October of the same year confirmation was given that progression on incremental points would continue as before and accordingly the claimant moved up three pay points. This is documented, for instance, in an NNC circular dated 12 November 2008 at pages 219-220.

7.10 In or about June 2010 the Chancellor of the Exchequer announced a Public Sector pay freeze whereby pay awards for civil servants (which is what the claimant was by now) were limited to 1% of the annual pay bill. In consequence of that, from April 2010, and for the remainder of the time which is material for this claim, the claimant received an annual pay award equivalent to one incremental pay point. The respondent concedes that the claimant has a contractual entitlement to annual increments, and it describes a pay award as including that contractual incremental progression, which everything else being equal, may or may not be accompanied by another element of pay award, such as performance related progression or a non consolidated award. So the respondent's position is that the claimant is contractually entitled to an increment but not any particular number of points, but she is not contractually entitled to any other form of pay award. The Respondent says that because of the pay freeze and on the basis that one pay point was worth approximately 1%, that is why there were 1% per annum pay awards from 2010 onwards.

7.11 We believe that the claimant may not necessarily have been aware of this distinction (increment/pay award) – which is not to criticise her. Confusion may well have been caused by what the respondent accepts was a pattern of late payments of the 1%. The confusion to which we refer is reflected in the way that one of the unauthorised deduction from wages issues was described in the September 2016 order – that was whether a payment which the claimant received in or about March 2016 and which was described, she said, as a 1% salary increase, was in fact the 2015 incremental progression payment (see page 69 in the bundle).

7.12 In evidence Mr Paskins explained the delay in making the annual incremental award on the basis that it was bound up in negotiations as to whether there would be a greater pay award, those negotiations being conducted with the relevant unions. However, when the award was made (which unsurprisingly was never more than the incremental 1% one point), it was backdated to the due date, 1 April. Mr Paskins also

explained that this practice had now been altered so that from 2017 onwards the 1% was paid on 1 April, as it were "up front", and then such negotiations as were to take place continue thereafter.

7.13 According to the claimant's case, it is the 2010 reduction to one point per annum which leads to her understanding that it would now take 22 years to reach the top of band 4. However, as the respondent points out, the claimant had in fact made good progress during the earlier part of her 'qualified' employment. It also points out that the claimant is not subject to a contractual retirement date and so whilst the claimant's concern is that she will not reach the top of band 4 before she retires, that concern is based upon her intention to retire at 66 when she receives her state pension. Everything else being equal, the claimant could continue to work beyond her 66th birthday. The respondent also points out that it is, and would be, open to the claimant to apply for a promotion to take her to a higher pay band altogether.

7.14 Confirmation that the 1% increments continued throughout the relevant period can be obtained from such documents as the NNC's letter to its members of 1 February 2012 (see page 236) which describes the salary settlement for 2011/12 to be one pay point to eligible employees in bands 3-6 as at 31 March 2011.

7.15 In May 2012 the claimant availed herself of a scheme known as "Flexible Retirement" whereby she received a lump sum on account of her pension and reduced her working hours. However, in March 2014 she reverted to her full-time hours.

7.16 On 1 June 2014 a restructuring of Probation Trusts came into effect. It is the respondent's case that the result of this was that employees of those Trusts were from that date transferred to either one of the newly created Community Rehabilitation Companies ("CRCs") or the newly established National Probation Service ("NPS"). Further, it is the respondent's case that it was to the NPS which the claimant was transferred. As we have noted above, the claimant says that she was not aware of this transfer and the respondent has not been able to show us any letter which might have been sent to employees such as the claimant to notify them of this change. As we have also noted, there are relevant statutory provisions – the Offender Management Act 2007 and related documents, that we need to consider when determining whether we have jurisdiction to entertain that part of the equal pay complaint that relates to what the respondent contends was the separate employment which ended in June 2014, thereby triggering the time limit referred to in section 129 of the Equality Act 2010.

7.17 We understand that the claimant raised a grievance on 3 June 2015 broadly about the issues which are now the subject matter of this claim. However, we have not actually seen the grievance or any related documentation.

7.18 Clearly, whatever the outcome of that grievance was, it was unsatisfactory as far as the claimant was concerned because on 4 November 2015 the claimant presented her claim to the Employment Tribunal. Mrs Woodhouse, the claimant's colleague, commenced a claim on the same basis at that time, but that claim has not proceeded.

8. **The Relevant Law**

Indirect Age Discrimination

8.1 Section 19 of the Equality Act 2010 defines indirect discrimination as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) It puts, or would put B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

8.2 Section 19(3) defines the relevant protected characteristics as including age and sex.

Comparators

8.3 Section 23 of the Act provides:-

> "(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

Time Issues – Indirect Discrimination

8.4 Section 123 of the Act provides that proceedings on such a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. However, the section goes on to provide that conduct extending over a period is to be treated as done at the end of the period.

Equal Pay

8.5 Section 66 of the Act defines the sex equality clause as follows:-

> "(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
>
> (2) A sex equality clause is a provision that has the following effect –
>
> (a) If a term of A's is less favourable to A than a corresponding term of B's is to be B, A's term is modified so as not to be less favourable;
>
> (b) If A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term."

8.6 Section 64 explains that in the following definitions B will be a comparator of the opposite sex to A.

8.7 Section 69 describes the material factor defence. It is in these terms:

> "The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –
>
> (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
>
> (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim."
>
> The effect of subsection (2) is that, subject to justification, the defence will fail if the factor is in itself indirectly discriminatory on the grounds of sex.

Burden of Proof (in relation to Indirect Discrimination and Equal Pay)

8.8 Section 136 of the Act provides that:

> "If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the Court must hold that the contravention occurred…but subsection (2) does not apply if A shows that A did not contravene the provision."

Time Limits – Equal Pay Complaint

8.9 These are governed by section 129 of the Act and will depend upon the type of case involved. In a "standard" case" – that is one which is not a concealment of incapacity case, the claim may not be brought after the

end of what is described as the qualifying period. The qualifying period in a standard case is the period of six months beginning with the last day of the employment.

Unauthorised Deduction from Wages

8.10 The relevant statute here is the Employment Rights Act 1996. Section 13 provides:-

"An employer shall not make a deduction from wages of a worker employed by him unless –

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) The worker has previously signified in writing his agreement or consent to the making of the deduction."

8.11 Both parties have referred us to cases which deal with various aspects of the claim, and rather than summarising those at this point in our reasons we will deal with them in our conclusions set out below – at least where they are relevant to our decision.

9. The Parties' Submissions

Both parties had carefully prepared written submissions and neither side wished to add to those submissions orally. There was the discussion concerning the putative transfer and ending of one employment which we have described in paragraph 4 above. We now summarise those respective written submissions:

9.1 Claimant's Submissions

9.1.1 The claimant began her written submissions by reminding us that her complaint was that she had realised she was working alongside male probation officers who were doing like work but who were earning significantly more money than her because they were being paid at the pay band maxima having reached the top of the band 4 pay scale within ten years of qualifying.

9.1.2 Under the hearing "Unlawful withholding of wages" the claimant reiterated her interpretation of the various changes made to the pay agreements and her contention that in November 2008 the respondent had reneged on the 2006 agreement. The claimant contended that as clause 7 of her 2004 statement of employment particulars referred to "annual increments" (as in plural) that indicated more than one increment per year.

9.1.3 The claimant reiterated that in recent years the increment had been, as she put, withheld but then subsequently offered as a pay award several months later – albeit backdated.

9.1.4 The claimant would not in her calculation reach the top of the scale by the time she was eligible for state pension at the age of 66.

9.1.5 The claimant complained that whilst the direction of the Chancellor of the Exchequer that public sector pay awards should not exceed 1% had been upheld within the Probation Service, there had been other public sector employees who had benefitted from pay awards and she gave politicians – presumably Members of Parliament – as an example. The claimant believed that the respondent was deliberately misinterpreting the Chancellor of the Exchequer's requirement – they had paid 1% as a pay award but in doing so had failed to pay the contractual increments. The claimant suggested that, by backdating what had been described as a pay award, employees had been misled into thinking that their contractual incremental progression had been paid. The claimant noted that as of 1 April 2017 the contractual increment had been paid in that month.

9.1.6 The claimant described this pay practice as discriminatory (although this is the section dealing with an unauthorised deduction from wages) and that it was a continuing act.

9.1.7 Under the heading of "equal pay claim" the claimant contended that her four male comparator probation officers had had more favourable contracts as they had progressed to the top of the band 4 pay scale within ten years post qualification, having received what the claimant described as "the contractual automatic annual incremental progression year on year". That had been progression at three points per year and the claimant suggested that because that had been happening for at least ten years it had become custom and practice. In addition, the comparators had during the same period of time also received consolidated and non consolidated pay awards and in due course would have a greater pension pot than the claimant. The claimant contended that the comparators had benefitted from the different terms which had been offered to them. The claimant was now precluded from the additional consolidated and non consolidated pay awards given to the comparators which placed her at a particular disadvantage when compared with those comparators.

9.1.8 The claimant accepted that some difference in pay due to length of service was appropriate, but that had to be proportionate and equitable. The claimant asserted that it was indirectly discriminatory in respect of both sex and age. She went on to refer to the case of **Cadman v Health and Safety Executive** where length of service was held to be an indirectly discriminatory criterion.

9.1.9 The claimant also referred to the case of **Crossley v ACAS**. She had referred to that in her witness statement at paragraph 37, and

at pages 291-292 in the bundle there is a commentary on that case – which appears to be a first instance Employment Tribunal decision dating from 2000. The commentary appears to be by Reid Business Information Limited and in the copy in the bundle the claimant has drawn attention to the passage which reads:

"The Tribunal held that the pay system was unlawful as it maintained the general difference in pay between those with longer service, who were predominantly male, and those with shorter service, predominantly female."

9.1.10 Under the hearing "Indirect sex discrimination" the claimant explained that the basis of this complaint was that the respondent had a pay policy which no longer allowed for automatic pay progression and that put women at a particular disadvantage when compared to men. The claimant went on to refer to recruitment trends in the Probation Service which she said showed a significant shift towards more females than males being employed. A situation emerged accordingly whereby males were clustered around the top of the pay scale in proportion to females who were placed lower down the pay band. We should add that we have not received any statistical evidence of what the recruitment trends in the Probation Service might be. The claimant acknowledged that evidencing that assertion had proved difficult due to what she described as the respondent's failure to provide reliable statistical data in a timely manner despite having been issued with an order. She contended that the data which had been provided initially was confusing and meaningless and that the data provided subsequently had proved to be inaccurate and therefore unreliable.

9.1.11 Noting that the respondent had conceded that the claimant's four comparators were paid at the pay maxima, the figures which the respondent had provided only showed three males at the top of the pay band. The claimant in her submissions stated that she was aware of at least six males (it is unclear whether she means six additional males) who are at the pay maxima and potentially more who are based in other locations within South Yorkshire. We should add that the Tribunal is unaware who those six are (other than the four comparators if they are included); still less are we aware of any others at different locations in South Yorkshire. The claimant's assertion remained that men were disproportionately clustered at the top of band 4 and the claimant invited the Tribunal to draw an adverse inference as to why the information which she had been requesting since February 2016 had subsequently proven to be inaccurate and therefore unreliable.

9.1.12 The claimant disagreed with the evidence given by Mr Paskins that the application of the pay policy in 2010 had been necessary for the retention of staff. She disagreed because probation posts

had not been made redundant since that date and recruitment continued.

9.1.13 Under the heading of "Indirect age discrimination" the claimant contended that pay practices within the Probation Service had not allowed for automatic pay progression. The claimant contended that her case was not dissimilar to that of **Homer v Chief Constable of West Yorkshire Police**.

9.1.14 The claimant disagreed that the 'underpin' arrangements in respect of pensions would negate any disadvantage to her. That was because underpin had been built in to ensure that there was no detriment to those who were within ten years of retirement, and that was not relevant to the claimant's case which was based on the fact that there would be reduced pension contribution into her fund and so any underpin would be negligible.

9.1.15 The claimant concluded that what she described as the 22 year length of service required to reach the top of band 4 was not justifiable.

9.1.16 The claimant then went on to deal with the TUPE transfer point. In fact it should be noted that the respondent is not suggesting there was actually a TUPE transfer but rather something which was akin to a TUPE transfer. In any event the claimant accepted that in June 2014 she had transferred from the Probation Trust to the newly formed National Probation Service but contended that that was under the umbrella of the Ministry of Justice and that her continuity of service had remained. As far as time issues were concerned, the claimant contended that in respect of equal pay, indirect age discrimination and indirect sex discrimination there had been a continuing failure to pay her the same as a male comparator. Failing that the claimant wished the Tribunal to take into account that she had not been able to secure union support. The union had encouraged her to await the outcome of pay negotiations. The claimant had become aggrieved in 2015 when she realised that colleagues close by were earning nearly £5,000 more than herself per annum and she had submitted a grievance. She had then pursued the matter as a litigant in person.

9.1.17 We should add that in the latter part of the trial bundle there are copies of various cases or commentaries on cases which the claimant has not referred to in her closing submissions. These include **Wilson v Health and Safety Executive**; **Tyne and Wear Passenger Transport Executive v Best**; an anonymous case referred to in a bulletin issued by Thompson Solicitors and an unreported first instance judgment of the Liverpool Employment Tribunal in the case of **Mort & others v Commissioners for HM Revenue & Customs**.

9.1.18 Further we should add that on 31 July 2017 (therefore post our hearing) the claimant sent an email to the Tribunal in which she said that having had some time to reflect on the proceedings she now wanted some other matters to be considered by the Tribunal. The first was that the respondent had introduced new documentation on the first day of the hearing – the statistical analysis – and that on the last day had made the suggestion that the claimant was the subject of a TUPE transfer. On the latter point we repeat the caveat about what the respondent actually contends. Further as we have already noted, the respondent had been contending that there was a transfer type time issue at least since it amended its response in October 2016. Whilst, as Mr Lewis pointed out on the first day of the hearing, that was not referred to in the List of Issues agreed at the 13 September 2016 preliminary hearing, that is perhaps unsurprising as the amended pleading to which we have referred did not arrive until the following month. Accordingly, whilst we accept that the claimant as a layperson may not have realised the significance of it, we do not think it is fair to suggest that the transfer/time issue was only raised by the respondent on the last day of the hearing.

9.1.19 In her email the claimant went on to contend that as she believed the raw data to have been inaccurate and unreliable, so too was the analysis which counsel had prepared based upon it. Further, the claimant contended that the respondent suggestion that she could have sought promotion was totally irrelevant. The case was about her current grade of probation officer, the role that she had trained to do. If she had wished to work in a management capacity she would have elected to apply for that role.

9.1.20 The claimant also reminded us that her work experience in an HR Department had been limited to an administrative post of nine months where she had been simply updating a filing system. Finally, the claimant reminded us that, as she had let us know during the course of the hearing, despite being a probation officer she had never worked in the court team and therefore her knowledge of the general process of a court was limited. The claimant concluded her email by suggesting that the respondent had introduced new issues at the last minute in order to gain advantage.

9.1.21 As it appeared that the claimant had not sent a copy of this email to the respondent, the Tribunal took steps to do this and invited the respondent to make any further observations it felt necessary. This it did in the Government Legal Department's letter of 25 August. As will be seen from our own observations above, we accept the Respondent's position.

9.2 Respondent Submissions

Indirect Age Discrimination

9.2.1 In his written submissions Mr Lewis dealt first with the complaint of indirect age discrimination. In terms of whether the respondent applied a provision, criterion or practice, Mr Lewis contended that all the respondent had done was introduce a change to its existing pay policy, in relation to incremental pay progression, and that took effect from 1 April 2011. Referring to the authorities of **ABN AMRO Management Services Limited & Another v Hogben** and **Edie & Others v HCL Insurance BPO Services Limited**, Mr Lewis contended that a change in the policy would not in itself amount to a PCP.

9.2.2 Turning to the question of the comparator pool, in the first instance that was a matter for the claimant. However, the Tribunal were not bound to adopt the suggested pool and could reject it if it was considered to be artificial or arbitrary. Mr Lewis also referred us to the recent Supreme Court judgment in the cases of **Essop v Home Office** and **Naeem v Secretary of State for Justice** where the Court had drawn attention to the guidance given in the Equality and Human Rights Commission Code of Practice on Employment 2011 which stated:

"In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively."

9.2.3 Mr Lewis stated that that meant that all workers affected by the PCP in question should be considered. A comparison could then be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. It was not permissible to include only some of the persons affected by the PCP for comparison purposes. Identifying the PCP would generally also identify the pool for comparison.

9.2.4 Although he felt that the claimant's case on the appropriate pool was not entirely clear, it had been recorded in the List of Issues as being a comparison between the probation officers who qualified in 2004 and at that date were aged 46 or over (the disadvantaged group) to be compared with probation officers who on qualifying in 2004 were aged 46 or under (a correction to the typographical error in the written submissions which referred to "over") – these being the advantaged group.

9.2.5 Mr Lewis contended that this could not be a valid pool. By artificially seeking to introduce a specific start date into the equation the result was that only some of the persons affected by

the PCP were included, and that was something which in **Essop** it was held there was no warrant for doing. Nor, in Mr Lewis' view, was it permissible for the claimant to compare herself with the four male probation officers also relevant for her equal pay claim. Those individuals had benefitted from a more generous incremental pay policy for several years prior to the claimant's employment starting, with the result that there were clear material differences (which section 23 of the Equality Act 2010 stated there must not be for the purposes of an appropriate comparison). Moreover the change to the pay policy in April 2011 had not affected them as they had reached the top of the pay band well before that time.

9.2.6 Next, assuming that a PCP was found and subject to the respondent's observations on the correctness of the pool, the Tribunal would need to consider whether the PCP put the disadvantaged group at a particular disadvantage in comparison with the advantaged group. There was little guidance in case law as to how a Tribunal was to determine whether a particular disparate impact was sufficient, although Mr Lewis did refer to paragraph 4.2 of the EHRC Code.

9.2.7 In terms of particular disadvantage it was understood that the claimant contended that the PCP caused the disadvantaged group two types of particular disadvantage – less annual pay and being precluded from reaching the top of the pay scale before retirement with the consequent adverse impact on pension. In relation to lower annual pay, Mr Lewis contended that there would be no actual difference in annual pay as between the two groups who, both having qualified in 2004, would continue to progress up the pay scale in accordance with the version of the policy then in operation. Accordingly from April 2011 onwards both groups, irrespective of their age, would have advanced by one pay point each year, meaning that it took both groups the same period of time to reach the top of their band. Whilst the claimant might consider that it was unfair that her four male comparators had been able to progress when more generous pay progression was provided for, that was not the appropriate comparison to make for an indirect discrimination complaint.

9.2.8 In any event, on the basis of the available statistical data (at pages 289F-M) it was adequately clear that older probation officers (those over 46) in band 4 had, as a matter of fact, higher average pay than their younger colleagues in the same band. That was so even if the Tribunal disregarded those who had already reached the top of the pay band and so were not affected by the 2011 change. The statistics also showed that older band 4 probation officers were in fact more likely in general to be clustered around the top of the pay band, and Mr Lewis referred us to table 8 on page 289E. Therefore the respondent contended

that the claimant could not show sufficient or any statistical basis for her argument that older workers were paid less.

9.2.9 In relation to pension disadvantage, Mr Lewis repeated his argument that unfairness in relation to colleagues who had started in earlier cohorts was not an apt comparison. However in any event the claimant had not called any evidence, statistical or otherwise, on the effect of the alleged PCP on the pension entitlement for either group. Further, the alleged disadvantage could not be adequately linked to the protected characteristic of age because other factors would come into play, including an individual's preferred retirement age, particularly bearing in mind that the respondent did not impose a mandatory retirement age. Members of the older group could also seek promotion and finally, members of the disadvantaged group benefitted from the advantage of the underpin arrangement that was not available to the younger group.

9.2.10 It followed that the respondent contended that the alleged PCP did not put the disadvantaged group at an identifiable or sufficient disadvantage for the purposes of section 19.

9.2.11 In terms of establishing personal disadvantage, there was none between the claimant's two chosen groups.

9.2.12 In relation to personal disadvantage concerning pension this was premised on the contention that the claimant would not reach the top of her pay band before she retired because of the PCP; however, this would in fact be determined by her chosen retirement date. Whilst the claimant's case was that she will not reach the top of the band before she retired at the age of 66, as there was no mandatory retirement age nor any organisational expectation, the claimant's retirement age would be her personal choice. It would be that decision rather than the alleged PCP that would prevent her from progressing further up the pay policy and from reaching the maximum.

9.2.13 Turning to the question of justification, the respondent's primary position was that it did not need in the circumstances to discharge its burden of proving objective justification. However, if it did need to the respondent contended that the change could readily be justified. The legitimate aim had been described in the amended response as the need to balance the ability to continue to award probation officers with an incremental annual pay rise in recognition of the difficult and valid role they undertake, and thereby retain those vital employees; set against the significant reduction in public money available to run that vital service and remunerate its employees in the light of the significant downturn in the economic climate from 2010 onwards. In paragraphs 32 and 33 of his written submissions Mr Lewis described the legitimate

aim in greater detail. We were invited to accept fully Mr Paskin's evidence on those matters.

9.2.14 In terms of proportionality it was contended that the April 2011 change was both an appropriate and a reasonably necessary means of achieving the legitimate aim. Because of the public sector pay freeze the only practicable way in which the respondent could honour its contractual obligation to probation officers that their salaries would rise by annual increments was to make the change that was put into effect in April 2011. It was immaterial that different measures with different aims could have been introduced, and the question remained whether there were more proportionate ways of achieving the specific aim of the measure in question. Government policy on public sector pay imposed significant limits on the respondent's realistic options, and in practice the respondent could not unilaterally amend contracts of employment.

9.2.15 Next in relation to the indirect age discrimination complaint, Mr Lewis turned to the question of jurisdiction. As the alleged PCP had been introduced in 2011 but the claimant had not presented her claim until November 2015, could the claim be regarded as in time? The respondent did not accept that there had been discrimination extending over a period. Instead it was contended on the authority of **Sougrin v Haringey Health Authority** that the respondent's decision to implement the change was a one off act, albeit one with continuing consequences. If, therefore, the claim was ostensibly out of time the issue arose as to whether it would be just and equitable to extend time. We were referred to the guidance given in the case of **Robertson v Bexley Community Centre**. The claimant had conceded in cross examination that she was aware at all material times of her right to raise a grievance and to bring proceedings in the Employment Tribunal, and that she felt that the problem with pay progression had been from 2010 onwards. Mr Lewis also referred to what he described as the claimant's experience operating in an HR role (however, as the claimant explained in her written submissions and as amplified in her subsequent email, we accept that her only involvement with HR was in a short-term administrative role).

Indirect Sex Discrimination

9.2.16 The respondent's position was that the claimant, having brought an equal pay complaint, could not also pursue a stand alone indirect sex discrimination complaint about pay. Mr Lewis refers in his written submissions to the relevant sections in the Equality Act 2010 which have that result. Nevertheless Mr Lewis accepted that it was necessary to set out the respondent's position on indirect sex discrimination in case that was required in the context of the material factor defence regarding the equal pay complaint. Here

Mr Lewis repeated his earlier submissions in relation to whether there was the alleged PCP.

9.2.17 In relation to the comparator pool, the claimant's case was that the disadvantaged group was a pool of female probation officers employed since 1999, and that the advantaged group were her four male probation officer comparators: Messrs Ullah, Harley, Taylor and Lockington. There was a clear and marked material difference, most obviously because the claimant was seeking to compare a group of female employees employed since 1999 with a group of male employees all of whom had been employed since well before 1999. Despite the relatively small difference between the parties as to such matters as the four comparators' start dates, it was accepted that all four comparators had started employment before 1999 and they had all reached the top of band 4 several years before the alleged PCP was introduced in 2011. Accordingly the comparators benefitted from a significantly different pay progression regime, one which had been in operation for several years before anyone from the claimant's comparator group had started to work for the respondent. It was not just that the comparators had longer service; it was the time at which they happened to have started that service. The claimant was seeking to adopt a highly selective and artificial pool for comparison. Moreover, the four males had not been affected by the change in 2011 because they had already reached the top of the pay band.

9.2.18 In any event Mr Lewis' written submissions go on to consider the question of establishment of a group disadvantage for the claimant's group of female probation officers. Mr Lewis contended that from the claimant's own selection of that group it was clear that the difference in annual pay had nothing to do with sex and everything to do with the date on which the four comparators happened to start their employment with the respondent. Further, if those four males had been female they would have benefitted in exactly the same way because of their start dates. In fact it was the respondent's case that numerous female colleagues with similar start dates to those males had benefitted in exactly the same way.

9.2.19 Mr Lewis went on to note that the claimant contended that recruitment trends over the past 15-20 years in the Probation Service showed an increase in female employees to that of males, and that by reference to her male comparators there was the suggestion that males were clustered at the top of the band 4 pay scale. Mr Lewis did not accept this on the basis of the available data. It appeared that approximately 17 band 4 probation officers were male, which equated to approximately 15%. Table 5 on page 289D showed a relatively even spread of men across the various pay points within band 4. Further, only three (which would equate to 18%) of people at the top of the band were men, so that the corollary was that the overwhelming majority of employees at the

top of band 4 were in fact female (82%). Mr Lewis noted that the claimant contended that there were four men or an even greater number at the top of band 4. If it was four then no significant statistical difference was made to the analysis above. Insofar as the claimant contended that there were more than four men she was either mistaken or wrong, and had not proved her case. The data shown on page 289 of the bundle indicated that the overwhelming majority, some 70%, of those with longest service, that is over 20 years at band 5, were female; whereas 25% of those with least service (up to 12 years) were male. The claimant had not proved any statistical or other basis for asserting that female employees as a group earned significantly less than men.

9.2.20 In terms of establishing personal disadvantage, Mr Lewis contended that the claimant could not do this because of the invalid comparator pool.

9.2.21 Finally, the respondent repeated its justification argument if it was necessary to do so, and also contended that in any event the Tribunal did not have jurisdiction because of time of presentation.

Equal Pay

9.2.22 The submissions note that it was agreed that the claimant was doing like work to that of her four male comparators and that she was paid less than them. However, it was contended that there was a material factor unrelated to sex behind that state of affairs. The pay which the claimant and her comparators received was determined by their pay band and their particular position on it. The comparators were paid more than the claimant because they were at the top of the band. The reason that they were at the top of the band was because of what Mr Lewis described as "happenstance" that led them to starting their employment with the respondent at an earlier time when swifter and more generous pay progression was available. Moreover, the comparators each had substantially longer service than the claimant. The material factor was genuine.

9.2.23 Mr Lewis accepted that the Tribunal needed to consider whether the material factor was itself tainted by sex. Clearly on Mr Lewis' submission it was not directly discriminatory. On the question of indirect discrimination, Mr Lewis relied upon his earlier submissions on that subject. The claimant could not show that she and persons of the same sex doing equal work to the claimant were put at a particular disadvantage when compared with persons of the opposite sex doing equal work to the claimant's. No causative link could be demonstrated between the claimant's sex and the fact that she was paid less than her named comparators. In the absence of a sex taint it was not necessary for the Tribunal to consider the question of special justification, although if it did we were invited to accept the evidence within the

bundle and Mr Paskin's evidence that the respondent had conducted a genuine and comprehensive job evaluation assessment which had been used as the basis for the 2006 modernisation programme.

Mr Lewis's comments on the authorities referred to by the claimant

9.2.24 In relation to the **Cadman** case the Court of Justice had affirmed that recourse by an employer to the criterion of length of service was appropriate to obtain the legitimate objective of rewarding experience, and that an employer did not have to establish specifically that recourse to that criterion was appropriate as regards a particular job unless the worker had provided evidence capable of raising serious doubts in that regard. However, if there was a job classification system based upon an evaluation of the work to be carried out which was used for determining pay there was no need to show that an individual worker had acquired experience during the relevant period.

9.2.25 In relation to the **Wilson** case the Court of Appeal had held that the "serious doubts" test was only of relevance before trial, in other words as a ground for strike out. At trial, claims involving a length of service criterion were to be approached essentially in the same way as any other equal pay claim involving indirect discrimination, so that the burden was on the claimant to show disparate impact and only if that was established would the burden shift to the employer to either explain or justify the difference.

9.2.26 Mr Lewis went on to refer to a case not mentioned by the claimant (**Secretary of State for Justice v Bowling** which he had provided a copy of to us) where the EAT had held that a salary point scale applied by the Civil Service amounted to a good material factor defence. It was the salary scale which explained the difference in pay between the claimant and her comparator. It continued to explain the differential throughout the claimant's employment, and in that case there was no reason to suppose that there was any sex taint in the application of the salary scale. A continuing difference would generally be lawful as long as it was explained by the operation of the pay scale and there was no discrimination in the initial decision. The EAT had said that that would remain the case even if the employee's subsequent experience in the job meant that the man's initial advantage as a result of his qualifications and experience had been entirely wiped out by the woman's personal development in the role.

9.2.27 Mr Lewis then addressed the case of **Homer v Chief Constable of West Yorkshire**. Mr Lewis contended that that case could be distinguished because it was materially different from the claimant's case. Mr Homer was not relying on a PCP that his employer had changed its policy and nor was he seeking to

compare himself with people who had worked under the old policy. Instead he was complaining that a new policy was discriminatory.

9.2.28 Mr Lewis went on to mention the two first instance Employment Tribunal judgments which the claimant referred to, noting that as such they would not be binding on this Tribunal. In any event the claimant had not provided a full report of the **Crossley** case (the Tribunal have not been able to locate a full copy either). From what Mr Lewis could glean from what he believed to be an online news article about the **Crossley** case there was nothing to suggest that ACAS had used a job classification system based on evaluation of the work to be carried out so as to determine pay. The pools appeared to be different too.

9.2.29 Finally Mr Lewis mentioned the **Mort** case where the claimant had provided a copy of the Employment Tribunal's judgment, but he considered that that case did not assist the claimant, particularly bearing in mind that the claimant's complaints in that case had failed.

Time point in relation to the equal pay complaint

9.2.30 Here Mr Lewis contended that the complaint was time barred insofar as it related to any alleged loss before 1 June 2014. That was based on a contention that the claimant's employment had transferred to the National Probation Service as of that date under a statutory staff transfer. Mr Lewis accepted in his oral submissions on this point that technically that was not a TUPE transfer, but he contended that it was analogous to one and so the position was as it had been in the case of **Gutridge & Others v Sodexo Limited**.

Unauthorised deduction from wages

9.2.31 The respondent's position was that the payment received by the claimant in or about March 2016 which was described as a 1% salary increase, was payment of the 2015 incremental progression payment – made retrospectively. The payment had not been withheld or deferred in the context of the NNC Pay and Conditions Modernisation Proposal document (p.159). That was only to apply in circumstances where an employee's performance was considered to be in question, which was not the case with the claimant.

9.2.32 In relation to the broader issue, the respondent's position was that the claimant had always been paid correctly in accordance with her terms and conditions of employment in that she was always paid an increment. There was no contractual provision as to what the specific increment would be. The claimant's contention that as the word "increment" was used in the plural in the contract that

meant she was entitled to receive more than one pay point was fatally flawed from a legal point of view. On a proper construction it could not have that meaning. Other words had been used in that clause in the plural, for instance "salaries", but that did not mean that the claimant was to receive more than one salary. The question was what a reasonably informed and objective reader of the clause would consider to be its proper meaning.

9.2.33 As matters stood and because payment had been made "up front" in April 2017, all payments due under the contract of employment were up-to-date.

10. **The Tribunal's Conclusions**

Indirect Age Discrimination

10.1 *Does the Tribunal have jurisdiction?*

10.1.1 This question arises because of the provisions in the Equality Act 2010 which provide that a complaint such as indirect discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. However, the Tribunal is given a discretion to extend time if it thinks it is just and equitable to do so. If the conduct complained of extends over a period it is to be treated as being done at the end of that period, and so time will run accordingly. All these provisions are contained in section 123 of the Act.

10.1.2 In this complaint the act which Mrs Stephenson complains about is the new pay policy (or change to an existing policy) introduced in 2010 and taking effect from 1 April 2011 onwards. She also complains about the ongoing consequences of that change.

10.1.3 We first need to decide whether time begins to run from the date of implementation (in which case the claim would have been presented out of time, everything else being equal) or whether the correct analysis is that the claimant complains about conduct extending over a period, in which case that conduct is ongoing with the result that the claim presented as it was on 4 November 2015 was in time.

10.1.4 The respondent contends that we should find that the case comes into the former category and in support of this proposition they rely on the case of **Sougrin v Haringey Health Authority [1992] IRLR 461**. This is a Court of Appeal decision which approved an earlier EAT decision in the case of **Amies v Inner London Education Authority [1977] ICR 308**. In the latter case the EAT had drawn a distinction between a continuing act (or in the current language "conduct extending over a period") on the one hand and the continuing consequences of a non continuing act on the other.

In that case the discriminatory act was appointing a male teacher to be departmental head in preference to a female teacher, which had the ongoing consequence that the female teacher, Ms Amies, was paid at a lower rate than she would have received if she been appointed departmental head. In **Sougrin**, the claimant was complaining about a grading exercise which resulted in an ongoing loss of wages. The judgment of the Court of Appeal was that that grading decision had been a one off act albeit with continuing consequences, with the result that the claim had been presented out of time. It was accepted that if the policy being complained about was overtly discriminatory the outcome would be different.

10.1.5 As Mrs Stephenson is complaining that the policy was indirectly discriminatory and on the facts we have found, we conclude that the correct analysis is a one off act with the result that time runs from April 2011. On that basis, and even allowing for a modest extension of time whilst ACAS early conciliation was being conducted, it is clear that the claim has been presented in excess of four years out of time.

10.2 *Would it be just and equitable to extend time?*

10.2.1 On this question the respondent relies upon the case of **Robertson v Bexley Community Centre [2003] IRLR 433** where, in the judgment of Auld LJ it was pointed out that time limits were exercised strictly in employment cases and that when Tribunals considered their discretion to extend time on just and equitable grounds there was no presumption that they should do so unless they could justify failure to exercise the discretion. To the contrary, a Tribunal could not hear a complaint unless the claimant convinced it that it was just and equitable to extend time with the result that exercising the discretion would be the exception rather than the rule.

10.2.2 We instruct ourselves that it is permissible for us to consider the test set out in the Limitation Act 1980 at section 33 (see **British Coal Corporation v Keeble & Others [1997] IRLR 336**). The key question is relative prejudice having taken into account all the relevant circumstances of the case which include the following matters:-

- The length of and reasons for the delay;
- The extent to which the cogency of the evidence is likely to be affected by the delay;
- The extent to which the party sued has cooperated with any requests for information;

- The promptness with which the claimant acted once she knew of the facts giving rise to the cause of action;

- The steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action.

10.2.3 In the circumstances of the claimant's case the delay of over four years clearly was a considerable delay. However, we need to consider the reasons for it. That includes, in our judgment, the uncontested evidence that whilst she approached her union at an early stage, the union advised a "wait and see" approach rather than giving the claimant positive advice about steps that she could take herself. The claimant has not been able to afford legal advice. We discount the respondent's suggestion that her brief involvement in the world of HR – in the context of a short-term administrative position – imparted to the claimant sufficient knowledge or experience so as to permit her to speedily proceed to enforce her rights. Whilst the claimant has criticised the respondent for failing to provide statistical data to her, we do not consider that to be relevant to the issue we are currently dealing with. That is because the claimant only began making her requests in February 2016 – some months after she had commenced the proceedings. It is not therefore a case where she was waiting for documentation in order to decide whether or not to proceed.

10.2.4 Despite the long delay, we conclude that the cogency of the evidence has not been affected. There has been no significant factual dispute in any event. In terms of the availability of documentation, it would appear that the only person potentially prejudiced by the delay has been the claimant herself in terms of statistical evidence which she had hoped to obtain to support her case. It is not a case where the respondent has been prejudiced in its defence by the lack of documentation it would seek to rely upon.

10.2.5 In terms of prejudice overall, we take the view that a decision to extend time would only prejudice the respondent to the extent that it is required to defend a complaint that otherwise would have been struck out. It is not and has not been prejudiced in the way in which it has actually had to defend the complaint. The reality, of course, is that we are considering this point not as a preliminary issue but at the conclusion of a two day hearing. The prejudice to the claimant in not allowing an extension of time would be far greater as she would have no opportunity to have this significant part of the claim tested on its merits. Accordingly our decision is that it would be just and equitable to extend time to the date of actual presentation of this claim on 4 November 2015.

10.3 *Did the respondent apply a provision, criterion of practice?*

10.3.1 The respondent contends that the claimant is not complaining about the pay policy as such but rather a change to that policy which took effect from 1 April 2011. Relying on the authorities of **ABN AMRO Management Services Limited v Hogben (UKEAT/0266/09)** and **Edie v HCL Insurance BPO Services Limited [2015] ICR 713**, the respondent says that this is not enough.

10.3.2 Having considered those authorities and taking into account the nature of Mrs Stephenson's complaint, we find that she is not complaining about the change per se or in isolation, but rather she is complaining about the new policy effected by that change. We observe that in the **Hogben** case the distinction was drawn between the change itself and the new substantive policy brought about by the change. In our judgment it is that new substantive policy which Mrs Stephenson complains about, and so we conclude that the respondent did apply that provision, criterion or practice, being the revised pay policy, with effect from 1 April 2011.

10.4 *The appropriate pools for comparison*

10.4.1 The claimant's case is based upon a comparison between a disadvantaged group described as probation officers who commenced employment (or more accurately qualified) in 2004 and at that date were aged 46 years or over, and an advantaged group of probation officers who commenced employment (or qualified) in 2004 who were aged 46 years or under.

10.4.2 The respondent contends that this cannot be a valid pool because the claimant has artificially sought to introduce a specific start date into the equation with the result that the pool includes only some of those affected by the PCP.

10.4.3 Insofar as the claimant may be seeking to compare herself with her four male equal pay comparators, the respondent says that that is not apt as those four individuals benefitted from a more generous incremental pay policy for several years before the claimant's employment began with the result that there are clear material differences, and section 23 of the Equality Act 2010 is infringed.

10.4.4 As we have noted, the respondent directs us to the guidance given in the Supreme Court's judgment in the combined cases of **Essop v Home Office** and **Naeem v Secretary of State for Justice [2017] UKSC27**. Lady Hale giving the judgment of the Court noted that in the case of **Allonby v Accrington and Rossendale College** Sedley LJ had observed that identifying the correct pool was not a matter of discretion or of fact finding but of

logic. Lady Hale went on to approve the advice given in the EHRC Code of Practice which we have referred to when noting Mr Lewis' submissions, but it is worthwhile to repeat it here:

"In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively."

10.4.5 This meant, said Lady Hale, that all the workers affected by the PCP in question should be considered. That meant that by identifying the PCP that would usually also identify the pool for comparison.

10.4.6 We have also considered the case of **Cheshire and Wirral Partnership NHS Trust v Abbott & Others [2006] ICR 1267** to which Mr Lewis directed us to support the proposition that whilst it was for the claimant to identify her comparator group, the Tribunal had to ensure that the chosen group was not an artificial or arbitrary one. Further as Mr Lewis reminds us, the guidance given in **Essop** is:

"There is no warrant for including only some of the persons affected by the PCP for comparison purposes."

10.4.7 We find that is what the claimant has sought to do by introducing into the definition of each pool the start or qualification date of 2004. The true position was that the PCP (the changed pay policy) applied to all probation officers, not just those who began their employment or qualified in 2004. Accordingly logic directs that the disadvantaged pool should be probation officers aged 46 or over when the PCP was applied, and the advantaged group, those probation officers who were aged 46 or under when the PCP was applied.

10.5 *Group Disadvantage*

10.5.1 Our focus here must be directed at what we have found to be the correct pools rather than those pools put forward by the claimant.

10.5.2 Dealing first with the alleged disadvantage of less annual pay, we find that we are reliant on the statistics which have been provided. As recorded in paragraph 5 above, the claimant's quest for statistical information has been fraught and clearly has caused her great frustration. Bearing in mind that the Tribunal cannot "step into the arena", we believe that by granting (on their merits) the Claimant's applications for specific disclosure, the Tribunal has done all that it can to assist the Claimant. That has not resulted in provision of the type of data which the Claimant hoped she would receive. Whilst it is not an ideal situation, we take the approach that we have to decide the case on the material before us,

including such statistical information as we now have. It would be an extreme step to draw the inference which the claimant invites us to which, if we are permitted to paraphrase, is that the respondent has deliberately failed to disclose statistics or other documentation that it has with the intent of depriving the claimant of a proper opportunity to have her claim adjudicated on its merits. Even if we were to make that inference (which we do not) the claimant would then be inviting us to simply accept her assumptions or suspicions unsupported by documentary evidence. That is an approach we cannot adopt.

10.5.3 Having carefully considered Mr Lewis' written submissions at paragraph 21(a)-(d) and having considered the statistical information within the bundle, we accept the respondent's argument and the conclusion which Mr Lewis urges us to reach, namely that the claimant cannot show any or any sufficient statistical basis for her argument that older workers are paid less than younger workers because of the PCP.

10.5.4 In relation to the disadvantage alleged in relation to pension and referring to paragraph 22 of Mr Lewis' submissions, we are forced to agree that the claimant has not called any evidence statistical or otherwise, as to the effect of the PCP on the pension entitlement of either group. We agree also that the alleged disadvantage will have been influenced by other factors than age, not the least an individual's preferred retirement age.

10.5.5 As we find no group disadvantage the question of personal disadvantage becomes irrelevant. Because we have found the indirect age discrimination complaint to fail for the reasons expressed above, we do not see the need at this stage to deal with the question of justification. However, that is a topic which we will return to when considering the equal pay complaint.

Equal Pay

10.6 *The Tribunal's jurisdiction to deal with the equal pay complaint insofar as it relates to alleged loss arising prior to 1 June 2014*

10.6.1 We have summarised the statutory provision governing time limits for equal pay complaints in paragraph 8.9 above. To that summary we make the further observations set out below. As we understand the claimant's case it is that no time issue arises because she has continuity of employment, by which we understand her to mean that she has been in one employment since 2002 and that employment continues. The equal pay time limit only begins to run from "the last day of the employment", and so if the claimant is correct no time issue would arise.

10.6.2 However, the respondent contends that the employment which the claimant had with South Yorkshire Probation Trust (from 1 April

2010 onwards) ended as of 1 June 2014 at which stage they contend that there was in effect fresh employment because of an alleged transfer to the National Probation Service (the claimant having been employed by the NPS in her first eight years as trainee and then qualified probation officer). In particular, the respondent relies upon the decisions in **Gutridge & Others [2009] IRLR 721** and **Powerhouse Retail Limited v Burroughs [2006] IRLR 381**.

10.6.3 In the **Powerhouse** case the House of Lords held that where there had been a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations, time began to run under the equivalent provision in the Equal Pay Act to the one which we are now dealing with in the Equality Act for the purposes of a claim against the transferor. The head note describes the rationale as being that the purpose of the time limit is best achieved if the period of six months runs from the end of the claimant's employment with the transferor to whom the liability belongs, rather than the end of her employment with the transferee. Giving the judgment of the House of Lords, Lord Hope of Craighead rejected the appellant's argument that the equality clause implied at that date by the 1970 Act transferred to the transferee in a TUPE situation.

10.6.4 It was noted that the then relevant limitation provision did not refer to contract and instead used the word "employment" to indentify the moment which started time running. It was not significant that the Transfer Regulations had come into force after the enactment of the 1970 Act. Where the claim was in relation to the operation of an equality clause relating to (in that case) an occupational pension scheme before the date of the transfer, then the relevant employment was with the transferor. The Court of Appeal in the **Gutridge** case held that the **Powerhouse** decision was not restricted to occupational pension schemes but was of more general application.

10.6.5 Wall LJ found himself in complete agreement with observations made by Elias J in the EAT where that judge had said:

"In my judgment, the true position after the transfer is that the claimant is enforcing a contractual right which is derived from the equality clause operating with respect to the transferor. She could enforce against the transferee such terms as were enforceable against the transferee. The issue is, therefore, what is the time limit for enforcing his particular contractual right…In short, in my judgment, regulation 5(2) (of the TUPE Regulations) transfers two kinds of relevant liabilities with respect to the equality clause. First, there is the liability for what was done (or not done) by the transferor prior to the transfer. Liability for such acts is transferred under TUPE. However, the time limit for enforcing that claim, is, following **Powerhouse**, six months from the date of the transfer.

The transferee stands in the shoes of the transferor, but this does not alter the time limits applicable to those claims."

10.6.6 On the basis of the principles enunciated in these cases and summarised above we would have no hesitation in accepting the respondent's case on the time issue if what had occurred on 1 June 2014 was a relevant transfer under the TUPE Regulations.

10.6.7 However, and although the respondent's case was somewhat vague and unsupported by documentation or authority until late in the day, the additional question which we now have to determine is whether the relevant provisions in the Offender Management Act 2007 and the secondary legislation made under that Act (the Offender Management Act 2007 (Probation Services) Staff Transfer Scheme 2014) produce the same result.

10.6.8 Schedule 2 to the 2007 Act permits the Secretary of State to make a scheme for the transfer of employees of a local probation board to a relevant person or so as to become employed in the Civil Service of the State (see paragraph 5).

10.6.9 Paragraph 6 of the second schedule applies to such an employee who is to be transferred and does so in these terms:

"(2) The contract of employment is not terminated by the transfer and has effect from the date of transfer as if originally made between the employee and the transferee.

(3) Where the employee is transferred under the scheme –

(a) All the rights, duties and liabilities of the transferor under or in connection with the contract of employment are by virtue of this subparagraph transferred to the transferee on the date of the transfer; and

(b) Anything done before that date by, or in relation to, the transferor in respect of that contract or the employee is to be treated from that date as having been done by or in relation to the transferee."

10.6.10 In paragraph 7 of the second schedule the following appears:

"(4) Where the employee is transferred under the scheme –

(a) All the rights, duties and liabilities of the transferor under or in connection with the contract of employment are by virtue of this subparagraph transferred to the Crown on the date of the transfer; and

(b) Anything done before that date by, or in relation to, the transferor in respect of that contract or the employee is

> to be treated from that date as having been done by or in relation to the Crown."

10.6.11 It is to be noted, therefore, that there is here the use of very similar language to that contained in the TUPE Regulations at regulation 4 which describes the effect of a relevant transfer on contracts of employment.

10.6.12 We observe also that in the transfer scheme itself it is explained that a staff transfer scheme is required because transfers from Probation Trusts to the NPS are transfers of administrative functions between public administrative authorities and so do not fall within the Transfer of Undertakings (Protection of Employment) Regulations 2006. In our judgment that does not alter the fact that the Probation Trust by whom the claimant was employed prior to 1 June 2014 was a different legal entity to the Crown through the Secretary of State by whom she was employed after that date.

10.6.13 We have not been referred to any authorities, that is to say decided cases, on this point and we assume that that means there are none. However, on the basis of the statutory provisions which we have analysed above, we accept Mr Lewis' argument that the transfer effected by the 2007 Act and 2014 scheme has precisely the same consequences as did an actual TUPE transfer in the cases of **Powerhouse** and **Gutridge**.

10.6.14 We therefore conclude that whatever the merits of the equal pay complaint (as to which see below) the Tribunal do not have jurisdiction to determine the complaint relating to a breach of an equality clause for the period prior to 1 June 2014.

10.6.15 Whilst we have considered it just and equitable to extend time for the indirect age discrimination complaint, we have no power to extend the time limit for an equal pay complaint.

10.7 *Does the Tribunal have jurisdiction to hear a "stand alone" complaint of indirect sex discrimination with regard to pay?*

10.7.1 In short the answer to this question is 'no'. We had expressed our provisional view on the first day of the hearing and this is recorded in the latter part of paragraph 1 towards the beginning of these reasons. What is said there is now our considered view.

10.7.2 However, we accept that we do need to consider whether there has been indirect sex discrimination when determining the merits of the respondent's material factor defence in the equal pay complaint – as to which see below.

10.8 The merits of the equal pay complaint

Having regard to our finding in respect of jurisdiction, we are now only dealing with merits in relation to the claimant's employment since 1 June 2014. As we have noted, the respondent concedes that the claimant and her four male comparators did, and continue to do equal work - that is like work. The respondent also accepts that the claimant is paid less than those four comparators. The remaining issue for the Tribunal to determine is whether the respondent can succeed in its material factor defence. Can the respondent show that the difference in pay is because of a material factor which does not involve treating the claimant less favourably, because of her sex, than the treatment of the four comparators? As part of this exercise we also need to determine whether any material factor is in itself indirectly discriminatory because of sex.

10.9 The material factor

The respondent contends that the material factors are that the male comparators are at the top of the band by reason of them starting their employment with the respondent at an earlier date than the claimant's start date. As a result, the comparators were able to benefit from the quicker and more generous pay progression that was then available. In addition each male comparator has substantially longer service.

We note that, taking the date these proceedings were commenced as the benchmark, the claimant had 13 years' service whereas, taking the dates which they give in their own witness statements (some of which are disputed by the respondent) Mr Ullah had slightly over 20 years' service; Mr Taylor over 23 years; Mr Lockington 22 years and Mr Harley (although we do not have a witness statement from him) apparently in the region of 21 years' service.

On this basis we accept the respondent's contention that the difference in pay between the claimant and her comparators ostensibly has nothing to do with her sex.

10.10 Is the factor indirectly discriminatory?

This is a consideration which section 69(2) of the Equality Act 2010 requires, and it is of course the claimant's case that there is indirect sex discrimination The claimant contends that what she refers to as "recruitment trends" in the Probation Service show a significant shift towards more females than males being employed which, she says, leads to a situation in which males are clustered around the top of the pay scale in proportion to females who are placed lower down the pay band. However, we note that the claimant has not put any evidence before us to support her contention about recruitment trends. The claimant goes on to explain – as we are well aware – that evidencing that assertion has proved to be difficult due, says the claimant, to the respondent failing to provide reliable statistical data. We have already commented on that situation. In her submissions the claimant goes on to

say that she is aware of at least six males at the pay maximum and potentially more. However, we have no information as to who these males are or any of their details.

Against what we conclude is the claimant's mere assertion, such statistical information as we do have before us supports the respondents case. In terms of recruitment trends, Mr Lewis analyses the statistics which are in the bundle at paragraph 67 of his written submissions, and on the evidence before us we find that that analysis is correct. Mr Lewis sets the context as there being relatively few men working as band 4 probation officers who are spread relatively evenly across the various pay points (see table 5 page 289D). Table 5 also shows that only three (or 18%) of people at the top of the band are men, so that the overwhelming majority of employees – some 82% at the top of band 4 – are in fact female. Further, the table on page 289 establishes that, put into percentage terms, some 70% of those with service over 20 years at band 4 are female, whereas 25% of the those with least service (12 years or less) are male. That in the context of males being represented in band 4 at 15%.

The claimant has cited the cases of **Cadman** and **Wilson**. We note, as Mr Lewis observes in paragraph 85 of his written submission, that the ratio of **Wilson** is that in a case involving a length of service criterion the approach should be essentially as it is in any other equal pay complaint involving indirect discrimination. If disparate impact is shown the employer needs to justify that. In the case before us, we find that there are not facts from which we could decide in the absence of any other explanation that indirect discrimination had occurred. Further, as we have found no sex taint in the material factor there is no requirement for the respondent to show “special” justification.

For all these reasons we find that the equal pay complaint fails.

10.11 <u>The unauthorised deduction from wages complaint</u>

The subject matter of this complaint is the incremental payment and specifically the payments which were due in 2015 and 2016.

What was the nature of the payment which the claimant received in or about March 2016?

On the basis of the explanation given by the respondent’s witness, Mr Paskins (which was not really challenged by the claimant) we find that the respondent has always acknowledged that the claimant has a contractual right to annual increments, albeit not increments at any particular specified amount. Further, and although rather confusingly it may have been described as a 1% salary increase, we are satisfied that what the claimant actually received in March 2016 was the backdated incremental progression.

Does the state of affairs described above mean there was an unauthorised deduction from wages?

The statement of employment particulars which was issued to the claimant in 2007 (pages 128-132), when reiterating the contractual entitlement to annual increments, adds that those will be paid on 1 April each year. It follows that when 1 April 2015 arrived but the annual increment did not there was an unauthorised deduction from the claimant's wages. It follows that the claimant was entitled to bring such a complaint when she commenced these proceedings in November 2015 because that increment had still not been paid. However when, during the course of these proceedings, that payment was made (in March 2016 backdated to April 2015) there was no longer a deduction. Receipt of that payment was confirmed by the claimant during the course of a case management hearing on 13 September 2016.

In these circumstances, whilst clearly there was a *delay* in making the 2015 payment, that is not a matter which gives rise to a complaint of an unauthorised *deduction*. It was in those circumstances that the claimant in June 2016 had been invited to withdraw the complaint. Quite properly the claimant pointed out that she now had an identical problem with regard to the payment which should have been made in April 2016, and an amendment was allowed so that that complaint could be brought.

Was there an unauthorised deduction of the increment due on 1 April 2016?

In similar fashion to the 2015 payment, it would have appeared that there was a deduction up to the point when the sums due were actually paid. Accordingly, as of the date of the amendment being allowed no payment of the April 2016 increment had been received. Nevertheless that was remedied when, in December 2016, backdated payments were made to April. It follows that as of that date there ceased to be a deduction and the claimant no longer had the need of the protection afforded by section 13 of the Employment Rights Act 1996. Whilst the claimant may have been inconvenienced and annoyed by the delay, no remedy for those matters is provided by section 13. In short, no complaint in law can be brought under section 13 about delay or “temporary deduction” if by the time the matter falls to be determined by a Tribunal all due payments have actually been made.

We were told that the payment due in April 2017 (about which there was no complaint before the Tribunal in any event) had in fact been paid on that date.

We should add that we do not accept the claimant’s contention that the reference in terms of employment to “increments” means that the claimant had a contractual right to more than one increment per year. Insofar as the plural is used in the 2004 contract, that document also refers to “salaries” in the plural, but clearly it was not intended that the claimant should receive more than one salary. In the 2007 statement of

employment particulars the reference to annual increments, again in the plural, must be read in the context of that clause going on to refer to those payments being made *each* year. It is 'increments' in the plural, therefore, because more than one will be received during the course of the employment if it goes from year to year. It cannot mean that more than one increment was receivable *each* year as a contractual right.

We also find that the provisions in the Pay and Conditions Modernisation document (p.159), which prohibit pay progression being deferred until there has been a discussion, only apply to a case where such deferment is being considered in the context of unsatisfactory performance (see clause 4.10 on p.158) and so have no application to the complaint before the Tribunal.

For all these reasons we find that the deduction from wages complaint fails.

Employment Judge Little

Date 5th September 2017