Case Number: 2205086/2006

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr P J Bloxham	**AND**	Freshfields Bruckhaus Deringer

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 9 to 17 July 2007 (in Tribunal)
18 and 19 July 2007 (in Chambers)

CHAIRMAN: Mr T P Ryan

MEMBERS: Mr D Buckley
Mr J Bartell

Appearances
For Claimant: Mr T Pitt-Payne, Counsel
For Respondent: Ms D Rose, QC
Ms J Mulcahy, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's complaint of discrimination on the grounds of age is not well-founded and is dismissed.

Thomas Ryan
CHAIRMAN
9 October 2007
.....
JUDGMENT SIGNED BY CHAIRMAN ON

.....
JUDGMENT SENT TO THE PARTIES ON

10/10/07
.....
AND ENTERED IN THE REGISTER

.....
FOR SECRETARY OF THE TRIBUNALS

THE EMPLOYMENT TRIBUNALS

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Claimant	***Respondent***
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Dates of Hearing 9 to 17 July 2007 (in Tribunal)
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REASONS OF THE EMPLOYMENT TRIBUNAL

Introduction

1. By a Claim presented to the Tribunal on 21 November 2006, Mr Bloxham, who had formerly been a partner with the Respondent firm, alleged that as a partner, or alternatively as a former partner, he had been discriminated against by the Respondent directly, or in the alternative indirectly, on grounds of age contrary to the relevant provisions of the Employment Equality (Age) Regulations 2006 ("the Regulations").

2. By its Response, the Respondent disputed jurisdiction by reference to the date or dates when the Regulations or part of them came into force. It disputed factually that it had discriminated on age grounds or by reference to the Claimant's age and asserted in the alternative that any such act was justified.

3. Before the Hearing before the full Tribunal, a number of Case Management Discussions had been held in the course of which it had been directed that the parties prepare an agreed list of issues. This they had done. The issues between the parties are set out in the conclusions of the Tribunal in these Reasons and are not separately set out here for that reason. In addition to those in the agreed list, a further issue was identified in a Case Management Discussion which took place on 21 February 2007 concerning the effect of paragraph 1 of schedule 5 to the Regulations which, it was said: "would require the Tribunal to determine, if it had jurisdiction in such matters, whether the relevant amendments/provisions before the Tribunal in the claim were void under the provisions of paragraph 1 of schedule 5 to the Regulations." The Tribunal has treated that as a further issue and it is described as issue 18 in the list of issues in the Tribunal's conclusions.

4. At the outset of the Hearing and having regard to the fact that there was an extensive agreed list of issues, the Tribunal asked the parties to identify what were the principal issues of fact which it would have to decide. It was confirmed that the areas of fact concerned the issue of justification, namely whether the

Respondent by its actions was seeking to pursue a legitimate aim by proportionate means; whether, as the Claimant contended, the Respondent did not adequately consult with the partnership concerning the amendments provisions that are the subject matter of the complaint; and whether the Claimant was offered a consultancy arising out of the circumstances leading to his retirement or decision to retire, it being the Respondent's case that the Claimant was not forced to choose to remain a partner on less advantageous terms as to retirement allowances because he could have retired at the time he did under the older more favourable retirement allowance provisions and taken a consultancy which would have carried him up to his intended date of retirement, which was the following year, and thus substantially negate the effect of the choice in financial terms as the Respondent argued.

Evidence

5. The Tribunal received evidence from the following witnesses: the Claimant, formerly a partner in the Respondent firm and, on behalf of the Respondent firm, from Mr Guy Morton, the joint senior partner; Mr Peter Jeffcote, the managing partner; Mr Perry Noble, a partner and co-practice group leader for the finance practice; Mr Bob Charlton, a partner and the acting departmental managing partner for the finance practice; and Mr Ted Burke, a partner and chief executive of the Respondent. A further witness, Mr Feargus Mitchell, a partner in Deloittes Human Capital Group, had provided a witness statement, which was accepted by the Claimant, and he was not called to give oral evidence although his statement was read by the Tribunal.

6. The Tribunal received a substantial volume of documentation. In addition to the agreed list of issues annexed to the Reasons, there was an agreed statement of facts. At the outset of the Hearing both parties submitted chronologies; the Claimant in addition provided a cast list. Both parties put in opening skeleton arguments and the Respondent, shortly after the evidence commenced, also submitted a note as to the effect of schedule 5 of the Regulations. The Tribunal was provided with 17 bundles of documents – 12 chronological bundles, a bundle containing the various versions of the Memorandum of Terms of Partnership ("MTP"), two bundles of inter-parties' correspondence, a bundle of witness statements, and a pleadings bundle comprising the pleadings, questionnaires, case management orders and the agreed documents referred to separately.

Findings of Fact

7. The Tribunal made the following findings of fact. The findings set out here comprise the agreed statement of facts in the terms in which they were agreed, together with additional facts as found by the Tribunal relevant to the issues in the case.

8. The Respondent is a very well-known international law firm. It is a partnership governed by English law. As such it is not a separate legal entity. The partners together carry on business as principals and as agents for each other. The

partners together own the business, share in its profits and are liable jointly, with all the other partners, for all the obligations of the partnership.

9. As at 1 April 1971 the Respondent had 21 partners. It expanded very substantially to the point where as at 29 March 2006 it had 511 partners - that is both equity partners and people held out as partners such as principal consultants. Both equity partners and principal consultants were remunerated on a lockstep basis described hereafter. As at January 2007 Freshfields had over 2,400 lawyers practising in 28 offices around the world. As at 1 May 2007 the Respondent had a total of 472 persons held out as partners including equity partners, principal consultants and 30 fixed-share partners.

10. The Claimant, Mr Bloxham, was born on 12 March 1952. He joined Freshfields in 1977 shortly after qualifying as a solicitor. His team was known within the firm as the R&I group (shorthand for Restructuring and Insolvency). This was part of the Respondent's finance department. The Claimant led at the R&I group until 2005 when he handed over the leadership of the group to his partner, Mr Shandro, in anticipation of his intended retirement in March 2007 at the age of 55. The Respondent recognised that the Claimant had made a substantial contribution to the firm during his career. He was described by Mr Noble in an e-mail to Mr Morton in May 2006 as having been "a loyal and wonderful contributor to the firm's success."

11. During the period with which this case was particularly concerned, Mr Noble was a joint practice group leader for the finance department albeit he was based in Hong Kong until July 2006. In those circumstances the day-to-day management of the finance practice in London was largely in the hands of Mr Charlton, the departmental managing partner. The management structure of the Respondent at the relevant times comprised two joint senior partners who are elected every five years. From January 2006 they were Mr Morton and Mr Mettenheimer – previously they had been Mr Mettenheimer and Mr Salz. The senior partners were assisted by a chief executive and a managing partner. From October 2001 Mr Jeffcote has been the managing partner; from 1 March 2006 Mr Burke has been the chief executive. Since 1990 the Respondent's principal policymaking body has been the council which consists of the senior partners, 15 elected members, the partnership secretary and ex officio members. The council supervises the management of the firm and meets at least quarterly. The papers submitted to the council and its minutes are distributed to all partners and are available on the partners' intranet known as Partnerweb.

12. Throughout the period of the Claimant's partnership, the Respondent operated a 'lockstep' system for sharing profits between active partners. Each partner is allocated a certain number of profit points upon becoming a partner and those points increase each year that the individual remains until a maximum is reached. Until August 2000 the maximum points was 40; at that point it was increased to 50. Each partner's share in the profits of the firm is proportionate to the number of points held by that partner. By reference to the lockstep arrangement, the firm's profits for each accounting year are shared between active and retired partners.

13. At all material times Freshfields has been governed by a partnership agreement set out in a document headed Memorandum of Terms of Partnership. The MTP has been amended from time to time. As from 1 April 1971, 21 individuals are named as partners in the MTP. That version of the MTP, read in conjunction with Schedule II, provided for payments described as pensions to be made to partners who had retired because of substantial ill health or incapacity prior to the age of 64. The amount of the payment varied with age; those retiring before 50 received the highest payment and those retiring after the age of 63 and before the age of 64 received the lowest. From 1 April 1974 the MTP listed 23 named individuals as partners and two prospective partners. Clause 5(c)(iii) of the MTP, read in conjunction with Schedule II, made provision for retirement allowances to be paid in certain cases. Schedule II, paragraph 2 provides as follows:

> "A partner who retires on or after his 55th birthday (or, with the consent of the Firm, on or after his 50th birthday) will be paid by the Firm a retirement allowance of one-third of a point for each qualifying year (but with a maximum of eight points) provided that [inter alia] .... if he retires before his 60th birthday, or the 31st March nearest his 60th birthday (whichever be the earlier) his allowance computed as above will ... be multiplied by the appropriate percentage shown in the following table:-
>
> | Age at birthday nearest to retirement | % |
> |---|---|
> | 59 | 93 |
> | 58 | 87 |
> | 57 | 81 |
> | 56 | 75 |
> | 55 | 70 |
> | 54 | 65 |
> | 53 | 61 |
> | 52 | 57 |
> | 51 | 53 |
> | 50 | 50" |

14. With the introduction of Schedule II in 1974, the pension points of retired partners were also taken into account in each year's profit allocation notwithstanding that the retired partners were no longer personally involved in the business and had no capital or other assets at risk. So from that day, Freshfields' aggregate profits each year were divided by the total number of points held by all active and retired partners.

15. Although the maximum number of active points and the maximum number of retired partners' points varied as the MTP was amended over the years, the lockstep arrangement operated by the allocation to a new partner of 20 points and then points accrued year on year at a set rate such that at the time when the Claimant retired the annual increment was 2.5 points and the plateau was therefore 50 points after 12 years as a partner. The accrual rate for pension points was at the rate of 0.5 points a year, leading to a maximum of 10 points after 20 years' service. Thus a pension as provided for by the MTP from 1974 onwards was worth up to 20% of a profit share of an active partner who had reached the maximum number of active points. Up until August 2000 the

maximum number of active points that could be accrued was 40 and, accordingly, the maximum number of pension points was eight. After that date the new maxima of 50 points and 10 points took effect.

16. Schedule II to the MTP was amended with effect from 11 February 1980 and a proviso was added after the table quoted above which stated:

> "Provided that any partner to whose allowance such table would apply may, by notifying the Firm at least one month prior to his retirement, postpone (by a whole number of years not exceeding four) the date from which his allowance will commence to be payable, in which event his allowance will be multiplied by the percentage in the above table appropriate to his age at such postponed date."

17. In general Schedule II was similar in concept and structure to an occupational pension scheme in that it provided for a lifetime pension (referred to as a "retirement allowance") with a two-thirds pension for a surviving spouse. However, there were material differences, for example Schedule II pensions were not paid out of funds set aside by the partners in the course of their careers. Pension rights were secured by way of participation by the retired partners in the annual profits in the firm owned by the active partners. Effectively each year there was one pie, representing the profits of the firm for the period, sliced according to the pension points entitlements of active and retired partners.

18. Some aspects of Schedule II were reminiscent of an occupational pension scheme, there being a threshold age for eligibility to retire for example, actuarial reductions for retirement before the contractual age, and the necessity of consent for retirement before the contractual age. Other aspects were very different. Rights to a pension did not accrue over the years served as a partner. A partner who left the firm below the age of 50 or between the ages of 50 and 54 without consent to retire did not receive any transfer value or the right to any deferred pension. Schedule II rights vested only at the date on which a partner retired in accordance with the terms of the scheme. A significant characteristic of Schedule II was that the cost incurred by one generation of partners in paying the pensions of then retired partners was rewarded by a pension paid to them by the next generation of partners. In that way A's retirement was paid for by generation B and generation B's retirement was paid for by generation C and so on. Such an arrangement requires continuing confidence in the relative stability of cost measured against benefit over a period of decades. Unfairness might occur if one generation paying for the benefits of those already retired could not foresee that they would receive an equivalent benefit when they in their turn came to retire.

19. At the time of the closure of Schedule II in 2006, the event giving rise to the claims in this case, confidence in the scheme had become severely undermined by a growing perception of intergenerational unfairness. Younger partners were having to contribute more than older partners had previously contributed because the number of pensioners was growing due to the expansion of the firm, as described above, and thus a larger proportion of the profits of the younger partners was going to pay retired partners. Secondly, the projections

were that somewhere around 2018 the 10% cap on Schedule II would be reached at which point the value of pension points would decline. That being so, the younger partners would suffer a double disadvantage in that they had paid for those whose pensions were uncapped but themselves would only ever have a prospect of receiving a capped pension. The cap was the provision within Schedule II whereby no more than 10% of profits in any one year could be allocated for the payment of retirement allowances.

20. Under Schedule II the value of a Schedule II payment depended not only on a partner's length of service but also upon his age at retirement. For those who retired on or after 30 April nearest their 55th birthday, a full Schedule II payment of a maximum of 10 points could be obtained. A partner retiring with effect from that date did not require the consent of the partnership council to receive benefits. A partner retiring before that date, that is between the ages of 50-54, required the consent of the council to retire and thus to receive the benefits. In addition, such a partner would suffer a percentage discount determined by reference to his age at the birthday nearest to retirement. That arose by reference to an amendment to the Schedule in April 1983. After that amendment, paragraph 3(i)(a) of Schedule II reads as follows:

> "A partner who retires on or after the 30 April nearest his 55th birthday (or, with the consent of the Firm, on or after his 50th birthday), otherwise than by reason of disability, will be paid by the Firm a retirement allowance of two-fifths of a point for each qualifying year (but with a maximum of eight points), but, if he retires before 30 April nearest his 55th birthday, his allowance computed as above will be multiplied by the appropriate percentage shown in the following table:
>
> | Age at birthday nearest to retirement | % |
> |---|---|
> | 54 or over | 80 |
> | 53 | 75 |
> | 52 | 70 |
> | 51 | 65 |
> | 50 | 60 |
>
> Provided that any partner to whose allowance such table would apply may, by notifying the Firm at least one month prior to his retirement, postpone (by a whole number of years) the date from which his allowance will commence to be payable, in which event his allowance will be multiplied by the percentage in the above table appropriate to his age at such postponed date (but so that the percentage applicable to any allowance so postponed shall not in any event exceed 80%)."

21. Thus a partner who retired at the age of 54 or over with the consent of the council would receive 80% of the full value of his accrued pension points, at age 53 - 75%, at age 52 - 70% and so forth. Those who were aged 50-53 could postpone the date from which the allowance would be payable and thereby erode the discounts and thus, in the case of someone aged 50, ensure that after the postponement 80% of the value of the retirement allowance would be payable rather than 60%. However, nobody under the age of 50 was entitled to retire with a pension at all and nobody in that group aged 50-54, which was referred to for convenience in the proceedings as the "consent group", could

improve their position to the same position as someone who retired at 55 or over, namely whatever steps were taken they would still suffer a discount and receive an entitlement based upon 80% of the partnership points accrued by length of service.

22. Thus in the scheme as it existed between 1974 and 1983 there was a discount of a few percent for each year between the retirement age of 60 and 50 which was said to have been based upon the Fords pension scheme upon which Freshfields had acted for Fords and which discounts were said broadly to reflect the actuarial discounts necessary to take account of the early receipt and the receipt over a longer period of the pension payment.

23. It was not suggested that the discount of 20% suffered by someone retiring at age 54 was said to be economically necessary for actuarial reasons. In cross-examination Mr Jeffcote accepted that the 20% deduction did not have the effect of achieving economic neutrality as between ages 54 and 55 and he accepted the proposition that, taken in isolation, the deduction at 54 as opposed to age 55 was in the everyday sense a penalty. The 20% discount thus provided a severe disincentive to retire before the 30 April nearest to one's 55th birthday. Mr Jeffcote accepted that a retirement thus before 55 would be considered premature retirement and acknowledged that it would be correct that a partner would not be likely to plan to leave at 54 or under without a very good reason to do so because there would be an obvious disadvantage in making that choice, as was put to him by Mr Pitt-Payne. Although the Tribunal heard some evidence about how frequent it was for partners to retire between 50 and 54, the figures were complicated by reason of the later mergers of Freshfields with the German firms, thus giving rise to partners whose relevant ages were in every case three years greater than the UK partners by reason of German retirement provisions. In the light of the concessions by Mr Jeffcote and the obvious disadvantage of retiring at age 54 as against age 55, the Tribunal did not need to consider the numerical analysis over the periods of years in this case. The disadvantage argued for by the Claimant in this case is obvious.

24. The reason for the changes to the MTP in April 1983 was a desire to facilitate the earlier retirement of partners. In November 1982 in a proposal to the partners concerning the changes, it was said:

> "... the Board felt that, if a partner wanted to retire early, it should be made easier for him, by removing the present provision that pension payable by the Firm is reduced if he leaves before he reaches 60.
>
> The Board therefore recommends to the Partnership an amendment to the Partnership Agreement. This would have the effect that a partner who retires after age 55 should be entitled to a full pension, based on his actual years of service up to retirement. If he leaves (with the consent of the Firm) between 50 and 55, his pension will be reduced, although not as sharply as present ...
>
> It is not thought that this change would cause a material increase in cost to the partnership – indeed, there would be a saving if it induces a partner to reduce his 'take' from 40 points to 8 a few years earlier ...."

25. Thus the amendment to the MTP removed the actuarial reduction for partners retiring after the age of 55 and the reduction factors for those aged between 50 and 54 were reduced. This can be shown in a comparative table:

Age as at birthday nearest to retirement	Previous "actuarial" reduction %	Previous allowance as %	New reduction %	New allowance as %
54	(35)	(65)	20	80
53	(39)	(61)	25	75
52	(43)	(57)	30	70
51	(47)	(53)	35	65
50	(50)	(50)	40	60

26. At the same time as this, an additional amendment was made to the MTP to provide that Schedule II could be changed in the same manner as the MTP if there was no-one at the relevant time in receipt of a Schedule II allowance, or if the change had no material adverse effect at the time or prospectively on any-one having the benefit of a Schedule II pension. However, it would remain necessary to obtain the consent of all retired partners or a committee representing them if any change would have a material adverse effect upon their entitlement. Schedule II in its form after 1983 assisted in the retention of partners in their early 50s who were likely to be valuable to the firm as making major contributions to profits and who might be attractive to head-hunters seeking to recruit for other firms. The provisions of Schedule II provided a strong incentive to remain with the firm at least until the partners reached the age of 55. Conversely, the availability of a substantial pension benefit to those between 50 and 54, retiring with the consent of the council, might also assist in easing the departure of those who were unable to contribute fully for whatever reason to the firm's business.

27. Although the reform of Schedule II was considered in the 1990s no decision to that effect was made. The matter came to the fore again in 2002. At a meeting on 12 December 2002, the Partnership Council considered a paper by the Senior Partners concerning the exercise of its discretion in response to requests for consent to early retirement. It was in the course of these discussions that the Partnership Council initiated a review of Schedule II.

28. As a result, in a paper dated 17 March 2003, Peter Jeffcote, Freshfields' Managing Partner, suggested terms of reference for a review of Schedule II. This review would consider: the implications of Schedule II for active and retired partners, taking account of appropriate assumptions relating to growth and profitability; the impact of Schedule II on partner behaviour, and the effect of Schedule II on the Firm's competitive position. On 2 April 2003 it was agreed that Mr Jeffcote would chair a Working Group which would conduct the review and report to the Partnership Council.

29. The Working Group appointed Deloitte Total Reward and Benefits Ltd ("Deloitte") to assist in modelling the Schedule II arrangements and potential alternatives, including demographic and financial projections for each design.

30. The Working Group produced a First Stage Report on the medium and long-term implications of Schedule II as the basis for wider consultation. This report, together with an overview, was sent to the Partnership Council on 19 March 2004. The Partnership Council considered the report on 30 March 2004 and asked the Senior Partners to formulate proposals as to how the review should be taken forward.

31. Between March and December 2004 the management team, guided by the Senior Partners and working with Deloitte, modelled a host of options with the aim of developing a proposal which was sustainable, and which balanced the interests of the different generations of partners. Over a hundred different benefit designs (including variants) were modelled and analysed.

32. A draft paper was considered by the Working Group on 29 November 2004 and submitted, after amendment, to the Partnership Council on 3 December 2004 for consideration on 14 December 2004. This set out three options: maintain Schedule II; modify but retain Schedule II; or terminate Schedule II.

33. In presenting the paper, the then Joint Senior Partner Anthony Salz noted that, if there was no growth in the number of active partners, the 10% cap would apply from 2018 onwards and the value of a pension point would decline thereafter. This meant younger partners would fund pensions of the older generation without the expectation of pensions of comparable value themselves. He also suggested that it seemed out of balance for a partner to earn a pension equal to 20% of his earnings after only 20 years' of service, when he might survive retirement by another 30 years.

34. The Partnership Council agreed that these and other matters had to be seriously considered and that the objective should be to try to find a sustainable model. The possibility of both a term and a lifetime pension scheme should continue to be examined. Any proposal should not be retroactive, and should contain sensitively constructed transition arrangements. At that point, the Partnership Council hoped for implementation of any outcome by 1 November 2005.

35. At its meeting on 6/7 July 2005, the Partnership Council agreed that the consultation paper being worked on should go to all partners. It should provide two options: a modified pension scheme, providing a pension for a limited term, together with a short transition period; or the termination of Schedule II over a defined period. 1 May 2006 was identified as the target date for the new provisions to come into effect. Partners seeking to retire before this date would be able to do so under the existing Schedule II rules. The Partnership Council indicated its willingness to allow those in the Consent Group who might seek to retire to do so during this period. These minutes, like all minutes of the Partnership Council, were distributed to partners by email, and posted on the firm's intranet.

36. On 12 August 2005, consultation papers were sent to the partners worldwide. The papers suggested a median proposal, in which Schedule II would be replaced by a more sustainable scheme (involving a retirement allowance of 7 points for 10 years, followed by 3 points for 5 years) with transition arrangements; or termination (freezing pension points for all partners as at 30 April 2006, with half being paid as a pension for 20 years and the remainder attracting cash payments at the end of the first two years of retirement).

37. In the course of September 2005, 18 consultation meetings were held in the Firm's offices around the world, in which up to 250 partners participated. During these meetings there was almost unanimous agreement that Schedule II was unsustainable, that prompt action should be taken to change it, and that any solution should remove Freshfields' exposure to the risk of retired partners living for longer. No-one suggested during the consultation process that the early retirement reduction for the Consent Group should be revised.

38. Consultation ended on 30 September 2005 and a report was made to the Partnership Council and Schedule II Working Group dated 27 October 2005 for consideration by the Partnership Council on 3 November 2005.

39. A group of older partners, calling themselves the "Grey Panthers", on 20 October 2006 submitted an alternative proposal for the reform of Schedule II, which was intended to afford greater protection to the expectations of the older partners. The Grey Panthers had invited all London partners aged over 45 to participate in their discussions, and had consulted widely with all ages and in other offices. Mr Bloxham had attended some of their meetings, and was involved in their discussions. The Grey Panthers supported reform but had proceeded on less conservative assumptions than the Working Group. Essentially, they proposed a fixed, indexed pension point and a fixed term pension with entitlement to a pension vesting after 10 years of service and the possibility of retirement (without the need for consent) at any age. The Grey Panthers' proposal did not suggest that partners under the age of 55 at the date Schedule II closed should be entitled to the right to retire on a Schedule II pension without the normal discounting arrangements: on the contrary, the proposal accepted that these arrangements would still apply and they also incorporated this condition in their own proposal. The 27 October 2005 report incorporated a detailed summary of the Grey Panthers' proposal.

40. The Partnership Council took careful note of the Grey Panthers' proposal in its debate and concluded that it was not possible to terminate the Firm's pension as there was insufficient backing for this route. It decided, instead, that all efforts should be focused on developing a cost effective ongoing pension scheme based upon the Grey Panthers' proposal (although a less expensive version). This scheme would be introduced on 1 May 2006 and there would be transitional arrangements to allow those over 50 at 30 April 2006 further time to decide whether they wished to retire as of that date.

41. Between 6 November 2005 and 19/20 December 2005, intensive work took place on developing and refining outline terms for the revised median alternative

(which was to become Schedule IIA). High on the list of issues for consideration were the transitional arrangements.

42. On 3 November 2005 the Partnership Council indicated that a transition period might extend to 31 October 2006, but on terms that those retiring after 30 April 2006 accept a 25 year limit to their Schedule II pensions. These conditions were reflected in the Schedule II Term Sheet (as revised following Working Group meetings in November 2005). This version of the Term Sheet was circulated to partners, along with the minutes of the Partnership Council meeting on 24 November 2005.

43. The Grey Panthers met to discuss that Term Sheet and, on 2 December 2005, sent a note to the Working Group making the point that the 25 year limit would, in reality, put partners considering retirement under pressure to make their decisions by the end of March 2006. This was a major matter of concern and they proposed, instead, that partners in the Consent Group should be allowed to retire (by not less than 3 months' notice) at any time prior to 31 October 2006 and take their Schedule II benefits (as accrued at 30 April 2006) without a 25 year limit. This request specifically accepted that such retirements would be subject to consent of the Partnership Council and the applicable Schedule II reductions for the Consent Group.

44. The Working Group took account of these representations, which were echoed in Mr Bloxham's own note of 8 December 2005, and amended the proposal to remove the 25 year limit while suggesting that the transition period should end on 31 July 2006. It was this proposal that went to the Partnership Council on 15 December 2005 for discussion at the meeting on 19/20 December 2005.

45. However, on 16 December 2005, the Grey Panthers sent a note to members of the Partnership Council urging them to decide that 31 October 2006 was the earliest possible date upon which to cut off the right to the old Schedule II (albeit that such a right would be subject, if applicable, to the existing early retirement deductions). These representations were accepted at the Partnership Council meeting on 19/20 December 2005. It was agreed that all partners aged over 50/53 should have until 31 October 2006 to retire (on three months' notice) with their Schedule II benefits as at 30 April 2006. Such retirements would, however, be subject to the requirement for Partnership Council consent and the early retirement discounts.

46. Two further concepts relating to transition were introduced in the latter part of 2005/early 2006. The first of these provided that all service before 30 April 2006 counted double, in terms of pension rights, compared with service after that date. This would be a major benefit to a partner in the position of the Claimant, if that partner chose to take a Schedule IIA pension, as he would receive twice the points over the 25 year term of the Schedule IIA pension compared with a new partner joining on 1 May 2006. The second benefit was that all partners aged over 50/53 at 30 April 2006 would receive an uplift in the value of their pension in the second (15 year) period by reference to their age and length of service as at 30 April 2006. This would also benefit a partner, of similar service to the Claimant, who chose to take a Schedule IIA pension.

47. However, a proposal to allow partners to freeze their entitlement to Schedule II benefits as at 30 April 2006 (subject to the 20% discount) was rejected as giving those partners able to benefit a significant advantage, initially at a cost to all partners and subsequently (once the cap was applied) at a cost to the partners who would retire later with a Schedule IIA allowance.

48. At a meeting of the Partnership Council on 24 January 2006, it was agreed to seek the opinion of Leading Counsel as to whether the Partnership Council had complied with its fiduciary duties to the partnership in relation to the process and substance of the development of Schedule IIA. Instructions to Jonathan Sumption QC included 29 questions drafted by the Claimant, who attended the consultation. A note of Mr Sumption's advice was subsequently made available to all partners. He addressed all of the Claimant's questions during the consultation. In particular, he stated that he did not believe that the length of the transition period, to 31 October 2006, was unfair.

49. At a meeting on 27 February 2006, the Partnership Council completed its review and amendment of the proposal and unanimously approved it for presentation to partners. On 2 March 2006, a proposal for the reform of Schedule II was sent to the partners. This made it clear that partners over 50/53 could elect, by three months' notice, to retire on or before 31 October 2006 and take their old Schedule II entitlement based on their accrual at 30 April 2006. This would be subject to consent and the applicable discount under the Schedule II scheme.

50. The partners voted on the proposal on 29 March 2006. The required vote to pass the proposal was two thirds of all partners. In fact, 442 out of 511 partners voted, ie. 86% of all partners. Of the 442, 400 voted for the proposal, ie. 90% of those voting, or just over 78% of all the partners. This vote also amended paragraph 1 of Schedule II so that, for the purpose of computing all actual Schedule II allowances of retired partners and the 10% cap, all partners retiring after 30 April 2006 (other than partners retiring by 31 October 2006 with a Schedule II pension) and any widow or dependant child of such partner was deemed to have become, on retirement, entitled to the allowances they would have received if Schedule II had continued to apply to them. Accordingly, for each partner retiring after 1 May 2006 who would have received a Schedule II pension had the scheme not been closed, shadow points are created and brought into the calculations of the Schedule II pensions actually payable. The purpose of this amendment was to ensure that Schedule II pensioners did not receive an additional benefit from the reform of the scheme.

51. The new scheme, Schedule IIA, came into force on 1 May 2006.

52. First discussions about offering consultancies to partners choosing to retire by 31 October 2006, in order to secure their old Schedule II terms, took place at the Partnership Council on 24 January 2006. It was decided that, in cases where the loss of an individual partner would be seriously damaging to the Firm, management should be in a position to consider arrangements to allow that person to retire on Schedule II terms but to continue to work as a consultant. However, following indications from a number of partners that they were

planning to retire following the 29 March 2006 vote, there was consideration about widening the class of consultancies to retain the services of more partners than had originally been envisaged. The debate about whether to dilute the strict test, of "seriously damaging to the Firm", in order to retain the services of a larger number of partners, continued for some months. This culminated in a discussion at the Partnership Council meeting on 5/6 July 2006 at which Guy Morton put forward an argument that the second group should be retained as consultants if they were of significant business value to Freshfields (rather than on the basis that their loss to the Firm would be seriously damaging). Mr Morton's argument was accepted. Business cases for those to be retained would be considered by the Practice Committee on 12 July 2006 and the Partnership Council would review these at its meeting on 26 July 2006.

53. In line with outline terms discussed at the Partnership Council on 6/7 July 2006, principal consultants would receive remuneration equal to a maximum of an annual rate of 40 points in the period to March/April 2007 (10 points less than the maximum annual points available to an active partner), reducing thereafter (in most cases) to an annual rate of 25 points. However, in addition to such remuneration, the consultants would also take the benefit of their Schedule II allowance from 31 October 2006. A Term Sheet was finalised on 7 July 2006 and immediately circulated to all Practice Group leaders. On 12 July 2006 the Practice Committee agreed to recommend 16 points-based consultancies. All these were accepted at the Partnership Council meeting on 26 July 2006 (at which outstanding requests for consent to retire with a Schedule II pension were also considered).

54. The Claimant took a close interest in the Schedule II reform process. He was associated with the Grey Panthers' group, and received their communications, including the alternative proposal sent to the Partnership Council on 20 October 2005 and their representations of 2 and 16 December 2005 relating to the transition period. He was involved in the consultation with Jonathan Sumption QC, and also raised numerous questions relating to the Term Sheet distributed on 21 December 2005 and the draft Proposal to Partners of 24 February 2006. Mr Jeffcote replied to these on 8 March 2006.

55. Further, in the period from 8 March 2006 running up to the vote on 29 March 2006, the Claimant sent Mr Jeffcote a further 9 emails raising 30 questions, to all of which Mr Jeffcote responded before the vote.

56. At no point in this correspondence did the Claimant make a positive suggestion as to an alternative basis of reform, save to the extent that he was associated with the Grey Panthers' proposal. The correspondence makes clear that his prime and understandable concern was that he should receive a full Schedule II pension on his retirement on 31 October 2006.

57. On 5 July 2006 the Claimant requested consent to retire from Freshfields under the transitional provisions. On 6/7 July 2006 he became aware of the proposed consultancy terms to be offered to some retiring partners. However, when on 10 July 2006 Bob Charlton forwarded the terms to the Claimant for discussion, the

Claimant dismissed any suggestion that he might be interested in a consultancy post, stating in an email later that same day: "In a word, no".

58. On 26 July 2006, the Claimant sent a note to Freshfields electing to retire from the partnership on 31 October 2006 with a Schedule II pension. This election was accepted the following day, on 27 July 2006.

59. On 10 October 2006, the Claimant served Freshfields with a questionnaire under the Employment Equality (Age) Regulations 2006.

60. On 31 October 2006 Freshfields wrote to the Claimant confirming his retirement from the Firm and outlining the financial arrangements that would apply as a result.

Regulations

61. The following parts of the regulations are material to this case:

1. (1) These Regulations may be cited as the Employment Equality (Age) Regulations 2006, and shall come into force—

(a) subject to sub-paragraphs (b) and (c), on 1st October 2006;

(b) for the purposes of regulation 7 (Applicants and Employees) and regulation 24 (Relationships which have come to an end), in so far as either regulation relates to arrangements for—

...

(iii) the provision of any benefits relating to pensions,

on 1st December 2006.

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

(a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons, or

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

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

(ii) which puts B at that disadvantage

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

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

(3) In this regulation –

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

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

17. (1) It is unlawful for a firm, in relation to a position as a partner in the firm, to discriminate against a person—

...

(d) in a case where the person already holds that position—

(i) in the way they afford him access to any benefits or by refusing to afford, or deliberately not affording, him access to them; or

(ii) by expelling him from that position, or subjecting him to any other detriment.

...

(6) This regulation applies to a limited liability partnership as it applies to a firm; and, in its application to a limited liability partnership, references to partner in a firm are references to a member of the limited liability partnership.

24. (1) In this regulation a "relevant relationship" is a relationship during the course of which an act of discrimination against...one party to the relationship ("B") by the other party to it ("A") is unlawful by virtue of a preceding provision of this Part.

(2) Where a relevant relationship has come to an end, it is unlawful for A—

(a) to discriminate against B by subjecting him to a detriment...

where the discrimination...arises out of and is closely connected to that relationship.

(3) In paragraph (1), reference to an act of discrimination...which is unlawful includes, in the case of a relationship which has come to an end before the date on which the act of discrimination...became unlawful by virtue of these Regulations, reference to an act of discrimination...which would, after that date, be unlawful.

Schedule 5

1. (1) A term of a contract is void where—

(a) the making of the contract is, by reason of the inclusion of the term, unlawful by virtue of these Regulations;

(b) it is included in furtherance of an act which is unlawful by virtue of these Regulations; or

(c) it provides for the doing of an act which is unlawful by virtue of these Regulations.

(2) Sub-paragraph (1) does not apply to a term the inclusion of which constitutes, or is in furtherance of, or provides for, unlawful discrimination against, or harassment of, a party to the contract, but the term shall be unenforceable against that party.

(3) A term in a contract which purports to exclude or limit any provision of these Regulations is unenforceable by any person in whose favour the term would operate apart from this paragraph.

(4) Sub-paragraphs (1), (2) and (3) shall apply whether the contract was entered into before or after the date on which these Regulations come into force, but in the case of a contract made before that date, those sub-paragraphs do not apply in relation to any period before that date.

62. The parties made extensive oral and written submissions. Rather than attempt an inadequate summary here we refer to the principal submissions which relate to the specific issues as part of our statement of our conclusions. Our attention was drawn to a number of authorities and considered them all. Those we found of most assistance are referred to in the context of the conclusions below.

Conclusions

63. We state our conclusions in relation to the issues in the agreed list. The first issues are described as jurisdictional issues and they are as follows:

64. **Issue 1(1):** "Whether the relevant act was the Claimant's election to retire from the Respondent dated 27 July 2006, before the coming into force of the Regulations."

65. The Claimant's argument here was that the relevant act extended over a period which included 1 October 2006 to 31 October 2006 or, alternatively, there was an act that took place on 31 October 2006 - in other words upon the Claimant's retirement taking effect. Mr Pitt-Payne argued that since a retiring partner's schedule to entitlement does not vest until he actually retires, in this case Mr Bloxham had suffered a prospective loss in respect of his Schedule II entitlement which did not crystallise and thus detriment was not suffered or not completed until the retirement actually took effect. He pointed out that until retirement it was open to the Respondent to alter the position. Relying further on regulation 42(4) of the Regulations, Mr Pitt-Payne submitted that it was an act extending over a period including the period from 1 October 2006. He submitted that the case fell within regulation 42(4)(b) and was therefore to be treated as occurring at the end of that period, namely on 31 October 2006.

Alternatively, he argued it fell within regulation 42(4)(c) and he relied upon the Respondent having omitted to take some remedial action. In the further alternative he argued the claim under regulation 17 related to an act that took place on 31 October 2006 when the Claimant's retirement took effect.

66. On this issue Ms Rose submitted that since the Regulations came into force on 1 October and applied only to acts of discrimination on or after that date, if the act of discrimination occurred before 1 October no claim could be brought in respect of the act. The Respondent's submission was that the relevance of that was the Respondent's consent to Mr Bloxham's election to retire which was given on 27 July 2006. Ms Rose submitted that it was at that point Mr Bloxham's cause of action crystallised. However, in making that submission the Respondent relied upon the fact that Mr Bloxham complained about being forced to choose between retiring on 31 October 2006 and receiving a Schedule II pension, or waiting until 30 April 2007 and receiving the less favourable Schedule IIA pension. The date of the choice, it was submitted, was thus the act of discrimination of which complaint was made.

67. In the Tribunal's judgment, the act was not when the Claimant elected to retire from the Respondent. The relevant act in relation to the imposition of the 20% discount as part of the transitional arrangements occurred when that term of the contract between the then existing partners was agreed upon. It is necessary to consider the interrelation of the provisions of regulation 1 and regulation 42 and schedule 5 to the Regulations in the context of the dates when various acts or events occurred. In a later part of these conclusions we attempt to carry out that analysis in order to reach a reasoned conclusion in relation to the combined effects of those matters. At this stage we answer this jurisdictional issue in the negative.

68. **Issue 1(2):** "Alternatively, whether the relevant act took place on or after 1st October 2006, or over a period of time concluding on or after 1st October 2006".

69. For the reasons just given we conclude that the relevant act did not take place on or after 1 October 2006 but was one which took place over a period of time which continued after 1 October 2006.

70. **Issue 1(3):** "In the light of the answers to (1) and (2), whether the Tribunal has jurisdiction to entertain the claim under regulation 17".

71. Again, for the reasons that we have given and because of the interrelationship of the various provisions, we find that the Tribunal has jurisdiction to entertain the claim under regulation 17 in so far as it subsisted between 1 October 2006 when the Regulations came into force and 31 October 2006 which was the date when the Claimant retired.

72. **Issue 2:** "In relation to the claim under regulation 24 of the Regulations: (1) whether this claim relates to the 'provision of any benefits relating to pensions', for the purposes of regulation 1(1)(b) of the Employment Equality (Age) (Amendment) Regulations 2006."

73. On this issue the Respondent argued that payments under Schedule II constitute benefits relating to a pension pursuant to regulation 1(1)(b)(iii) and therefore asserted that since regulation 24 did not come into force until 1 December 2006 the claim in respect of regulation 24 was premature because the Claim was lodged on 21 November 2006.

74. It was common ground between the parties that Schedule II was not an occupational pension scheme as defined for the purposes of regulation 11. Ms Rose submitted that the regulation uses the wider term pension scheme and there was thus no doubt that Schedule II and indeed Schedule IIA fell within the scope of that wider term. In a further argument Ms Rose submitted that regulation 24 did not apply to the complaints made in this case on the ground that regulation 24 does not prohibit discrimination in the way a person is afforded access to benefits after the end of a relationship. It is more a limited prohibition on discrimination which consists of subjecting a person to a detriment or to harassment.

75. The Claimant by contrast argued that the benefits afforded by Schedule II were not pension benefits within the meaning of regulation 1(1)(b)(iii). In making that argument the Claimant relied upon the fact that the drafting of Schedule II refers to retirement allowances save in respect of one individual who was specifically given a pension. It was notable that throughout the events giving rise to the proceedings and the proceedings themselves, the terms 'pension' and 'retirement allowances' were used interchangeably by all the witnesses in the case and all those involved in the correspondence. In his argument Mr Pitt-Payne relied upon a distinction between retirement allowances and pensions, as usually understood, because he said Schedule II gave retired partners a continuing stake in the success of the firm, which was profit-related and unfunded, and retirement allowances under Schedule II fall outside that expression.

76. So far as the argument concerning the confining of regulation 24 to cases of detriment is concerned, Mr Pitt-Payne relied upon the discussion of detriment in Shamoon v Royal Ulster Constabulary [2003] IRLR, 285, HL and argued that it was a term that was wide enough to encompass a situation where a claimant is deprived of an anticipated benefit.

77. Dealing with the last point first, the Tribunal was satisfied that the word "detriment" in regulation 24 is sufficiently wide to cover receiving a lower benefit than one would otherwise have received. The House of Lords in Shamoon describes detriment in terms of being put at a disadvantage. Receiving a lesser benefit than one might otherwise have received would, in our judgment, undoubtedly be considered by anybody to fall within the definition of detriment when considered in the light of the Shamoon "disadvantage" definition.

78. So far as the issue of whether the retirement allowances under Schedule II amounts to a pension is concerned, the Tribunal sought guidance and was told that in the Oxford English Dictionary 'pension' was defined in a number of ways which were either now historical or obsolete. A current definition was given as "an annuity or other regular payment made to a retired employee, servant,

citizen, etc. by right or in consideration of past services, the relinquishment of an emolument etc." The definition there, it seemed to the Tribunal, describes what is meant by pension in a general sense in common parlance. The Tribunal noted the wording of section 1(1)(b)(iii) - the provision of any benefits related to pensions – is not restricted to occupational pension schemes which are covered in regulation 11 and Schedule 2 nor to personal pension schemes which are also referred to in Schedule 2. It follows that if the relevant provisions of Schedule II satisfy a definition of a "pension scheme" in a wider sense than the occupational scheme as defined in the Regulations then the Respondent's argument is correct and the Tribunal must consider the effect of regulation 1.

79. The submission that since the benefits under Schedule II are called 'retirement allowances' rather than 'pensions' they fall outside the scope of the expression "pension benefits" in regulation 1 was a submission we could not accept. The reasons for that use of language were lost in the mists of the Respondent's history and could not now be explained. What was being paid for under Schedule II, whatever it was termed, was, in the general sense, a payment in consideration of past services. The amount of the benefit was related directly to the length of service as reflected in the points-based system by which the benefits were calculated. In those circumstances the Tribunal's answer to the question posed in this issue is simply in the affirmative, namely that this claim does relate to the "provision of any benefit relating to pensions".

80. **Issue 2(2):** "Whether in the light of the answer to (1) the Tribunal has no jurisdiction by reason of the fact that the claim was brought prior to 1st December 2006."

81. The Claimant's entitlement to his Schedule II benefits arose upon retirement on 31 October 2006. At that time the Claimant ceased to be a partner. He could at that point, and subject to any issue of limitation, bring a claim under regulation 17 in respect of any acts of discrimination which occurred while he was a partner. His position is at that point analogous to an employee who alleges, for example that they have been discriminated against on grounds of sex or race in being suspended disciplined and dismissed and who after dismissal institutes proceedings. However the Claimant would have to rely upon regulation 24 and bring a claim as a person who had been in a relationship which had come to an end in respect of any act of discrimination that arose after the relationship came to an end.

82. The Tribunal noted that by regulation 1(1)(b) and the provision of any benefits relating to pensions, the regulations so far, as they related to regulation 7 (Applicants and Employees) and regulation 24 (relationships which have come to an end), did not come into force until 1 December 2006.

83. In those circumstances, accepting as we have that this was a provision of benefits relating to pensions, the Claim presented on 21 November 2006 was premature in so far as it was presented as a claim under regulation 24. The Tribunal noted that no similar deferral of the regulations coming into force occurred in relation to the claim presented by the Claimant as a partner under

regulation 17.

84. **Issue 3**: "Whether, as pleaded in paragraph 8 of the Claimant's claim, a partner retiring under Schedule II prior to 30 April 2006 (and prior to the imposition of the transitional provisions) would receive his full Schedule II entitlement even if his retirement date was 31 October and he was actually still 54 at that time, or whether a partner would be allowed to retire (without consent) only if such retirement was 'on or after' 30 April nearest his or her 55th birthday"?

85. The distinction between these alternative interpretations of the relevant provisions of Schedule II was reflected in the drafting of paragraphs 8 and 8(a) of the Particulars of Complaint attached to the Claim Form. In the Claimant's opening argument for the Tribunal, it was conceded that the construction contained in paragraph 8 was incorrect and it was accepted that the Respondent's case, namely that a partner would be allowed to retire without consent only if such retirement was on or after 30 April nearest his or her 55th birthday, was the correct interpretation. That being so, the issue was withdrawn from the Tribunal's consideration, the Claimant accepting the Respondent's construction of the agreement was correct and the Tribunal has proceeded on the basis throughout that this was the correct interpretation and has not decided this issue.

86. **Issue 4**: "Whether the Respondent offered the Claimant a consultancy (to take effect after his retirement as a partner), or indicated to the Claimant that it wanted him to work as a consultant after his retirement as a partner. If such an offer was made or such an indication was given, what were its terms? Further, if such an offer was made or such an indication was given, did the Claimant indicate that he was, or was not, willing to consider such an arrangement?"

87. The answer to this issue turns entirely upon the facts. The Claimant was offered a consultancy in the sense that the Respondent indicated to him that it wanted him to work as a consultant. It was an offer in that general sense in which non-lawyers may speak of offers. It was not such an offer as could have been accepted by the Claimant such that, upon the Claimant saying "I agree", a binding agreement in law would then have been in existence between the parties. However, it was an offer by partners to a partner who had indicated he wished to retire, and would be considered, the Tribunal was entirely satisfied, by each side in those circumstances to be equivalent to a binding agreement in principle, subject to the Respondent's Council approving the consultancy. Such approval, the Tribunal finds, would have been given. It would have been subject also to the precise details of the terms of the consultancy - in particular whether it was to continue beyond six months and, if so, at what rate of points. The terms of the offer or indicative offer were those set out in the e-mail of 10 July 2006. The Claimant by his responses showed at all times that he was entirely unwilling to accept such an offer and it was indeed for that reason that the Council was not asked to give its approval to the consultancy and why more precise terms were not discussed between the parties.

88. The Tribunal turned to consider those issues that related to the allegations of discrimination on the grounds of age.

89. **Issue 5**: "Whether the application of the 20% reduction to the Claimant (by virtue of the transitional provisions) amounted to less favourable treatment of the Claimant on the grounds of age, as compared with London-based partners in the Respondent aged 55 and over as at 30 April 2006, and/or as compared with London-based partners in the Respondent whose 55th birthday fell between 1 May 2006 and 29 October 2006."

90. The Respondent's principal submission was that in this respect the treatment complained of was not on grounds of age but because Schedule II had closed on 30 April 2006. The Respondent argued that Mr Bloxham was not in materially similar circumstances as those aged 55 and over as at that date, that such partners had already accrued the right to retire with a full Schedule II pension and that Mr Bloxham did not have that right but only a contingent right to retire with the Council's consent with a discounted pension. It was said that it was the scope of the individual partner's rights at the date of scheme closure and not his age which was the reason for the difference of treatment. In support of that argument, it was submitted that the point that the Claimant was seeking to make would apply also to distinguish the position of those over 55 with those aged 50-54. It had been pointed out that those over 55 had superior accrued if not vested rights as at the date of the scheme closure. It was submitted that those over 55 who remained with the firm were now less favourably treated than Mr Bloxham since they had lost their Schedule II rights. That, it was said, was not on grounds of age but because Schedule II had closed and the new scheme applies to everyone. It was submitted that when a pension scheme closed there was bound to be a cut-off date which will operate to the detriment of some whose rights are not fully accrued at the date the scheme closes. It was submitted that if Mr Bloxham was correct, any closure or amendment of a pension scheme which has a similar effect to this is prima facie discriminatory on grounds of age unless it could be justified and that the same argument would apply to almost any attempt by an employer to amend his employment policies for the future.

91. By contrast, the Claimant argued in a simple way that as at 30 April 2006 his age at the birthday nearest to that date was 54 not 55. If it had been 55, he would have received 100% not 80% of his entitlement and, therefore, the age was the reason or ground for the difference in the outcome. It was submitted that, having regard to the decision in Nagarajan, the Claimant's age was one of the reasons why the Respondent treated the Claimant as it did, even if that was not the sole reason. In answer to the question: why were the Claimant's rights under Schedule II determined by reference to his entitlement at 30 April 2006, it was submitted the correct answer was because that was what the transitional arrangements required. But the second question, which is a relevant question, is why is it that the result of that determination was that the Claimant suffered a 20% reduction in his Schedule II entitlement, should receive the proper answer – because of his age as at 30 April 2006.

92. The Claimant submitted that the Respondent's argument that a 55-year-old was not a true comparator because a 55-year-old could retire under Schedule II, cannot be right because the distinction itself was age-based and indeed based

on exactly the same age difference. It was submitted that distinction between discrimination on grounds of age and discrimination on grounds of age at a particular date is a distinction without a difference for age is always age at a particular date.

93. In support of this interpretation of the meaning of 'on grounds of age', the Claimant relied upon the judgment of Mr Andrew Nicol QC sitting as a Deputy Judge of the High Court in the case of Unison v The First Secretary of State [2006] EWCH 2373, where in the administrative court the union had sought to quash, in an application for judicial review, certain changes to the local government pension scheme based upon a particular feature known as the "85 year rule". The 85 year rule applied under certain regulations so as to reduce the entitlement of a member retiring if the sum of the member's age in whole years, his membership in whole years and a period of employment amounted to less than 85. There had been a proposal to abolish that rule by the government in order to comply with Council Directive 2000/78/EC, the framework directive for equal treatment in employment, requiring member states to take measures in relation to discrimination including discrimination on grounds of age. The union were arguing that the defendant had misconstrued the directive. The learned judge was satisfied that the decision would have been the same independently of the views taken of the directive. As a result, it was not then strictly necessary for the judge to go to consider the question of whether the defendant had misdirected himself as to the impact of the directive or indeed whether the 85 year rule amounted to age discrimination at all. However, bearing in mind that it had been fully argued before him, the learned judge expressed his conclusions upon the question of whether the 85 year rule amounted to age discrimination at all. He referred to article 2(2)(a) of the directive and the fact that it is there made clear that direct discrimination occurs when one person is treated less favourably than another in comparable situations. In paragraph 26 of the judgment he said this:

> "... The distinguishing characteristic between the two cases must (for present purposes) be age. Mr Goudie's example contrasts the position where the distinguishing characteristic is the nature of the pension regime. It does not meet, still less undermine, the government's case that under the present regime, the 85 year rule produces different outcomes where the distinguishing characteristic is age."

Counsel argued by giving an example in relation to the 85 year scheme on the part of the union:

> "Member A and Member B join the Scheme at the same time. Member A joins the scheme at 30 and leaves after 15 years service. Member A satisfies the 85 year rule at 60 and may take the 15 years of preserved benefits at age 60 without reduction. Member B joins the scheme at age 45 and leaves after 15 years service. Member B does not satisfy the 85 year rule until age 65. Therefore Member B cannot take 15 years of benefits without reduction until he is 65. The only difference between the two members is the age at which they joined the Scheme."

Applying that analysis, the learned judge expressed the opinion that the 85 year rule is discriminatory on grounds of age.

94. Due to the fact that these are recent Regulations, this is the only decision to which Counsel was able to direct us where any court had considered what was meant by "grounds of age". We do not consider ourselves bound, in the sense of precedent, by a decision of the Administrative Court expressing an opinion on the framework directive where is the domestic Regulations that we have to construe. However, we consider that the decision in that case provides strong support for the conclusion to which we have come. The conclusion is this. The application of the 20% discount to the Claimant was based upon two factors. One was the decision to have in place a transitional arrangement for those aged 55 and over and the consent group partners who had acquired the right to retire under Schedule II. The second factor was the age of the partners concerned as at 30 April 2006. The difference in treatment in terms of the application of a discount of 20% or not gives rise to a different answer to the case of a 55-year-old partner as it does to the case of a 54-year-old partner. In those circumstances the Claimant has established that he suffered less favourable treatment as compared with partners in London aged 55 and over as at 30 April 2006 and that such treatment, unless justified, is discriminatory.

95. We acknowledge the Respondent's point that for employers this may mean that they must consider the effect on employees of different age groups whenever a change to a pension scheme or an employment policy is concerned. We accept that because age is not a binary condition this may require employers to undertake even more by way of research, evaluation and reflection than hitherto. However, the mere fact that these consequences may ensue does not entitle us to adopt an interpretation of the regulation which is contrary to reason. If an act or event occurs by reference to a specific date which by reason of their age at that date affects some employees (or partners) but not others to their disadvantage the employer may have to justify the disadvantage to avoid a finding of discrimination. He cannot do so by ignoring the age of the employee which, in effect is what the Respondent has asked us to do here.

96. Subject to justification we hold that the Claimant was treated less favourably on grounds of age by reason of the transitional provisions in Schedule IIA.

97. **Issue 6**: "Alternatively, whether the application of the 20% reduction to the Claimant (by virtue of the transitional provisions) amounted to the application of a provision, criterion or practice which puts London-based partners in the Respondent who were 54 as at 30 April 2006 at a disadvantage, as compared with other London-based partners in the Respondent aged 55 or above as at 30 April 2006 and/or as compared with London-based partners in the Respondent whose 55th birthday fell between 1st May 2006 and 29th October 2006."

98. The Respondent submits, correctly in our judgment, that this claim of indirect discrimination in the alternative is bound to fail at the first hurdle because the Claimant has not identified a provision, criterion or practice which the Respondent has applied equally to the comparator group.

99. In his submissions Mr Pitt-Payne acknowledged that this was an alternative, and did not seek to pursue this argument in the event of there being a finding that

the direct discrimination argument in relation to the 20% reduction succeeded subject to issues of justification.

100. It is not necessary to consider issue 7, which is the issue concerned with the remaining elements of the test of indirect discrimination in relation to this argument.

101. **Issue 8**: "Whether the Claimant was "forced" to choose between (i) retiring on 31 October 2006 with a 20% reduction to his Schedule II pension or (ii) remaining as a partner with the Respondent after 31 October 2006 and retiring with a Schedule IIA pension ("the choice")?"

102. The answer to this allegation is one which turns upon its facts. The Claimant, in the Tribunal's judgment, had exactly the same choice as his comparators, albeit that his comparators were not as financially disadvantaged as the Claimant by virtue of the 20% discount.

103. It was argued by the Respondent that in any event this contention was factually incorrect. The Claimant has three choices, as he accepted. He could have retired with his preserved Schedule II rights, as he did. He could have retired with those rights and sought a consultancy or accepted the offer of a consultancy; or, he could have stayed and retired at some future point with a Schedule IIA pension. Had he chosen to stay, he would have continued to earn as a partner, have had a share in the profits while he remained as partner and he would have received benefits of a broadly equivalent nature for at least six months as a consultant up to the date upon which he sought to retire. It might well be the case on the evidence that the Claimant's pension provision, at least in the first 25 years of his retirement, would have been no less favourable had he remained under Schedule IIA taken in the round.

104. The terms of the issue ask the Tribunal to answer whether the Claimant was forced to choose. The Tribunal's judgment is that he was not forced to choose any more than those who were 55 or over or those who were 53, 52, 51 or 50 were forced to choose. It was a judgment that each had to make. The Respondent had not compelled any particular partner or group of partners at a particular age to make any particular choice. In those circumstances there was no less favourable treatment.

105. **Issue 9**: "If the Claimant was so "forced", did this amount to less favourable treatment of the Claimant on the grounds of age, as compared with London-based partners in the Respondent aged 55 and over as at 30 April 2006"?

106. Although this strictly does not require an answer we state that for the reasons previously given the Tribunal does not find that this was less favourable treatment.

107. **Issue 10**: "Alternatively, whether the choice faced by the Claimant amounted to the application of a provision, criterion or practice which put London-based partners aged over 50 but under 55 as at 30 April 2006 at a disadvantage, as

compared with other London-based partners in the Respondent aged 55 or above as at 30 April 2006."

108. This allegation of indirect discrimination founders for the same reason as that in issue 7. The Claimant is unable to identify an age-neutral provision, criterion or practice in this issue and, unless there is a provision, criterion or practice which applies equally to persons of a different age group, no claim of indirect discrimination can be formulated. For that reason, the answer to issue 10 must be in the negative and, for the same reasons as previously given, the answer to issue 11 – whether it amounts to discrimination – must also be in the negative.

109. **Issue 12**: "Whether the Claimant's inability to defer receipt of his Schedule II pension amounted to less favourable treatment of the Claimant on the grounds of age, as compared with London-based partners in the Respondent aged between 50 and 53 as at 30 April 2006."

110. The Claimant was not under the terms of Schedule II able to defer taking any pension to which he was entitled at aged 54 and thereby reduce the discount that would apply to it. Those aged 50 to 53, who were subjected to further discounts ranging from 25% at age 53 to 40% at age 50, did under Schedule II have the opportunity to have those discounts reduced by postponing for a whole number of years the date at which they began to draw the relevant pension. But not even those partners, that is those younger than the Claimant in the consent group, could, by postponing the date upon which they took pension, put themselves in any better position than the Claimant. In the circumstances the Tribunal is not satisfied that the Claimant here makes an appropriate like-for-like comparison as required by regulation 3(2) of the Regulations. In the Tribunal's judgment, the relevant circumstances in the one case are not here the same and are materially different one from the other. A partner aged 54 could retire with consent of the council and take an immediate pension discounted at 20% assuming his entitlement was otherwise the maximum. A partner aged 52 for example, in order to retire and take a pension that was discounted by only 20%, would have to put off for two years the date upon which he or she drew that pension. In other words, instead of going straight from being a partner receiving a share of profits to a former partner receiving an immediate pension of 80%, the partner aged 52 would have to defer for two years in order to put themselves in the same position as the Claimant, namely being a former partner in receipt of a pension discounted only to 20%. For all those reasons, the Tribunal was satisfied that either this was not a like-for-like comparison.

111. Perhaps more significantly, as argued by the Respondent, and not contradicted by the Claimant, the partners in the younger group with whom the Claimant sought to compare himself were in fact treated less favourably than those in the Claimant's age group. For that reason, the Tribunal rejected this allegation of direct discrimination.

112. **Issues 13 and 14** asked similar questions about indirect discrimination based upon the same factual premises: "Alternatively, whether the application of different discounting arrangements for those aged between 50 and 54 amounts to the application of a provision, criterion or practice which puts London-based

partners in the Respondent aged 54 as at 30 April 2006 at a disadvantage, as compared with other London-based partners in the Respondent aged 55 or above as at 30 April 2006."

113. The allegation of indirect discrimination must, in the Tribunal's judgment, fail for the same reason as the earlier allegations of indirect discrimination, namely that the Claimant has not identified an age-neutral provision, criterion or practice that applies to the comparator group.

114. The remaining issues relate to the issue of justification.

115. **Issue 15**: "If any answer to question 5 to 14 is yes, what aim or aims were pursued by the Respondent in treating the Claimant as it did or in applying the relevant provision, criterion or practice?"

116. The Respondent's aim, on the evidence that the Tribunal heard, was, we hold with respect, neither precisely that stated by the Respondent nor that stated by the Claimant. It was, to some extent, a synthesis of the aims as stated by both parties.

117. The Respondent's general aim in the reform of its pension arrangements, namely the closure of Schedule II, the inception of Schedule IIA and the transitional arrangements in respect of certain partners between the two schemes was part of the decision to provide a pension arrangement that was more sustainable than had existed solely under Schedule II and it was to reduce the effect of the intergenerational unfairness whereby younger partners would contribute more and more as active partners against the prospect of receiving a smaller and smaller pension themselves when in due course they came to retire. Within that context, the specific aim of the Respondent in having in place the transitional arrangements for those aged 55 and over and in the consent group was to ameliorate the effect that those who were at or near retirement age would suffer if on the date chosen for the implementation of the arrangements they lost immediately all Schedule II rights and only thereafter had Schedule IIA rights which, by common consent, represented at best for them a discount of 35% or thereabouts in relation to their rights.

118. The Tribunal reminded itself that it is for the Respondent to prove on the balance of probabilities that the treatment in this case is a proportionate means of achieving a legitimate aim. In the Tribunal's judgment, it is an error of law to focus solely upon the treatment and not consider the context in which the treatment occurs. It seems to the Tribunal that this will be particularly necessary in cases of age discrimination because of the need to recognise that changes to the treatment of persons of one age or age group may, as in the instant case, directly affect to some extent the treatment of persons in a different age group. That this is so in the instant case is made particularly acute by the fact that the arrangements are all concerned with the distribution on an annual basis of a finite sum by way of profits. To use the language adopted by Ms Rose in her submissions, the distribution by reference to points of the profits of the firm to former partners and to active partners was the slicing of a pie and it did not

require any legal analysis to realise that if one person gets a larger slice of pie, then it must follow that the remainder will have smaller slices.

119. **Issue 16**: "Was or were the aims pursued legitimate?"

120. So far as that is concerned, it was accepted by the Claimant that the attempt to provide a more financially sustainable pension scheme which reduced the intergenerational unfairness on younger partners was a legitimate aim. However, Mr Pitt-Payne sought to argue that the failure by the Respondent to consider the removal of the 20% discount "cliff" in the transitional arrangements was of itself an indication that the imposition or retention of the discount was not a legitimate aim.

121. In the Tribunal's judgment, it is necessary here as well to consider the retention of the 20% discount in the context of the admittedly legitimate aim of the reform of the pension scheme. The reform of such a scheme was legitimate and necessary for the firm. It might have been achieved by the abolition of the scheme or by an immediate replacement of the Schedule II scheme by the Schedule IIA scheme on a given date without transitional arrangements. The transitional arrangements themselves were put in place as a result of consultations and in particular as a result of representations made by the group of partners known as the 'Grey Panthers'. Only one partner, Mr Prentice, had sought to criticise the operation of the particular term of which Mr Bloxham complains in these proceedings. It was accepted in evidence that in order to improve the position of Mr Bloxham by removing the 20% discount a disadvantage would ensue, to some extent at least, to one of the other groups of those who might be affected. The most obvious group from which to derive some benefit for the consent group might appear to be those aged 55 and over. However, as Mr Jeffcote's evidence demonstrated, the numbers in the 55+ group as compared to the numbers in the consent group were such that a very substantial reduction in the benefits of those aged 55+ would have to be made in order to produce a very small amelioration of the position so far as the consent group partners were concerned.

122. There were many partners in the age groups up to and including 49 years old. When Mr Prentice raised his suggestion with Mr Morton and Mr Mettenheimer, Mr Morton, with whom Mr Mettenheimer concurred, suggested that in the context of a revision of the pension scheme intended to benefit younger partners and militate against unfairness to them, it could not be justified that in that process older partners who had Schedule II rights should have those rights increased at the expense of younger partners.

123. It was also recognised that it would be possible under Schedule II to reduce the pensions of those who had retired in order to fund the removal of the 20% discount in the consent group. However, such a step could not be taken without the consent of the group or a representative committee, it being considered by the Respondent that it would have a materially adverse effect upon pensioners were that to be the case. That group would also include some partners who had themselves had to wait until 55 in order to be able to take a pension that was undiscounted by the 20% factor, and it would be considered by them at least

unfair that those who were to retain their Schedule II rights upon the implementation of Schedule IIA should be further benefited at their expense.

124. In the Tribunal's judgment, those arguments against altering the 20% discount were legitimate. They were not fanciful arguments. They were not arguments which were advanced without a recognition that the application of the discount to Mr Bloxham and those in his age group would have an effect upon the sums to which they were entitled. Particularly in the context of a case involving a decision as to the size of respective shares in a pool or pot of defined amount, the Respondent's aims were, in our judgment, wholly legitimate.

125. **Issue 17**: "Was the treatment of the Claimant or the application of the provision, criterion or practice proportionate to the aim or aims pursued?"

126. Mr Pitt-Payne argued that even if the aims were legitimate the Respondent could not show that the treatment was proportionate. He relied upon the fact that during the process the Respondent did not attempt to quantify the cost; that the disadvantage to the Claimant was substantial; that the Respondent did not even consider whether those aged 55 or over should suffer a reduction. He submitted that it was relevant that the reforms were eventually to benefit the younger persons, but he said that the fact that a scheme for age-related benefits has an entry age below which no benefits were obtained did not obviate the need to ensure the scheme avoided age discrimination as between those who were within it and entitled to benefit. The Claimant did not accept Mr Jeffcote's argument that the removal of the 20% discount would have required the consent of the retired partners because it would affect them in two ways, namely that it would dilute the value of the points and it would accelerate the potential application of the cap.

127. In the Tribunal's judgment, the argument by the Respondent as to proportionality was the more cogent and was one which the Tribunal accepted.

128. Ms Rose relied upon a number of particular matters: that the reform of Schedule II was necessary and finding a fair and acceptable solution was a difficult matter; that the reform involved the balance of conflicting interest between different generations; that one of the main drivers had been the unfairness of Schedule II to younger partners; that the aim was extremely important to the future of the firm; that a reasonable transitional provision to allow those who had already accrued rights to retire with a Schedule II pension was permissible but that it would be a wholly different proposition to suggest those rights should have been enhanced when all others' rights had been reduced; that the solution was arrived at after many months of work and analysis, including expert assistance from Deloittes. She submitted also that the consultation process was extensive and adequate and had included the direct participation of Mr Bloxham in the attendance at the consultation with Jonathan Sumption QC; that every concern raised by partners in the consultation process was addressed carefully and was not rejected without full reasons being given. She submitted that the reforms themselves were subject to the consent of a two-thirds majority of the partners. In that regard Ms Rose relied upon the

recognition by a court, as in the case of Bridge v Deacons (A Firm) [1984] AC 705, of arrangements entered into by partners among themselves.

129. It was further submitted that the substantial majority that the proposals attracted was itself an indication of there being sufficient and proper consultation upon the reforms. There was no evidence to suggest that the majority was influenced by the offer of consultancies to individual partners – if anything those with whom consultancies were discussed did not vote in favour of the proposal. The issue of the discount itself had been considered between Mr Prentice and Mr Morton and, in the course of the reform process, the firm had taken legal advice on the Age Discrimination Regulations. It was further argued that the retention of the unaltered Schedule II provisions during the transitional period was reasonable; that removing the 20% discount would have been unfair to those who had retired at the same age before 30 April 2006; that the group which comprised the 54-year-olds was already significantly favoured in relation to all other groups; and that, given that one of the principal aims of the reforms was to mitigate intergenerational unfairness, to enhance the benefits of one of the groups that was otherwise benefiting under the old scheme would itself have been perverse. Finally, it was noted that no alternative less discriminatory solution could be conceived. The impact of the requirement of a partner to retire retaining such Schedule II benefits as he or she had acquired was mitigated by the availability of a consultancy and in fact the actual difference to the Claimant in terms of remuneration, at least until the date of retirement, would have been less than £7,000 in the relevant period.

130. In the Tribunal's judgment, the argument in favour of a conclusion that this was a proportionate means of achieving a legitimate aim was not merely met but was comfortably passed by the Respondent. The Tribunal considered the following factors to be of particular importance:-

(1) The reforms themselves were aimed at addressing an issue whereby, apart from any issues of discrimination, there had been a recognition that younger age groups were becoming increasingly disadvantaged.

(2) That in such a process maintaining the status quo for those most proximately affected is acceptable.

(3) That maintaining the status quo does not absolve the employer from considering other steps.

(4) That improving the position of the consent group, already protected by the transitional provisions, in the context of the aim of the reforms would be and be seen to be both unfair and perverse.

(5) That even at the conclusion of the lengthy and thorough consultation period leading to the reforms and by the end of the Hearing before the Tribunal no less discriminatory alternative could be put forward.

131. In those circumstances, absent any other grounds for rejecting the Claim, the Tribunal would hold that the application of the 20% discount to Mr Bloxham,

whilst potentially discriminatory for the reasons given, was not discriminatory on the grounds that it was justified, as required under the Regulations.

137. Finally, the Tribunal considered the application of Schedule 5 to the contract, which is the means by which the reforms were achieved.

138. **Issue 18**: "Whether the relevant amendments/provisions before the Tribunal in the claim were void under the provisions of paragraph 1 of schedule 5 to the Regulations?"

139. This was an issue raised during an early case management discussion. The Tribunal noted at an early stage that by reason of paragraph 1(2) a discriminatory term is not void as between parties to the agreement but unenforceable. Ms Rose submitted that the Claimant could not rely on this as he was not seeking to enforce anything. With respect, we disagreed. The Claimant would be entitled to enforce the payment to him of benefits that were not reduced by reason of discrimination. Had the Respondent's argument on justification not succeeded, we anticipate that that is what we would have ordered the Respondent to pay by way of compensation.

140. Drawing those threads together, the Tribunal analyses the effect of Schedule 5 and the other matters relating to jurisdiction and the arguments in relation to pension and the relative positions of partners and those who were in a relationship which has come to an end, as follows.

141. The 20% reduction for those aged 54 on 30 April 2006 was a reduction in relation to pension.

142. That reduction, hereafter "the term", was based upon two factors:-

(i) the decision to have in place a transitional arrangement for those aged 55 and over and consent group partners who had acquired the right to retire under Schedule II; and

(ii) the age of the partners concerned as at 30 April 2006.

143. Accordingly, the term provided for the doing of an act which would be unlawful by reason of the Regulations were they in force. In those circumstances Schedule 5 paragraph 1(1)(c) operates such that the provision could be void.

144. However, there is also a term in a contract the inclusion of which constitutes unlawful discrimination against the parties to the contract on the grounds of age in the circumstances of this particular case. For that reason the term would not be void but would be unenforceable against the Claimant - see Schedule 5 paragraph 1(2).

145. However, these provisions were not in force prior to 1 October 2006. Accordingly, up until that date the provision was not unenforceable (see Schedule 5 paragraph 1(4)). It was, however, unless justified, unenforceable upon the coming into force of the Regulations.

146. On 1 October 2006 (subject to justification) the term became unlawful. It was in force in respect of partners under regulation 17 with effect from 1 October 2006 and could be sued upon at that time.

147. On 31 October 2006 the Claimant ceased to be partner in the Respondent firm. Any claim that he wished to bring would have to be a claim under regulation 17 in respect of matters that had occurred prior to that point and under regulation 24 in respect of matters which arose after the partnership relationship which had come to an end.

148. However, in respect of relationships which had come to an end, insofar as that relates to the arrangements for the provision of any benefit relating to pensions, the Regulations did not come into force until 1 December 2006. In this case the Claimant presented his Claim to the Tribunal on 21 November 2006.

149. Because at that stage he was not a partner and could not bring a claim in relation to a relationship which had come to an end, the only claim that he could bring in relation to an unlawful provision was one that could be brought historically for the period as a partner between 1 October 2006 and 31 October 2006 when he ceased to be partner.

150. This analysis of course is subject to the overriding consideration that even though the Tribunal has jurisdiction to the limited extent set out, namely in relation to the acts done to the Claimant as a partner during October 2006, insofar as the contractual term was discriminatory as against him in that period, the Tribunal rejects his claim for that period on the grounds that any discriminatory effect was justified for the reasons previously given.

151. In all those circumstances, the claims are dismissed.

Thomas Cox

CHAIRMAN

9 October 2007

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REASONS SIGNED BY CHAIRMAN ON

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REASONS SENT TO THE PARTIES ON

10/10/07

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS