Neutral Citation Number: [2017] EWHC 1787 (Admin)

Case No: CO/159/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2017

Before :

LORD JUSTICE SALES
MRS JUSTICE WHIPPLE

- -

Between:

(1) Public And Commercial Services Union **(2) Lawrence Dunne** **(3) James Donald Roy Cox**	**Claimant**
- and -	
Minister for the Cabinet Office	**Defendant**

- -

Oliver Segal QC and **Ijeoma Omambala** (instructed by **Thompsons Solicitors**) for the **Claimants**
Clive Sheldon QC and **Joseph Barrett** (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 04 & 05 July 2017

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Approved Judgment

Lord Justice Sales:

Introduction

1. This is an application for judicial review of the decision of the defendant Minister of 8 November 2016 to make a scheme under section 1 of the Superannuation Act 1972, which amended the Civil Service Compensation Scheme ("the CSCS") to reduce the value of certain benefits paid to civil servants on redundancy or taking early retirement or other forms of exit from the civil service ("the 2016 amendments"). It came before the court on a "rolled up" basis, for consideration of permission with the substantive hearing to follow if permission was granted. The court had read the papers in advance of the hearing and granted permission at the outset. The hearing proceeded as a full substantive judicial review.

2. The 2016 amendments were made by the Minister and laid before Parliament, as required by the 1972 Act. The process of making amendments to the CSCS is not subject to a positive or negative resolution procedure in Parliament.

3. The particular reductions in benefits to which the application relates are those in respect of compulsory redundancy (CR), voluntary redundancy (VR), voluntary exit (VE) and what are termed "inefficiency payments." VR payments are made when a government department invites civil servants to apply for voluntary redundancy, and are typically at a higher rate than CR payments. VE payments are made when, even though no redundancy situation exists, a government department invites civil servants to leave their posts in order to reduce staffing costs. Inefficiency payments are made when a government department is seeking to deal with a civil servant who has a poor performance or attendance record, but is not liable to dismissal. The department can invite the civil servant to accept an inefficiency payment as the price for terminating his post.

4. The first claimant trade union ("the PCSU") is the largest of the civil service trade unions. It currently has around 160,000 members in the civil service and related bodies. We were told that it tends to represent civil servants at the lower end of the salary scale. The second and third claimants are civil servants who are members of the PCSU.

5. The claimants' grounds of challenge to the 2016 amendments are that: (1) there has been inadequate consultation by the Minister with the PCSU about the 2016 amendments, in contravention of his statutory duty to consult with the PCSU contained in section 1(3) and section 2(3D) of the 1972 Act; (2) the Minister wrongly excluded the PCSU from the process of consultation regarding the 2016 amendments, in breach of its rights and those of its members under Article 11 of the European Convention on Human Rights ("ECHR"); (3) the 2016 amendments violate the rights of civil servants under Article 1 of Protocol 1 to the ECHR (protection of property); and (4) the Minister breached his obligation under section 149 of the Equality Act 2010 (the public sector equality duty) in making the 2016 amendments, in that he did not have due regard to the impact which the change to the inefficiency payments would be likely to have upon civil servants with disabilities. The Minister disputes all these grounds of challenge. He also submits that, even if he is found to have acted unlawfully in some respect, it is highly likely that if he had not done so the outcome would still have been the same or substantially the same: the 2016 amendments would

still have been made to make the same changes to the CSCS. Therefore, by virtue of section 31(2A) of the Senior Courts Act 1981, relief should be refused and the 2016 amendments should not be quashed.

6. The amendments to the CSCS made on 8 November 2016 are part of a further round of reform of public sector pension and exit payments, and follow previous reforms of the CSCS in 2010. A first set of changes was introduced by the then Minister in April 2010. At that time, as I held in *R (Public and Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027 (Admin); [2010] ICR 1198 ("*PCSU (No. 1)*"), section 2(3) of the 1972 Act as it then stood required the agreement of relevant trade unions to the changes. The PCSU, which was the claimant in that case as well as in this, had not agreed the changes. Accordingly, the April 2010 amendments to the CSCS were quashed by the court. The Minister did not appeal.

7. Instead, after the General Election in 2010, the government sought and obtained from Parliament primary legislation to cap payments under the CSCS and also amendments to section 2 of the 1972 Act. The unions' right of veto was removed and replaced with an obligation of the Minister to consult on any proposed changes to the CSCS with a view to reaching agreement on them, as is set out in section 2(3D) of the 1972 Act. I address the effect of the amended provisions in the judgment below.

8. In December 2010, the Minister made amendments to the CSCS under the as yet unamended provisions in sections 1 and 2 of the 1972 Act. The statutory caps on benefits were to come into effect if the amendments to the CSCS were quashed in any new challenge. This background is explained in the judgment of McCombe J (as he then was) in *R (Public and Commercial Services Union) v Minister for the Civil Service* [2011] EWHC 2014 (Admin); [2011] IRLR 903 ("*PCSU (No. 2)*").

9. The PCSU brought a challenge to these changes to the CSCS and the statutory caps on benefits set out in the amended CSCS, principally on the ground that the changes and the caps constituted unlawful interferences with civil servants' rights to peaceful enjoyment of their possessions under Article 1 of Protocol 1 to the ECHR. In *PCSU (No. 2)*, McCombe J dismissed this challenge. He held that, although civil servants had legitimate expectations regarding the payments they would receive under the CSCS as it stood before the amendments in December 2010, which qualified as "possessions" for the purposes of Article 1 of Protocol 1, the changes made by those amendments to reduce the level of payments were objectively justified in light of the public interest identified by the government and Parliament of reducing the public spending deficit.

10. At the time when the December 2010 changes to the CSCS were introduced and when union members were balloted on whether to accept them, a number of statements were made by or on behalf of the then Minister to the effect that the new CSCS terms would represent "a sustainable and affordable long-term successor scheme." The Minister at that time (Francis Maude MP) said, "I believe we now have a scheme which is fair, protects those who need the most support, addresses the inequities in the current system and is right for the long term". The Head of the Civil Service described the new CSCS terms as "sustainable" and "affordable". As appears below, the claimants place emphasis upon these statements in the context of their present challenge. They say that these statements amounted to assurances that no further changes to the CSCS to the detriment of civil servants would be introduced for a

considerable period after 2010 and that the 2016 amendments to the CSCS, which further reduce payments to be made under it, breach those assurances. They also say that the fact that such assurances were made in 2010 undermines the Minister's case on objective justification under Article 1 of Protocol 1 in the context of the present challenge.

Legislative framework

11. Section 1 of the 1972 Act provides in relevant part as follows:

> "**1.— Superannuation schemes as respects civil servants, etc.**
>
> (1) The Minister for the Civil Service (in this Act referred to as *"the Minister"*)—
>
> (a) may make, maintain, and administer schemes (whether contributory or not) whereby provision is made with respect to the pensions, allowances or gratuities which, subject to the fulfilment of such requirements and conditions as may be prescribed by the scheme, are to be paid, or may be paid, by the Minister to or in respect of such of the persons to whom this section applies as he may determine; …
>
> (3) Before making any scheme under this section the Minister … shall consult with persons appearing to the Minister … to represent persons likely to be affected by the proposed scheme …."

12. Section 2 of the 1972 Act provides in relevant part, and as amended, as follows:

> "**2.— Further provisions relating to schemes under s. 1.**
>
> …
>
> (2) Any scheme under the said section 1 may make provision for the payment by the Minister of pensions, allowances or gratuities by way of compensation to or in respect of persons—
>
> (a) to whom that section applies; and
>
> (b) who suffer loss of office or employment, or loss or diminution of emoluments, in such circumstances, or by reason of the happening of such an event, as may be prescribed by the scheme.
>
> (3) Subject to subsection (3A) below, no scheme under the said section 1 shall make any provision which would have the effect of reducing the amount of any pension, allowance or gratuity, in so far as that amount is directly or indirectly referable to rights which have accrued (whether by virtue of service rendered, contributions paid or any other thing done) before the

coming into operation of the scheme, unless the persons consulted in accordance with section 1(3) of this Act have agreed to the inclusion of that provision.

(3A) Subsection (3) above does not apply to a provision which would have the effect of reducing the amount of a compensation benefit except in so far as the compensation benefit is one provided in respect of a loss of office or employment which is the consequence of—

(a) a notice of dismissal given before the coming into operation of the scheme which would have that effect, or

(b) an agreement made before the coming into operation of that scheme.

(3B) In this section—

"compensation benefit" means so much of any pension, allowance or gratuity as is provided under the civil service compensation scheme by way of compensation to or in respect of a person by reason only of the person's having suffered loss of office or employment;

"the civil service compensation scheme" means so much of any scheme under the said section 1 (whenever made) as provides by virtue of subsection (2) above for benefits to be provided by way of compensation to or in respect of persons who suffer loss of office or employment.

(3C) In subsection (3B) above a reference to suffering loss of office or employment includes a reference to suffering loss or diminution of emoluments as a consequence of suffering loss of office or employment.

(3D) So far as it relates to a provision of a scheme under the said section 1 which would have the effect of reducing the amount of a compensation benefit, the duty to consult in section 1(3) of this Act is a duty to consult with a view to reaching agreement with the persons consulted.

…

(11) Before a scheme made under the said section 1, being the principal civil service pension scheme or a scheme amending or revoking that scheme, comes into operation the Minister shall lay a copy of the scheme before Parliament.

(11A) Subsection (11B) below applies if a scheme made under the said section 1 makes any provision which would have the effect of reducing the amount of a compensation benefit.

> (11B) Before the scheme comes into operation, the Minister must have laid before Parliament a report providing information about—
>
> (a) the consultation that took place for the purposes of section 1(3) of this Act, so far as relating to the provision,
>
> (b) the steps taken in connection with that consultation with a view to reaching agreement in relation to the provision with the persons consulted, and
>
> (c) whether such agreement has been reached.
>
> …"

13. Prior to amendment in 2010, section 2(3) provided for a right of veto for civil service trade unions in relation to changes to the CSCS which were detrimental to their members: see *PCSU (No. 1)*. So far as is relevant for present purposes, that protection was modified and reduced by amendment of section 2, by its replacement by the obligation of consultation with civil service trade unions with a view to reaching agreement with them as set out in section 1(3) read with section 2(3D), backed up by the requirement of a report to Parliament under subsections (11A) and (11B).

14. Section 3(1) of the Human Rights Act 1998 ("the HRA") requires the court to read and give effect to primary legislation in a way which is compatible with Convention rights, so far as it is possible to do so. Section 6(1) of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

15. The Convention rights relied on in this case are Article 11 and Article 1 of Protocol 1 ("A1P1"). Article 11(1) provides:

> "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

16. A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest of to secure the payment of taxes or other contributions or penalties."

17. The Minister is a public authority. Section 149 of the Equality Act 2010 provides in relevant part as follows:

"**149 Public sector equality duty**

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

…

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is

> not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are—
>
> …
> disability;
> …"

18. Section 31(2A) of the Senior Courts Act 1981 states in relevant part:

> "The High Court-
>
> (a) Must refuse to grant relief on an application for judicial review …
>
> If it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

Factual background

19. In *PCSU (No. 1)* I described the legal position of civil servants and the nature of benefits under the CSCS: see [10]ff. It is not necessary to repeat what is said there.

20. The payments under the CSCS upon leaving the civil service prior to retirement at pensionable age were and remain in legal theory a matter of discretion on the part of the Crown, but we were told by Mr Sheldon QC for the Minister that as a matter of invariable administrative practice they were and are paid when the events to which they relate occur. In addition to the formally discretionary nature of all payments under the CSCS, the operation of the CSCS involves other elements of discretion for government departments. It is a matter for the choice of a government department whether it decides to make a civil servant compulsorily redundant, or to offer VR or VE or an inefficiency payment to a civil servant. But when it decides to do so, the CSCS defines the way in which termination payments will be made and as a matter of invariable administrative practice the department will make payments in accordance with the calculation set out in the CSCS. In relation to both a VE payment and an inefficiency payment, the terms of the CSCS accord a government department a discretion as to the amount of the payment to be made, within certain defined parameters. But again, in a case where a department decides that a civil servant should be dismissed in a situation in which the CSCS stipulates that a VE payment or an inefficiency payment is due, it is a matter of invariable administrative practice that an inefficiency payment will be made within the scope of the parameters defined in the CSCS.

21. It is not necessary to set out the provisions of the CSCS in detail. The payments for which it provides are a function of length of service (giving a multiplier based on a set tariff relating to each year of service) and current salary (subject to a minimum assumed salary for lower paid workers, "the underpin salary"). In addition, prior to the 2016 amendments, it provided for some people leaving the civil service in their early 50s to take their pensions early (i.e. before reaching retirement age), in full (i.e.

as if they had reached retirement age) and without actuarial reduction in respect of early receipt, to be funded by the employing department to the extent that the value of such early receipt could not be funded out of the termination payment to the employee under the CSCS. This latter benefit is referred to as funded top up for early access to pension.

22. On 8 February 2016 the Minister issued a public consultation document on proposed reform of the CSCS ("the CSCS consultation paper"), seeking responses by 4 May 2016. In parallel with that consultation, HM Treasury issued a public consultation document on wider proposed reforms to public sector exit payments.

23. The CSCS consultation paper set out the Minister's proposals to change the CSCS so as significantly to reduce payments under it. The tariff was to be reduced from four weeks to three weeks per year of service; VE payments were to be capped at a multiplier of 18 months; VR payments were to be capped at 12 months; CR payments were to be capped at 9 months; the funded top up for early access to pension was only to be allowed where a civil servant had reached minimum pension age for a new entrant to the scheme (i.e. 55 at a minimum); there was to be a cap on CSCS compensation payments at £95,000, in line with the general cap on public sector termination payments which the government was proposing to introduce in legislation; and there was to be a three month notice period for all early exits from the civil service. The CSCS consultation paper also proposed changes to inefficiency payments. The proposals in the paper did not refer to any possible change to the underpin salary in the CSCS, then set at £23,000 p.a..

24. Four particular reasons were given in the CSCS consultation paper why the Minister wished to revisit the terms of the CSCS as amended in 2010:

> "This reformed scheme has been in place for over four years now and the experience of its use has led the Government to believe that it is not fully delivering against its aims. In particular the Government is concerned that:
>
> - The Voluntary Redundancy (VR) terms are limiting the flexible use of the Voluntary Exit (VE) terms. The scheme is therefore not functioning as intended but is still encouraging staff to hold on in the expectation of better terms later;
>
> - Early access to pension was included to allow staff to retire and draw all of their Civil Service pension without reduction for early payment. Given the significant costs, the limited eligibility and that Government's aim in encouraging longer working lives (for example the recent pension reforms) it is questionable as to whether it is still appropriate for the employer to be funding this as an option;
>
> - Overall the scheme remains too expensive in light of the national debt and budget deficit leaving less money available to support those where necessary. This is

> especially acute because of the requirement to reduce current staff numbers due to both the spending review and the need to create space to allow for the recruitment of apprentices; and
>
> - More broadly the scheme is out of line with the terms that the Government considers should be generally available in the public sector. In particular the Government does not believe that six figure compensation payments are likely to be fair or to offer value for money."

25. The Minister's analysis underlying the CSCS consultation paper indicated that the savings in relation to CSCS payments which had been expected when the 2010 amendments to the CSCS were introduced had not been realised. It had been expected that the average cost of VE or VR after those amendments would be £33,754, whereas the actual average cost of a VE or VR exit in 2014/15 was £40,376. The evidence filed for the Minister did not give a detailed breakdown or explanation for this difference. Mr Segal QC, for the claimants, suggested that it was to be inferred that it arose because as things transpired more civil servants on higher salaries had been removed than had been expected in 2010, and that this was overall a benefit for the Government in terms of reducing the future cost of the civil service, with the result that this point could not be relied upon in support of the Minister's submissions on justification for the 2016 amendments.

26. I do not accept that this is the correct inference to be drawn. As Mr Sheldon for the Minister pointed out, the size of salary is not the only variable which affects the amount of VR and VE payments. Also relevant is the civil servant's period of service and his age, in particular where he may be entitled to a funded top up for early access to pension. Mr Sheldon told us that these were significant reasons for the difference in actual average payments under the CSCS as compared with what had been expected in 2010. Although the evidence for the Minister does not go into detail about this, it is clearly intended to convey that the full contribution to improving the public finances which was expected from the changes in 2010 had not materialised, which point could not properly have been maintained if the position was as suggested by Mr Segal. In the CSCS consultation paper, the point was made that completely removing the employer funded top up for early access to pension would save around 12% of the costs of the CSCS. I see no reason to doubt the accuracy of the basic point made in the Minister's evidence, nor the broad thrust of the explanation for it given by Mr Sheldon.

27. The principles underlying the proposed amendments to the CSCS were explained in the CSCS consultation paper as follows:

> "The Government is seeking to make changes to the CSCS so that it remains a suitable and appropriate tool. Specifically it is looking to reform to meet the following principles:
>
> - to align with wider compensation reforms proposed across the public sector, including the Government's manifesto commitment to prevent excessive payouts to the better paid by ending six-figure exit packages;

- to support employers in reshaping and restructuring their workforce to ensure it has the skills required for the future;

- to increase the relative attractiveness of the scheme for staff exiting earlier in the process, and to maintain flexibility in voluntary exits to support this aim;

- to create significant savings on the current cost of exits and ensure appropriate use of taxpayers money; and

- to ensure any early access to pension provisions remains appropriate."

28. The CSCS consultation paper was made available to the public. It was posted on the Cabinet Office website. It was not directed only to civil service trade unions, but invited representations from anyone who wished to make them.

29. The Minister received many responses to the CSCS consultation paper, including from the PCSU and other civil service unions. The unions were generally very hostile to the proposals. The proposals would mean significant reductions in payments under the CSCS to civil servants across the board, with particularly substantial reductions in relation to such payments to those in the 50-54 age bracket. In that age bracket, the mean value of exit payments (cost of exit) would be reduced from £26,900 to £20,000 for CR and from £64,300 to £30,600 for VR and VE. Although this was not distinctly explained in the evidence, Mr Sheldon told us that these differences were due in large part to the non-availability of funded top up for early access to pension for persons in that age bracket under the 2016 amendments.

30. In June 2016 the Minister produced an Equality Analysis in relation to the proposals in the CSCS consultation paper ("the 2016 Equality Analysis"). This did not deal with the equality impacts of proposed changes to inefficiency payments which were eventually included in the 2016 amendments.

31. However, reform of the inefficiency payments along the lines eventually included in the 2016 amendments had been considered by the Minister and debated with civil service unions in late 2014 and 2015, before being overtaken by the General Election in 2015 and put to one side. An Equality Analysis conducted by the Minister in December 2014 ("the 2014 Equality Analysis") had assessed the likely equality impacts of such a change, finding that there was a marked difference between the proportion of employees with a declared disability who were dismissed with inefficiency payments as compared with the proportion of employees so dismissed across the whole of the civil service. This was an unsurprising finding. The evidence adduced for the Minister from Mr Peter Jinks, Deputy Director, Workforce, Policy and Reward at the Cabinet Office, in answer to the present challenge, is that this finding was borne in mind and given consideration when the 2016 amendments were introduced, and that the potential detrimental impact of the changes to inefficiency payments in those amendments was considered to be justified by the rationale underpinning the reforms. I see no reason to doubt this evidence: at a meeting with the unions on 15 April 2016 express reference was made to the previous discussions with the unions about changing the inefficiency payments under the CSCS.

32. Running in parallel with the request for written responses to the CSCS consultation paper, the Minister provided information to and held a number of meetings with the National Trade Union Council ("the NTUC") in the period between 11 February and 4 May 2016. The NTUC was formed in 2010, to provide a single body with which the Minister could discuss issues such as pay policy and pensions in the civil service. At the relevant time, the PCSU was part of the NTUC, as were the Prison Officers' Association ("POA"), Prospect, FDA, NIPSA, Unite and the GMB. Having the NTUC in place made it easier for the Minister to carry out his obligation of consultation pursuant to sections 1(3) and 2(3D) of the 1972 Act.

33. At an initial meeting on 11 February 2016, the Minister's representatives indicated that the government was looking to find savings of about a third of the cost of operating the CSCS. The NTUC wrote on 29 February 2016 to say that the proposed changes to the CSCS were unjustified and contravened the statement by the Minister when the 2010 changes had been made. A reply dated 4 March 2016 on behalf of the Minister referred to the principles identified in the CSCS consultation paper and stated, "We are consulting with trade unions with a view to reaching agreement on a set of proposals that meet these overall principles". This was clearly a reference to the duty of consultation in the 1972 Act. The Minister also indicated that it might be possible to extend the consultation beyond 4 May 2016.

34. Further meetings with NTUC representatives, including representatives from the PCSU, took place on 18 March, 6 April, 15 April, 25 April and 4 May to discuss the proposed reforms. I will refer to the meetings between 11 February and 4 May 2016 as "the first round of discussions". Points made by the union side included that there was already scope to offer better VE terms than VR terms, which was underused, so they questioned the need for reform in relation to this. Points made on the Minister's side included that the current CSCS terms were considered to be relatively generous compared to others, especially as a large number of employers in the private sector used statutory redundancy terms in similar circumstances, which were markedly less generous than both the current CSCS terms and the proposed amended CSCS terms. At the meeting on 4 May, the Minister's representatives confirmed that the consultation closed that day and that they would consider with him what would happen next, and whether to hold further discussions.

35. On 3 June 2016, Mr Simon Claydon, Director, Civil Service Workforce Strategy and Inclusion at the Cabinet Office wrote to the NTUC (copied to individual union representatives) as follows:

> "1. As you will be aware the consultation on changes to the Civil Service Compensation Scheme (CSCS) closed on 4 May. We committed to write to set out next steps.
>
> 2. The Government has not yet reached a decision on what changes to make to the Compensation Scheme. However, based on consideration of the responses received through the consultation period including those expressed by trade unions, the Minister for the Cabinet Office is still minded to amend the scheme.

3. The Minister has taken particular note of the comments made from trade unions throughout our discussions, especially on the issue around the relative levels of compensation payable under the VE and VR terms. He has agreed that we should hold a further series of meetings with trade union colleagues who can engage with the intention of reaching an agreement on a revised proposal, as well as on inefficiency compensation terms.

4. If we are able to reach agreement then it is likely that the proposal below would become the basis of a final Government position. The base structure of this proposal is that:

- the CSCS terms will be reformed to produce significant savings;

- the tariff to be three weeks per year of service;

- the compulsory notice period to be reduced to three months;

- the limits for both VE and VR exits to be set at 15 months' salary; and

- for employer funded early access to unreduced pension to be available from age 55 (and then track 10 years behind state pension age).

5. Within these further discussions we note that several unions have expressed a desire to ensure that any reforms to be of an enduring nature; to discuss the interaction between early access to pension and the cap on the value of exits at £95,000; to discuss the transition and a desire for a clear commitment to redeployment where possible. We also want to discuss streamlining the exit process to deliver cost saving and a more efficient process. We are willing to discuss these areas in more detail with the ultimate aim of delivering against the principles outlined in the consultation document. We recognise that equalising the VE and VR position may be seen to run counter to incentivising VE but this is something we could accept as part of an overall agreement. There will be come scope to slightly amend the base structure of the proposal, but it is unlikely that these discussions would lead to comprehensive changes.

6. I want to be clear that attendance at any further discussions will be taken as a clear commitment that those unions engaging in the talks have accepted that the proposal above will form the basis of a reformed, negotiated, set of arrangements that their relevant executives can recommend acceptance to their members in any ballot. The aim of these further discussions is

> to reach agreement on the precise form that those changes will take.
>
> 7. To provide this commitment, we are aware this may require exceptional meetings of Executive Committees, and we will encourage employers to assist in ensuring that appropriate facility time is provided if requested.
>
> 8. I will shortly be inviting you, NTUC colleagues and other unions that have engaged with the consultation, to a series of further meetings over the next three weeks. To participate in these discussions, I would expect a commitment in writing to engage on the basis outlined in paragraph 6 by the end of Wednesday 15 June at the latest.
>
> 9. Following these further meetings we will consider the views of unions and advise the Minister accordingly, before making a formal offer…"

36. The PCSU, Unite and the POA replied in a joint letter dated 19 June 2016:

> "We are writing on behalf of our 3 trade Unions in response to your letter of 3 June 2016. You will note that PCS, POA and Unite represent an overwhelming majority of civil servants who are union members and predictably our unions also represent a majority of the civil servants affected by redundancy situations in future years.
>
> Taking each point in turn.
>
> 1. We note your views on next steps. We hereby put forward ours.
>
> 2. We are at a loss to understand how the Minister can be minded to amend the scheme if the Government has not yet reached a decision on what changes to make to the CS Compensation Scheme, or any changes to other Public Sector schemes. Can you please explain this situation?
>
>   You state that the Minister's view is based on consideration of the responses received through the consultation period including those expressed by trade unions. Can you please furnish us with copies of the responses to the consultation, the analysis of those responses and explain what is contained within the Reponses that has drawn the Minister to this view?
>
>   Can you also provide us with a full equality impact assessment of the proposed amendments to inform our discussions going forward?

> 3. We note that the Minister has taken particular note of the comments made from trade unions throughout our discussions, especially on the issue around the relative levels of compensation payable under the VE and the VR terms. We can confirm that we are prepared to engage in a further series of meetings with the intention of reaching an agreement on this issue, as well as on inefficiency compensation terms.
>
> 4. It is premature to conclude what the basis of a final Government position will look like, primarily for two reasons: firstly, you state that the Government has yet to reach a decision on what changes to make to the Compensation Scheme; secondly, it is simply illogical to conclude what the outcome of discussions will be before those discussions have taken place.
>
> We are happy to enter discussions with an open mind and with a view to reaching agreement on a final package and a set of arrangements that our relevant executives can recommend to our members in any ballot. …"

37. Mr Claydon responded by letter dated 21 June 2016 to Mark Serwotka, the general secretary of the PCSU, expressing his disappointment that that union's response did not "fully meet the commitment requested in paragraph 6 of my letter [of 3 June 2016]". He wished to be clear that attendance at any future meetings "will be taken as a clear commitment that you have accepted that you are engaging in talks having agreed with your union executive that the proposal in paragraph 4 [of the letter of 3 June 2016] will form the starting basis of a reformed, negotiated, set of arrangements that your executive believe could result in recommending acceptance to their members in any ballot" and invited the PCSU's confirmation that it would agree to engage on that basis. In response to the request for the consultation responses, Mr Claydon said that the formal offer, which would follow any further meetings, would be accompanied with an analysis of the consultation responses and equality impacts.

38. The PCSU, Unite and the POA replied in a joint letter dated 4 July 2016:

> "Our unions have genuine concerns regarding the refusal to provide us with important information, the refusal to respond to the questions and points we have previously raised, the attempt to impose a restrictive framework on talks and the unseemly rush to conclude matters. Taken together, these concerns can only lead us to suspect that the process you are embarking on is a sham. Your insistence upon unreasonable restrictions and illogical sequencing also undermines the entire concept of free collective bargaining.
>
> …
>
> All of this notwithstanding, our unions are prepared to engage in further talks with a view to seeking agreement. We will do so unfettered, in

> accordance with our status as free Trade Unions operating in a democratic society."

39. Mr Jinks responded in Simon Claydon's absence, by letter dated 8 July 2016. He disagreed with the assertion that the process was a sham. He said:

> "We have given ample time for consultation and we have made every effort to reach agreement with unions on a revised set of CSCS terms in line with our requirement to consult with a view to reaching agreement. You have given no indication of seeking to reach agreement on the basis set out in Simon [Claydon]'s letters. Simon's letter of 21 June specifically stated that if you were unable or unwilling to reach agreement then it was unclear what utility there would be in entering into further discussions beyond the comprehensive ones that took place during the consultation period."

He confirmed that Cabinet Office representatives were still prepared to meet if the commitment requested in previous letters was provided.

40. There were further exchanges of correspondence in which each side repeated points already made. The PCSU, Unite and POA maintained their refusal to provide the commitment sought by the Cabinet Office. They were in consequence excluded from further discussions.

41. In a witness statement dated 12 May 2017 prepared for this judicial review, Mr Jinks characterised the commitment sought from the trade unions in this way at para. 8:

> " … The only requirement was that, in order to participate, a trade union should at least be prepared to confirm that the discussions might lead to an agreement i.e. they should indicate that there was at least a possibility of an agreement being reached."

However, the commitment sought by Mr Claydon at paragraph 6 of his 3 June 2016 letter, substantially repeated in his 21 June 2016 letter, was much more demanding than that. It required an acceptance that the current proposals would form the basis of a negotiated package which the unions could recommend to their members in a ballot. It was not surprising that the PCSU, Unite and POA, all of whom were in general opposed to the proposals, were unable to give such a commitment.

42. Other trade unions replied to Mr Claydon's letter of 3 June 2016 to give the commitment requested by him (some, it should be said, in somewhat equivocal terms, but sufficient to satisfy the Cabinet Office). Those that did (the FDA, Prospect, GMB, UNISON and the Defence Police Federation) were then invited to participate in a further round of meetings to discuss the revised proposals which Mr Claydon had set out in his letter of 3 June 2016. There were thirteen further meetings between Cabinet Office representatives on behalf of the Minister and these unions between 23 June 2016 and 22 September 2016 to discuss the proposals ("the second round of discussions"). The minutes of these meetings have not been put in evidence by the Minister.

43. At the end of the second round of discussions, on 26 September 2016 the Cabinet Office published its response to the public consultation between 8 February and 4 May 2016.

44. Also on 26 September, Mr Claydon wrote to all the unions (including now the PCSU) to set out a formal offer by the Minister regarding the changes to the CSCS which he proposed and inviting them to agree. The letter referred to the public consultation, which closed on 4 May 2016; to the first round of discussions with the NTUC; and to the second round of discussions. Mr Claydon referred to his letter of 3 June: "I … wrote on 3 June to all unions who provided substantive responses to the consultation to invite them to continue with talks with the aim of reaching agreement on a set of reforms focused around a basic structure outlined in that letter." He wrote:

> "Our intention has always been to agree a negotiated package of reforms that meets the Government's objectives as set out in the consultation document and has the support of the majority of trade unions representing staff covered by the [CSCS]. I am grateful to the FDA, Prospect, GMB, UNISON and the Defence Police Federation who responded positively to my letter of 3 June and have continued constructive discussions on this basis with a view to reaching agreement."

45. The formal offer contained two sets of terms. The first set was more advantageous for civil servants, but was conditional on acceptance by what the Minister would regard as a sufficient number of unions. The first set of terms were: the standard tariff to be three weeks per year of service; VE and VR payments capped at 18 months' salary; CR payments at 9 months' salary; only to allow employer funded top up for access to pension from age 55 and for this to track 10 years behind state pension age; to offer a partial buy out option for certain employees; CR notice periods to be 3 months for new starters; and an increase in the underpin salary to £24,500. Mr Claydon gave an assurance for the Minister that if there was sufficient acceptance of the first set of terms, the government would regard them as "a firm foundation for the management of the Civil Service and its people for a generation" and that "This administration will not seek to deviate from this agreement".

46. Eight unions (the FDA, Prospect, GMB, UNISON, Unite, NCOA, the Defence Police Federation and PGA) replied to agree the first set of terms. The PCSU and the POA did not accept the terms.

47. The Minister decided that this represented sufficient union acceptance of the first set of terms and therefore made the 2016 amendments to the CSCS to reflect them.

48. The Minister laid a report before Parliament, pursuant to section 2(11B) of the 1972 Act. In the report, the Minister referred to the public consultation and to the first round of discussions with the NTUC. He went on, "Following the closure of the consultation, the Government considered the responses it had received to date and thereafter sought to continue to engage with trade unions with the aim of reaching agreement on a set of reforms." This was a reference to the second round of discussions. The report explained that participation of unions in the second round of discussions "was made conditional upon their acceptance that a proposed basic structure would form the starting basis of a reformed, negotiated, set of arrangements

that could lead to a final agreement". The report then referred to the letter of 26 September 2016, which had been sent "[W]ith the intention of securing agreement", and reported that in the government's view the offer on the first set of terms had been agreed by a sufficient number of unions.

Discussion

Ground (1): breach of the obligation of consultation in the 1972 Act

49. The obligation upon the Minister of consultation with representative trade unions, including the PCSU, contained in section 1(3) of the 1972 Act, read with section 2(3D), is an unusual one. It is not simply an obligation to consult about proposals, but rather an obligation "to consult [with those unions] with a view to reaching agreement with the persons consulted".

50. This is not an obligation of result, since no agreement may be forthcoming at the end of such consultation. However, it is an obligation to consult in good faith and in a spirit of willingness to consider counter-proposals put forward by any representative trade union, such as the PCSU, with a view to seeing if, after giving them consideration, they might be accommodated in or alongside any proposed changes to the CSCS which the Minister proposes to make.

51. The making of the 2016 amendments constituted the making of a scheme under section 1 of the 1972 Act. The 2016 amendments obviously affected the civil servants represented by the PCSU (among others), so section 1(3) imposed an obligation on the Minister to consult with the PCSU.

52. In my judgment, the obligation was to consult with the PCSU on the particular terms which came to be made as a scheme under section 1 in the form of the 2016 amendments. This is clear from:

    i) the wording of section 1(3), since "the proposed scheme" in relation to which the duty of consultation arises is the scheme which is eventually made ("Before making any scheme …"); and

    ii) the wording of section 2(3D) and the context in which the particular obligation of consultation defined in that subsection arises, namely in relation to a proposal to make a scheme "which would have the effect of reducing the amount of a compensation benefit". Since the focus is on loss of one or more particular compensation benefits as defined in subsection (3B), the duty of consultation is intended to provide a safeguard before that occurs. The duty is to consult "with a view to reaching agreement", meaning on the particular terms of the scheme being put forward. The natural meaning of the word "agreement" in this context is, actual agreement on any provision in a scheme which would have the effect of reducing the amount of a compensation benefit.

53. This interpretation of section 1(3) and section 2(3D) is also supported, in my view, by section 2(11A) and (11B). The fact that the Minister has to make a report to Parliament in accordance with these provisions emphasises the importance of the safeguard for workers' rights in the civil service which the duty of consultation set out

in sections 1(3) and 2(3D) is supposed to create. It is clearly entirely possible that "the devil is in the detail" in this context, so the safeguard for workers is that they will not have their rights to compensation benefits diminished or removed without a genuine attempt first having been made to secure agreement on that specific issue with their union representatives. These provisions are not concerned only with vague agreements in principle.

54. Further, subsection (11A) states that subsection (11B) applies if a scheme "makes any provision which would have the effect of reducing the amount of a compensation benefit". This again involves looking to see whether a general scheme includes a particular provision which would have the effect of reducing the amount of a particular compensation benefit. The focus is on the particular terms of the scheme as made and their effect upon particular compensation benefits. Subsection (11B) requires that a report be made to Parliament providing information about the consultation which took place for the purposes of section 1(3) "so far as relating to the provision" (i.e. the particular provision in the new scheme the Minister has made – here, the 2016 amendments – which has the effect of reducing the amount of a compensation benefit), the steps taken in connection with that consultation "with a view to reaching agreement in relation to the provision" (i.e. that particular provision) with the persons consulted, and "whether such agreement has been reached" (i.e. in relation to that particular provision).

55. In my view, on this interpretation of the relevant provisions of the 1972 Act, by cutting the PCSU out of the second round of discussions the Minister has acted in breach of the obligation of consultation with the PCSU contained in section 1(3), read with section 2(3D). The scheme in the form of the 2016 amendments which the Minister ultimately proposed making was different from the scheme proposals which he originally set out in the CSCS consultation paper and on which he consulted in the first round of discussions. The Minister did not consult with the PCSU on the terms of the scheme which he ultimately made.

56. The Minister could not lawfully exclude the PCSU from the consultation which ultimately mattered in terms of his statutory duty, namely on the terms of the 2016 amendments, which occurred in the second round of discussions. The PCSU, in the letter of 19 June 2016 sent on its behalf, indicated a willingness to discuss such matters and to consider the possibility of agreeing things at the end of such discussion. It did not rule out all possibility of reaching agreement, nor did it indicate that it had no intention of engaging in the consultation process in good faith. It might well have relevant contributions which it could make in the course of discussion which could affect the interests of its members. The Minister has at all times, and rightly, emphasised that he engaged in discussions about the changes which became the 2016 amendments in good faith and with an open mind, at least to the extent of being willing to make adjustments if good and persuasive points were made. The contributions which the PCSU might make might have been important and might have been capable of leading to some modification of the terms ultimately chosen for the 2016 amendments, even if ultimately the PCSU felt unable to agree those amendments.

57. There was no basis on which the Minister was entitled to exclude the PCSU from the consultation on the revised proposed terms set out in Mr Claydon's letter of 3 June 2016 and as they came to be further refined in the course of the second round of

discussions, thereby depriving some 160,000 civil servants of a voice in those debates. The Minister was not entitled to impose additional entry conditions above and beyond those stipulated in the 1972 Act for participation in that consultation, in the form of the pre-commitments he required the unions to make.

58. Mr Sheldon submitted that the consultation required by sections 1(3) and 2(3D) of the 1972 Act had come to an end on 4 May 2016. For the reasons given above, I cannot accept this. After that date, the Minister produced revised proposals for a scheme to be made under section 1, but he failed to consult with the PCSU about those revised proposals before changing the CSCS in accordance with them by making the 2016 amendments.

59. The strong and unusual duty of consultation in sections 1(3) and 2(3D) of the 1972 Act means that the Minister is not entitled to consult unions on one set of proposals for changes to the CSCS to reduce compensation benefits, consider responses received and then proceed to make different changes without going back to consultees, as would be the case with a usual consultation requirement. Rather, if there are to be modifications from proposals as originally presented, the Minister is obliged to go back to the unions which fall within the scope of sections 1(3) and 2(3D) and check with them whether they will agree to the terms as so modified. Even if they will not, they may still have useful contributions to make which might lead the Minister to change the proposals before making changes to the CSCS. And if he does, the Minister would need to check again whether agreement on those revised modified terms could be reached.

60. The practicalities of doing this indicate that the Minister's practice of consulting with representatives from relevant trade unions assembled together is a sensible one. That way, if one union makes suggestions for modifications, others will be able to comment on such suggestions in the course of the consultation without the whole process becoming overly cumbersome. The ability of unions to comment on suggestions for changes made by other unions is an important one, at any rate if the suggestions find favour with the Minister, since members of different unions might have competing interests or countervailing comments to make which should all be taken into account in the process of consultation before detailed changes to the CSCS are finally made.

61. For the reasons given above, in my judgment the claimants succeed in relation to Ground (1) of the challenge to the 2016 amendments. As appears in the further discussion about relief below, I do not consider that relief should be refused in relation to this ground of challenge by reason of section 31(2A) of the Senior Courts Act 1981.

Ground (2): Article 11 of the ECHR

62. In view of the conclusion under Ground (1), it is unnecessary to address the arguments based on Article 11 and I do not think it would be appropriate to do so. The claimants succeed under Ground (1) on ordinary principles of interpretation of legislation, without need for recourse to Article 11 and section 3 of the HRA. Also, they do not need to rely on Article 11 and section 6 of the HRA in order to show that the Minister acted unlawfully in excluding the PCSU from the second round of discussions about the changes to the CSCS. The Strasbourg case law in relation to

Article 11 is not always easy to interpret and apply (for a recent review, see *The Pharmacists Defence Association Union v Boots Management Services Limited* [2017] EWCA Civ 66), and it would not be helpful to try to embark upon such an exercise in this case where the issue does not arise.

Ground (3): A1P1

63. The issues which arise under this Ground are (i) whether civil servants' entitlements to compensation benefits under the CSCS as it stood before the 2016 amendments were made constitute "possessions" for the purposes of A1P1, and hence qualify for protection under that article; and (ii) whether interference with those "possessions" by the making of the 2016 amendments is objectively justified. The Minister accepts that if those entitlements are "possessions", the making of the 2016 amendments to the CSCS constituted an interference with them.

64. Similar issues arose in relation to the PCSU's challenge to the changes to the CSCS made in late 2010 which was determined by McCombe J in *PCSU (No. 2)*, albeit in a somewhat different legal context and economic and political context. The legal context was different, because McCombe J had to consider whether entitlements to compensation benefits under the CSCS constituted "possessions" at a time when civil service trade unions had a right of veto in respect of any change to the CSCS being made by the Minister, by virtue of section 2(3) of the 1972 Act, as it then stood and as interpreted in *PCSU (No. 1)*. McCombe J referred to the leading Strasbourg authorities of *Bronowski v Poland* (2005) 43 EHRR 1 and *Kopecky v Slovakia* (2004) 41 EHRR 944, GC, and held that entitlements under the CSCS did constitute "possessions" for the purposes of A1P1: see [23]-[38]. In the present case, Mr Sheldon submits that it was critical to this conclusion that at the relevant time the 1972 Act contained a right of veto for representative unions, whereas now it only contains a right to be consulted, as discussed above.

65. On the issue of justification, McCombe J referred to the relevant authorities and held that the reductions in benefits with which he was concerned were introduced in pursuit of a legitimate aim in the public interest and were proportionate to that aim; the interference struck a fair balance between the persons affected and the community as a whole; the individuals affected were not required to bear a disproportionate or excessive burden; hence the reductions were objectively justified, with the result that there had been no violation of A1P1: see [42]-[63]. He emphasised the extensive notion of the "public interest" in this context (citing in that regard *Bronowski* and *Hutten-Czapska v Poland* (2007) 45 EHRR 35, paras. 165-166) and held that the decisions under challenge lay in an area "in which the state is afforded the widest margin of appreciation, namely the area of economic and social policy": [51] (also [43], citing *Hutten-Czapska* for the proposition that the legislature's judgment as to what is in the public or general interest in implementing social and economic policies should be respected unless that judgment "is manifestly without reasonable foundation"). In *PCSU (No. 2)* the PCSU accepted that the objective of reduction of the national budget deficit was a legitimate aim, to which the savings to be made by the changes to the entitlements under the CSCS would make a contribution: [44].

66. At para. [61], McCombe J said:

> "Drawing such assistance as I can from the Strasbourg cases, I bear in mind that the scheme and payments made under it are designed to plug a gap between employments or between leaving the service and full retirement. To this extent, they are "weaker" than pension rights which afford financial protection for many years and into old age and have a transfer value (e.g on divorce). Salary and pension benefits remain unaffected. The rights of scheme members have not been eliminated by the New Scheme; they have been reduced in a manner designed to spread the burden fairly among all civil servants. There is no discrimination argument such as that raised successfully in the *Asmundsson* case [*Asmundsson v Iceland* (2004) 41 EHRR 927]. Past service is still recognised in the calculations. The decision was taken by the Defendant having considered the unions' objections and after assessing in detail the alternative proposed by them. While I recognise that each union has a different membership "profile", it is not, I think, without relevance that four unions accepted the New Scheme and five union negotiating teams did so. It is also not seriously contested that the New Scheme is still relatively favourable to departing employees when compared with statutory terms and the terms customarily on offer in the private sector and other public sector employments. Nor is it a case where some alternative is obviously available. Helpful though Counsels' arguments have been in enabling me to see how the Defendant and his ministerial colleagues and officials went about the problem, it is quite impossible in the context of a 2 ½ day hearing to make a full assessment of the quality of the calculations that underlay the Defendant's decision."

67. In my view, in the context of the present case, the entitlements under the CSCS still do constitute "possessions" for the purposes of A1P1, as they did in *PCSU (No. 2)*. However, as in *PCSU (No. 2)*, I consider that the interference with them is objectively justified. I therefore conclude that the making of the 2016 amendments did not violate civil servants' rights under A1P1.

68. As regards issue (i), whether the entitlements under the CSCS are possessions, para. 35 of the judgment in *Kopecky* provides guidance, as it did for McCombe J:

> "An applicant can allege a violation of Art. 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Art. 1 of Protocol No. 1,

> nor can a conditional claim which lapses as a result of the non-fulfilment of the condition."

69. The term "legitimate expectation" in this passage is an autonomous concept within the framework of the ECHR and the jurisprudence of the European Court of Human Rights, which does not necessarily correspond to the concept of "legitimate expectation" as used in domestic public law: see e.g. *Stretch v United Kingdom* (2003) 38 EHRR 196.

70. As explained in *PCSU (No. 1)*, the entitlements to compensation payments under the CSCS are not matters of contractual right for civil servants. However, such payments were and are in fact paid in accordance with the terms of the CSCS as a matter of invariable administrative practice when the conditions set out in the CSCS are satisfied. In *PCSU (No. 1)* an argument was addressed to me that entitlements under the CSCS constituted enforceable legitimate expectations of civil servants falling within the scope of their application, but it was not necessary to resolve that issue in that case: see [61]. Resolution of that issue is relevant here, however, because it bears upon whether the entitlements under the CSCS constitute "possessions" for the purposes of A1P1.

71. Mr Sheldon submits that the entitlements under the CSCS do not constitute legitimate expectations in domestic public law. I do not agree. It is established that consistent administrative practice in the exercise of discretionary powers can give rise to a protected legitimate expectation under domestic law: see e.g. *O'Reilly v Mackman* [1983] 2 AC 237, 275; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 408-409. In my view, that is the position here. The claim for legitimate expectations for individual civil servants based on the stated entitlements in the CSCS is a particularly strong one, given the longstanding nature of the administrative practice in question. The entitlements in the CSCS are set out in clear and specific terms; they are akin to contract rights (as they would be, if civil servants worked in the private sector and had their rights set out in contracts of employment); civil servants are encouraged by publication of the CSCS and the government's unvarying practice over very many years to apply the CSCS terms to expect that they will be paid in accordance with the CSCS and to rely upon that expectation when making decisions in relation to their employment in the civil service (such as whether to look for other jobs or to apply for early exit in accordance with the CSCS terms). The previous availability under section 2(3) of the 1972 Act of a right of veto for trade unions in respect of changes to the CSCS is not a critical feature in this analysis (nor, for that matter, do I read the relevant paragraph in McCombe J's judgment *PCSU (No. 2)*, para. [37], as indicating that he thought that it was).

72. On the footing that individual civil servants would have legitimate expectations enforceable in domestic public law in relation to CSCS entitlements, akin to contract rights which they would otherwise be in relation to employment in the private sector, I consider that it is clear that these entitlements would be classified as "possessions" for the purposes of A1P1. That is so even though they would only come into play if certain contingencies occurred. Even in advance of those contingencies arising, a civil servant would be entitled to expect that if they did occur payments would be paid to him in accordance with the CSCS, absent any legislative change by the Minister to the terms of the CSCS beforehand. While particular entitlements under the CSCS remain part of it, they would be enforceable as domestic law legitimate expectations.

73. But even if, for some reason, entitlements under the CSCS did not qualify as legitimate expectations in domestic law, they would still in my view qualify as "possessions" for the purposes of A1P1, on the basis that they come within the autonomous concept of "legitimate expectation" in the law in relation to A1P1. The entitlements are clear and precise, they are invariably complied with by government, they are akin to contractual employment rights and they are given special recognition and protection under domestic legislation, through the current set of safeguards in sections 1 and 2 of the 1972 Act in relation to any proposal to change them, as discussed above.

74. Turning to the question of objective justification, although the present context is somewhat different from that addressed by McCombe J in *PCSU (No. 2)*, I consider that the Minister's case on objective justification is made out, essentially for the same reasons as were given by McCombe J in his judgment in that case. It remains a critical declared objective of the government that there is still an imperative need to reduce the budget deficit and the further savings to be achieved by the changes to the CSCS will make a material contribution to that objective. The decision to introduce the 2016 amendments cannot be said to be manifestly without reasonable foundation.

75. In light of the wide margin of appreciation which is applicable, the 2016 amendments do not fail to strike a fair balance between persons affected and the community as a whole, nor are the individuals affected required to bear a disproportionate or excessive burden. The Minister has consulted widely on the changes, with a view to ensuring that a fair balance is struck between the interests of civil servants and the tax-paying public and as between different classes of civil servant. Although civil servants in the 50-54 age bracket are particularly badly affected by the changes, that reflects the comparative generosity of the particular benefits they could enjoy under the CSCS in its form before the 2016 amendments were introduced. Although the benefits under the CSCS are now reduced below the benefits after the changes in 2010 reviewed by McCombe J, it remains the case that the benefits remain more generous than would typically be available to workers in the private sector. As in *PCSU (No. 2)*, it is also relevant that a significant number of trade unions have agreed the changes set out in the 2016 amendments.

76. Mr Segal submits that by reason of the assurances given by or on behalf of the Minister in 2010 about the long-term and sustainable nature of the changed to the CSCS made then, it is not open to the Minister now to say that the version of the CSCS in place before the 2016 amendments was too costly in terms of the public finances. Mr Segal also submits that those assurances mean that civil servants had reasonable expectations that the CSCS benefits would not be reduced at this stage, such that it would be irrational for the Minister to conclude that they could be reduced. For the latter submission, Mr Segal seeks to draw an analogy with the analysis of Warren J in *IBM United Kingdom Holdings Limited v Dalgleish* [2014] EWHC 980 (Ch) in relation to changes to final salary pension plans in the private sector introduced by the pension plan trustees.

77. I do not accept these submissions. The assurances given in 2010 were not clear, unequivocal and devoid of relevant qualification, such as might provide a foundation for a domestic law legitimate expectation that the Minister would not exercise his power to amend the CSCS. The assurances did not disable the government from forming a fresh view regarding the exigencies of the public finances in the light of

current conditions and concluding that it was in the public interest to make further cuts to the CSCS benefits, in order to address what it regards as an excessive budget deficit as things stand at the present time. As Mr Jinks explains in his evidence on behalf of the Minister, the 2015 Government Spending Review set budgets going forward for government departments which require significant savings to be made to address the budget deficit, which still continues. Workforce reduction may have to be considered to achieve these savings, and if the costs of such reductions are not constrained to some degree money will have to be diverted from the provision of public services by government departments. The government is entitled to assess the public interest in the light of current circumstances and to conclude that more needs to be done to reduce the budget deficit by limiting costs under the CSCS than was previously thought necessary. It is clear from the evidence that the 2016 amendments are assessed to be capable of making a significant contribution to fiscal savings, said to be in the region of £80-100 million p.a. (equating to £400-500 million over the term of a Parliament).

78. Aside from that general point, I am also satisfied on the evidence that the full costs reductions which were expected to result from the reforms to the CSCS in 2010 have not materialised. Therefore, even if there had been no other relevant change of circumstances since 2010 (which is not the case), the Minister would still have had good reason for introducing the 2016 amendments because the previous assumptions regarding the cost of the CSCS have been falsified by experience.

79. I do not find the reference to the *Dalgleish* case helpful. That case was concerned with purely private financial considerations in the context of a private sector pension scheme. There is nothing in it which touches on the wider considerations to which a national government is entitled to have regard when deciding on measures affecting a country's economic and social policy, which is the present context. There is nothing in it which provides guidance as to the proper approach to the application of A1P1 in the present context.

80. Mr Segal submitted that the Minister could not support the 2016 amendments by reference to the four objectives identified in the CSCS consultation paper, set out above. The 2016 amendments abandoned any distinction between VE and VR payments (first objective), a cap on CSCS payments at £95,000 was not required because primary legislation to that effect was to be introduced (fourth objective), and the mere saving of money could not constitute a legitimate objective in itself, particularly in view of the statements made in 2010 that the scheme as amended then was in a form which was fair, affordable and sustainable.

81. I do not accept these submissions either. It is clear that the overall objective of the Minister in making the 2016 amendments was to reduce the cost of the CSCS in support of a major national economic objective (reduction of the budget deficit) in a way which sought to strike a reasonable and fair balance between the interests of tax-payers and civil servants and also between different groups of civil servants. The Minister was persuaded by the unions in the first round of discussions that it was unnecessary to differentiate between VR and VE payments, so the overall objective could adequately be pursued without doing so. This does not undermine the public interest being pursued. Indeed, seeking agreement with the unions, which was the statutory objective under section 2(3D) of the 1972 Act and which might forestall damaging industrial unrest in future, was in itself a relevant aspect of the extensive

concept of the "public interest" which it was legitimate for the Minister to pursue, so his concession to the unions' arguments on this issue in no way undermines his case on objective justification. There is nothing illegitimate or improper in the CSCS itself setting out a cap on the benefits payable under it, which happens to replicate a general cap on exit payments in the public sector contained in primary legislation. In making the 2016 amendments, the Minister was not simply seeking to save money: he was seeking to pursue the legitimate objective of deficit reduction while balancing fairly a number of competing interests, including those of individual civil servants. As explained above, he was not prevented from doing this in 2016 by the statements which had been made about the changes in 2010.

82. For these reasons, I would dismiss the challenge to the 2016 amendments based on A1P1.

Ground (4): the public sector equality duty

83. On the evidence, I consider that the Minister complied with the public sector equality duty under section 149 of the 2010 Act. He had regard to the needs and interests of persons with disabilities. He had identified the particular impact upon them of the proposed changes to the inefficiency payments under the CSCS when the Cabinet Office carried out its 2014 Equality Analysis and that impact was taken into account when the decision was made to promulgate the 2016 amendments. As Mr Jinks explains, the detrimental impact was considered to be justified by the rationale underpinning the reforms.

84. Mr Segal was critical of the 2016 Equality Analysis, which did not repeat the analysis in the 2014 Equality Analysis. He submits that this shows that the Minister failed to comply with the public sector equality duty under section 149 of the 2010 Act at the relevant time, namely in 2016 when he made the 2016 amendments.

85. I disagree. Section 149 requires only that due regard should be had to relevant matters when a public authority exercises its functions: see the summary of the relevant principles in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [26]. It does not stipulate that this must be evidenced in a single document, such as the 2016 Equality Analysis, or indeed in any document: see *Bracking* at [26(5)(iii)]. But it is good practice for a decision maker to keep records demonstrating consideration of the duty: *Bracking* at [26(5)(vi)].

86. The evidence shows that in 2016 the Minister did in fact have due regard to relevant matters in accordance with section 149. The relevant consideration had been recorded in the form of the 2014 Equality Analysis. At most, the Cabinet Office might be criticised for failing to keep a record of the re-consideration of this point in 2016, perhaps by way of a cross-reference to the 2014 Equality Analysis. But that only constitutes a venial failure to follow best practice in this case. It does not constitute a breach of any legal obligation resting on the Minister under section 149.

87. For these reasons, I would dismiss the challenge to the 2016 amendments based on section 149 of the 2010 Act.

Relief: section 31(2A) of the Senior Courts Act 1981

88. Although the Minister has lost on the first ground of challenge, Mr Sheldon submits that the court should refuse relief pursuant to section 31(2A) of the 1981 Act because it is highly likely that if the PCSU had been consulted in the second round of discussions, as it should have been, there would still have been no difference (or no substantial difference) in outcome in respect of the final form of the 2016 amendments adopted by the Minister. He invites the court to accept at face value the evidence of Mr Jinks to the effect that neither the Minister, nor the officials advising him, would have accepted any further increase in the level of the underpin salary beyond £24,500, nor any enhanced protection for those in the 50-54 age group, because "Any such proposals would have been very costly and also were not considered to be consistent with the aims of the proposed amendments to the CSCS". Mr Sheldon also pointed to an absence of evidence from the claimants as to what further changes they might have pressed for in the amended terms of the CSCS.

89. Although section 31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as *Simplex GE Holdings Ltd v Secretary of State for the Environment* [1988] 3 PLR 25, the threshold remains a high one: that it is highly likely that the outcome would not have been substantially different. This involves an evaluation of the counter-factual world in which the identified unlawful conduct by the public authority is assumed not to have occurred.

90. In the present context, Mr Sheldon has failed to persuade me that the new statutory test for refusal of relief has been satisfied. Although he relies on assertions in the evidence of Mr Jinks that the 2016 amendments would have been made in the same or substantially the same form even if the PCSU had participated in the second round of discussions, a number of points should be emphasised.

91. First, these parts of Mr Jinks's witness statement are not evidence of past facts by a witness with knowledge of those facts, but an exercise in speculation about how things might have worked out if no unlawfulness had occurred. It is true that Mr Jinks's speculation is informed by a background understanding of the parameters within which the Minister was working and thus is entitled to some weight. However, self-interested speculations of this kind by an official of the public authority which has been found to have acted unlawfully should be approached with a degree of scepticism by a court. That is especially so where the public authority has not provided a full evidential picture of all matters which bear upon such parameters. In this case, the Minister has not provided the court with a full account of the ebb and flow of debate in the second round of discussions, nor with the minutes of those discussions, to enable the court to make a critical evaluation of the assertions made by Mr Jinks about the counterfactual position. Nor has the Minister provided any detailed information about any discussions with HM Treasury relevant to the parameters under which he was working or about his own internal calculations regarding the level of flexibility available to him in the negotiations: it might be said that release of such material might be unfairly detrimental to the government in future negotiations with unions, but if so there are well recognised court procedures involving confidentiality rings and so forth to accommodate such concerns. The court has not been placed in a position in which it can make a critical evaluation of the assertions made by Mr Jinks and satisfy itself that they are justified.

92. For similar reasons, I am not impressed by Mr Sheldon's criticism of the want of evidence from the PCSU. Since it was the very nature of the unlawful conduct by the Minister that the PCSU was excluded from the second round of discussions and hence deprived both of an opportunity to test the Minister's position in the course of them and of knowledge about what points were made and which positions were adopted by the Minister from time to time in the course of them, the PCSU had no means of making a critical evaluation of the assertions made by Mr Jinks and of directing specific evidence in answer to them. In fact, in its letter before claim the PCSU did set out plausible points on which it could and would have pressed the Minister if it had been allowed to participate in the second round of discussions.

93. These points carry particular weight in a context in which the Minister was subject to a statutory duty to consult with a view to reaching agreement with the PCSU, amongst others, and has been at pains to say that he was acting in good faith to that end. Moreover, the assurances given in 2010 gave the PCSU the potential for a degree of leverage in the discussions.

94. Mr Jinks in his evidence called in question assertions by the PCSU that it would have pressed for a further increase in the underpin salary for the CSCS, as it had not raised this in its response to the public consultation nor in the first round of discussions. But in my view this is a point without substance. Part of the object of requiring the Minister to consult with the PCSU along with other unions in the second round of discussions was to give it an opportunity to respond to and develop points made in the course of that round of discussions, perhaps adding its weight (and the weight of its 160,000 members) to arguments first raised by others on which the Minister had revealed a degree of flexibility.

95. It is clear that there was a prize for the Minister in obtaining agreement on the changes from as many unions as possible. To do so would make easier his reporting to Parliament under section 2(11B) of the 1972 Act. The incorporation of that reporting obligation in the legislation when the unions' right of veto over changes to the CSCS was removed in 2010 was plainly intended to reinforce the substantive effect of the obligation to consult with a view to agreeing such changes then set out in section 2(3D). Also, the more the Minister could secure union agreement to the changes, the less the risk of future disruptive industrial action.

96. These points are reinforced by the fact that the Minister did display flexibility on financial terms in both the first and second rounds of discussions in order to secure agreement from unions. In the first round he abandoned his attempt to differentiate VR and VE payments, and accepted that payments should be at the higher VE rate in both cases. In the second round, he agreed a significant uplift in the amount of the underpin salary. Presented with the possibility of a still greater prize, of perhaps securing agreement from the biggest civil service union of all, it cannot be said that it is highly likely that the outcome would not have been affected if the PCSU had been allowed to participate in the second round of discussions, as it should have been.

97. A further dimension to this part of the case arises by reason of the practicalities of consulting with all relevant trade unions, as referred to above. The Minister was not the only audience for the arguments of the PCSU. Other unions were as well. If the PCSU were successful in enlisting support from other unions for one or other suggestions for changes which it wished to see, the pressure on the Minister to

accommodate such suggestions in order to secure the agreement of a sufficient number of unions would have been increased. As the Minister put it in his response of 26 September 2016 to the public consultation on proposed reform of the CSCS, "Although we have a preferred proposal we want, wherever possible, to reach a negotiated package of reforms which has the support of the majority of trade unions" (para. 8.167; a similar point was made in Mr Claydon's letter of the same date to the unions).

98. This was a negotiation with many moving parts, in terms of different participants with varying interests and objectives and with an uncertain and to some degree flexible possibility of financial accommodations between those interests. The cake was of uncertain size and there was a great deal to play for in terms of how it might be divided up. Each financial element in the kaleidoscope was of potentially varying size and the applicable arguments varied in force accordingly: a partial reduction in the impacts on the 50-54 age group might have been possible in order to smooth out the harsh impacts of the proposed changes on them, even if the government thought that full retention of their benefits was too expensive and conflicted to too great a degree with other principles in terms of expecting people in their 50s to try to find other work. Again, by virtue of the nature of the process, I cannot say that it is highly likely the outcome would not have been affected in a significant way if the Minister had not behaved unlawfully in relation to cutting out the PCSU from involvement in it.

Conclusion

99. For the reasons given above, I would uphold the first ground of challenge to the 2016 amendments, but would dismiss the other grounds of challenge. This is not a case in which it is appropriate to refuse relief by virtue of section 31(2A) of the Senior Courts Act 1981. As I understand that Whipple J agrees with my judgment, the parties are invited to try to agree the form of relief. If they cannot do so, the court will make a further determination on that point.

Whipple J:

100. I agree.