

**IN THE COUNTY COURT AT CENTRAL LONDON**

Claim No M10CL051

Thomas More Building  
Royal Courts of Justice  
Strand  
London WC2A 2LL

Date: 19 March 2026

**Before :**

**HIS HONOUR JUDGE MONTY KC**

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**Between :**

**CHARLES MENDES**

**Claimant**

**- and -**

**SLATER AND GORDON (UK) LIMITED**

**Defendant**

**- and -**

**ENERGY, SAFETY AND RISK  
CONSULTANTS (UK) LIMITED**

**Proposed Second  
Defendant**

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**Ms Chloë Bell** (instructed by **Thompsons Solicitors**) for the **Claimant**  
**Mr Jonathan Chew** (instructed by **Travelers Legal**) for the **Defendant**  
**Mr Stephen Brown** (instructed by **Brecher LLP**) for the **Proposed Second Defendant**

Hearing dates: 3, 4 November 2025  
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**Approved Judgment**

## HHJ Monty KC:

### Introduction

1. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) is the current implementation of the EU’s Acquired Rights Directive, which protects an employee’s rights when a business is transferred to a new employer. In broad terms, it provides that the employee’s contracts and associated rights are automatically transferred to the new employer under the same terms.
2. TUPE Regulation 10 contains an exemption under which rights under occupational pension schemes which relate to old age, invalidity and survivors’ benefits are carved out from the transfer, such that the new employer does not have to provide those rights.
3. There is an exception. An employee’s enhanced early retirement or redundancy rights do transfer to the new employer on a transfer of employment. These are known as “Beckmann rights”, after the case of *Beckmann v Dynamco Whicheloe* [2003] ICR 50.
4. The present claim raises (amongst others) the following questions. Where an employer fails to ensure that an employee’s Beckmann rights are transferred, with the result that the employee’s pension is less than it would have been had those rights been transferred, when does the employee’s cause of action arise, and what is the applicable limitation period for bringing such a claim?

### Brief factual chronology

5. The Claimant is Dr Charles Mendes. From February 1994, Dr Mendes was employed by Nuclear Electric. In 1995, his employment was transferred to Magnox Electric plc. On 30 October 2005, his employment was transferred to E&TS Ltd under the then current regulations in TUPE 1981 (the predecessor to the current regulations). On 29 June 2012, his employment was transferred to Energy, Safety and Risk Consultants UK Ltd (“ESRC”) under TUPE. On 21 May 2017 he left ESRC having been dismissed for compulsory redundancy. At that time, he was 50 years and 1 month old.
6. When Dr Mendes started work for Nuclear Electric, he joined the Electrical Supply Pension Scheme (“ESPS”). Under ESPS, he was entitled to the following redundancy benefit:

“the benefits specified in and calculated as provided by Rule 14 [i.e. an annual pension of 1/80th of the Member’s Pensionable Salary for each year of Contributing Service and a lump sum of 3/80ths of his Pensionable Salary for each year of Contributing Service] shall in the case of a Member who is retired compulsorily by the Employer employing him on or after attaining age 50, be paid to him if such Retirement is consequent on reorganisation or redundant and may, in the discretion of such Employer be paid to him if such Retirement is for any other cause”.
7. The redundancy benefit was of considerable value. Under the ESPS, there is no actuarial reduction for early retirement which would otherwise be applied to a Member taking their pension prior to their Normal Pension Age (which, in the case of Dr

Mendes, was 63), and any additional cost to the scheme was to be borne by the employer who last employed the Member.

8. Dr Mendes remained a member of ESPS whilst employed by Magnox.
9. When his employment transferred from Magnox to E&TS under TUPE 1981, Dr Mendes' accrued pension benefits in ESPS transferred to a new scheme called the Serco Pension & Life Assurance Scheme ("SPLAS"), under which he was known as a Magnox Member. SPLAS provided a redundancy benefit which was similar to that under ESPS:

"The Normal Pension and Retirement Lump Sum payable under General Rule 4.2.2 in respect of an Active Member shall be:

4.2.2.1 if the Active Member retires in circumstances other than because of Incapacity an amount equal to the Normal Pension and Retirement Lump Sum which would have been payable to him at Normal Pension Age but calculated at the date of his actual retirement. Unless the Magnox Member has reached his 50th birthday and has 10 years' Pensionable Service or is compulsorily retired from Service by his Employer due to redundancy or a reorganisation of the Employer's business, the Normal Pension and Retirement Lump sum will be reduced by the Trustees on Actuarial Advice to take account of early payment in respect of the date of retirement and Normal Pension Age..."
10. Further, Dr Mendes was entitled to a lump sum under SPLAS Rule 6.3:

"...where the Magnox Member's Service ended, in the Trustees' opinion, due to redundancy or a reorganisation of the Employer's business, the Magnox Member will receive a Normal Pension payable during his life time and a Retirement Lump Sum immediately (or, if later, from age 50) calculated at the date when the Magnox Member's Service ended (or, if later, from age 50)".
11. In June 2012, when Dr Mendes' employment transferred to ESRC under TUPE, he had to leave his accrued pension benefits in SPLAS and joined a section of the Amec Pension Scheme which provided mirror benefits to his SPLAS benefits.
12. Under TUPE, ESRC (as the transferee employer) was obliged to provide an enhancement or top-up to reflect the full value of Dr Mendes' Beckmann rights to his redundancy benefit, which would have protected those benefits which accrued to him prior to his employment with ESRC. Under the Amec Pension Scheme, Dr Mendes was only entitled to a redundancy benefit for his period of service with ESRC, but his Beckmann rights entitled him to a redundancy benefit for his employment since 1994 (in other words, his redundancy benefit under the ESPS and SPLAS schemes as well as that under the Amec Pension Scheme).
13. Dr Mendes' employment with ESRC ended on 21 May 2017.
14. He did not receive redundancy payments reflecting his Beckmann rights. Dr Mendes received only a retirement lump sum and a pension calculated by reference to his period of service with ESRC.

## **The present claim**

15. Dr Mendes sought advice from solicitors, Slater and Gordon UK Ltd, who are the Defendant to the present claim (“SG”).
16. SG failed to take Dr Mendes’ instructions within a reasonable time to issue proceedings against ESRC in respect of his Beckmann rights and failed to issue proceedings (or enter into a standstill agreement) by 20 May 2023 (which was 6 years after Dr Mendes was made redundant). The significance of that date is that SG ceased acting for Dr Mendes when they wrote to him on 13 June 2023 saying that “the time limit for the issue of proceedings will have expired 6 years following your date of dismissal”.
17. In the present claim, SG admits that it breached its contractual and tortious duties to Dr Mendes to exercise reasonable skill and care. The claim is therefore for the lost value of the underlying claim against ESRC.

## **Limitation**

18. SG is running three limitation arguments in relation to the underlying claim.
19. Limitation Argument 1: The underlying claim is to be treated as a claim by a beneficiary under a trust to recover trust property in the possession of the trustee or previously received by the trustee and converted to his use such that by section 21(1)(b) of the Limitation Act 1980 (“LA”) there is no limitation period applicable to the underlying claim.
20. Limitation Argument 2: The underlying claim is a claim upon a specialty, namely the SPLAS deeds, and the limitation period is therefore 12 years under LA section 8.
21. Limitation Argument 3: Each failure by ESRC to pay Dr Mendes’ Beckmann rights amounts to a new breach and therefore a new cause of action arises each time in respect of which a 6-year limitation period applies under sections 2 and/or 5 of the LA.
22. Thus under Limitation Arguments 1 and 2, SG says that the relevant limitation period has not expired, and under Limitation Argument 3 that all Dr Mendes has lost is (a) those instalments which should have been received between May and August 2017, and (b) the ability to sue for the lump sum payment from May 2017 rather than August 2017.

## **The preliminary issues**

23. Against that background, on 15 July 2025, HHJ Evans-Gordon directed a trial of the following preliminary issues:

Issue 1: Is the relevant applicable limitation period or periods for the Claimant’s claim or claims against ESRC 6 years, 12 years or is there no limitation period from the date of redundancy, in relation to (a) monthly pension payments and (b) the lump sum payment?

Issue 2: Does a fresh cause of action accrue on each date on which a pension payment was or would have been due?

24. It was further ordered that for the purposes of the preliminary issue trial, the facts shall be assumed to be as alleged by the Claimant. For that reason, the narrative in the chronology section above is mainly based, with thanks, on the Claimant's skeleton argument.

### **The involvement of ESRC**

25. Dr Mendes has issued an application to join ESRC as a Second Defendant in the event that it is held that the underlying claim against ESRC is not statute barred. With the consent of the existing parties, and with the permission of the court, ESRC was allowed to participate in the preliminary issue trial.

### **Representation**

26. Dr Mendes, SG and ESRC all had the benefit of extremely able representation. I am very grateful to Mr Chew, for SG, Ms Bell, for Dr Mendes, and Mr Brown, for ESRC. Each produced detailed and helpful skeleton arguments and made their oral submissions with admirable clarity.
27. The hearing bundle comprised 1493 pages. It was not necessary to look at most of the documents, principally because all three parties agreed the background facts and in particular the operation of TUPE, how Dr Mendes' Beckmann rights are said to arise, and how the various pension schemes (as well as pension schemes generally) work. As a result, I do not think it necessary to do more than set out the summary in the chronology section above which I trust will suffice for present purposes, although Mr Chew's skeleton argument in particular sets it all out in far more detail.
28. There was a 3-volume authorities bundle comprising 53 cases/extracts from statutes/extracts from textbooks, totalling 1294 pages, and one further authority was handed up during the course of submissions. Again, it did not prove necessary to look at all of the authorities in the bundle, for similar reasons.

### **The pleaded case**

29. In respect of the underlying claim, Dr Mendes' case is set out at paragraphs 35-40 of the Particulars of Claim.

“35. Upon his redundancy Dr Mendes had a contractual right and/or a statutory entitlement under TUPE 2006 and/or a freestanding right under Article 3(1) of the Acquired Rights Directive to the Serco Redundancy Benefit or its substantial equivalent.

36. Upon his redundancy ESRC did not provide Dr Mendes with the full value of the Serco Redundancy Benefit. Instead, ESRC provided Dr Mendes with a redundancy benefit calculated by reference only to his years of service with ESRC rather than his continuous service, as preserved by TUPE 1981 and TUPE 2006 ('the ESRC Version of the Redundancy Benefit').

37. The ESRC Version of the Redundancy Benefit was not a substantial equivalent of the Serco Redundancy Benefit.

38. In not providing Dr Mendes with the Serco Redundancy Benefit or its substantial equivalent, ESRC breached their contractual, statutory duties and/or their duties under the Acquired Rights Directive towards Dr Mendes.

39. As a result of those breaches, Dr Mendes suffered loss and damage representing the difference between the full value of the Serco Redundancy Benefit and the ESRC Version of the Redundancy Benefit. He has also suffered loss of interest that would have accrued on amounts that he should have been paid earlier.

40. The precise amounts Dr Mendes would have claimed in a dispute against ESRC will be the subject of actuarial evidence.”

30. Two points arise.
31. First, the alleged obligation on ESRC is said to be to “provide” Dr Mendes with his Beckmann rights or the substantial equivalent. The focus at this preliminary issue stage is therefore, in my view, upon the nature of that obligation, because that should determine the various limitation issues.
32. Secondly, the reference at paragraphs 37 and 38 to “substantial equivalent”. Where it is not possible to duplicate transferring rights, the obligation is to provide “a scheme of substantial equivalence”: see *Mitie v French* [2002] IRLR 512. Counsel have been unable to find a reported case which has considered what is the substantial equivalent of a Beckmann right.
33. Documents in the hearing bundle show that there was some discussion in 2012, at the time of the transfer to ESRC, about whether past service could be transferred, and this culminated in a letter dated 12 July 2012 which stated that only Dr Mendes’ future service would be protected and “you will not be entitled to transfer your past service into the AMEC pension scheme”.
34. No application was made to the Employment Tribunal in relation to the terms of Dr Mendes’ employment and pension rights once he was made redundant, and the time for making such an application (which had been envisaged in *Mitie v French*) expired on 13 September 2017.
35. SG was retained by Dr Mendes on 23 September 2017, and ceased to act for him on 13 June 2023.

### **The approach to the preliminary issues**

36. I intend to address the limitation issues raised by SG in the order in which they were addressed by Mr Chew.

#### **A. Does a fresh cause of action accrue on each pension instalment payment?**

37. The SPLAS pension is described as annual, and the Amec pension is paid monthly.
38. Each month, Dr Mendes receives a payment which does not reflect his Beckmann rights.

39. Thus, each payment is in effect an underpayment in the sense that ESRC pays Dr Mendes less than it would if the payments reflected his Beckmann rights.
40. Mr Chew contends that if ESRC was obliged to ensure that the pension is at the level it should be, inclusive of the Beckmann rights, then a cause of action accrues in respect of each pension instalment every month; every monthly underpayment amounts to a new breach and a new loss caused by that breach.
41. Ms Bell contends that there was a one-off breach upon redundancy (the failure to ensure that Dr Mendes had his Beckmann rights), and that there was an immediate loss (or at least a loss when the first monthly payment was less than it should have been). Mr Brown agrees with Ms Bell.

### *SG's position*

42. Mr Chew's analysis starts by characterising pension payments as instalments or periodic payments.
43. An early retirement Beckmann rights claim has been described as an effective annuity, which is a type of periodic payment.
44. *Frankling v BPS Public Sector Ltd* [1999] ICR 347 is a decision of the Employment Appeal Tribunal. The applicants were employed by an NHS hospital trust under contracts of employment which had what would later become known as Beckmann rights (the *Frankling* case predates *Beckmann* and the substantive decision is inconsistent with the Beckmann decision). The trust transferred their employment to the defendant company, and later the applicants were made redundant. Their claims for the enhanced benefits were dismissed as being excluded under TUPE 1981 (it is for that reason that the decision does not survive *Beckmann*). On appeal, the EAT had to consider the nature of the enhanced rights. At p358, Morison J held (emphasis added, as this is the sentence particularly relied on by Mr Chew):

“Effectively, therefore, what the applicants are seeking is an annuity payment from the company which would give them the ‘missing’ benefits. Such a payment would have to reflect the possibility that one of them might die in benefit and a survivor become entitled to payment. From a legal and practical point of view the transferee was not able to make payments to the scheme so as to enable the scheme to make the payments to the applicants. Thus, the obligation on the transferor to make payments to the scheme has been converted into an obligation on the transferee to make payments to their redundant employees.”

45. Mr Chew refers to “longstanding authority” that both annuities and periodic payments have serial limitation periods arising afresh when each payment falls due.

“It seems that a gift of such an annuity [charged on personalty] amounts to a gift of successive annual sums and that time begins to run in respect of each instalment only when the sum becomes payable”: Halsbury's Laws Vol 68 (Limitation) §1209.

46. A claim for an annuity by the estate of the widow of a person who had received the annuity during his lifetime was analysed by the House of Lords as a claim against trustees, in respect of which no limitation period applied, whereas the Court of Appeal had held that the claim was not a trust claim, and that the cause of action accrued each time there was a failure to pay (and the Court of Appeal's analysis of the nature of the claim, had this in fact have been a non-trust annuity, was not questioned): *Edwards v Warden* (1874) LR 9 Ch App 495 (CA Ch) and *Edwards v Warden* (1876) 1 App Cas 281.
- “There may also be a series of breaches of a single covenant. Examples are failure to pay instalments of interest or rent.”: Chitty on Contracts 32-025, and the cases there cited for that proposition.
47. In *Amott v Holden* (1852) 18 QB Reports 593, it was held that a new cause of action arose upon each successive breach of a condition to pay an annuity as it fell due, and that the (then 20-year) limitation period did not prevent the obligee from suing to recover on breaches within 20 years. Lord Campbell said at p603 “if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that”, and Wightman J referred at p605 to “every breach creates a fresh cause of action”.
48. In the field of pension schemes, rights to payments of pension are treated as fresh instalments.
49. *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] 2 AC 455 was a case in which underpaid pension contributions were held to be subject to a six-year limitation period for each “complete cause of action”, which cause of action arose in respect of each separate payment obligation. Lord Slynn of Hadley said that there was a breach of an individual complete cause of action every time a periodic payment was not made:
- “That obligation may have been on a daily or weekly or other periodic basis but each time there was an obligation to admit to the scheme and to make the necessary payments to the trustees and the obligation was breached a complete cause of action arose since the damage existed at once. The next time the obligation was breached a separate cause of action occurred in respect of that second breach. The time limit of six years runs from each complete cause of action. Accordingly I do not accept that the comparison is between six years from the date of termination of employment for all failures to carry out the equality clause obligations by giving access to the scheme and six months from the date of termination of employment under section 2(4). Once six years had run in respect of each specific breach claims in respect of that breach were statute-barred.”
50. By analogy, Mr Chew says that an employer's Beckmann obligations are also individual obligations, arising each time a payment falls due, with a limitation period running from each breach of an obligation.
51. In *Webber v Department of Education (No 2)* [2015] Pens LR 69, a claim was made against a pensioner for recovery of mistaken overpayments. Nugee J as he then was held that the claim was subject to a 6-year limitation period prior to a cut-off date being

the date when the mistake could with reasonable diligence have been discovered. Thus each overpayment gave rise to a fresh cause of action.

52. Mr Chew says this shows that there is no logical difference between a claim – such as in *Webber* – for overpayment of pension, and a claim – such as that by Dr Mendes – for an underpayment of pension.
53. In *Hughes v Pension Protection Fund* [2021] Pens LR 2, Lewis J held that a claim for underpayment of statutory compensation from a statutory body was subject to a 6-year limitation period where the relevant question was whether each instalment had been paid within six years before the claim (the decision was appealed, but not on limitation: see [218], [222]).
54. Again, Mr Chew points out that in *Hughes* there was a new cause of action each time there was an underpayment.
55. *Re Axminster Punter Southall v Hazlett* [2021] EWHC 1652 (Ch), [2022] Pens LR 1 was another underpayments case, this time by a pension trustee. It was held that claims against the trustee had no limitation period because of section 21 of the LA, and as Mr Chew says, part of Morgan J's analysis was that unless section 21 applied, the beneficiary would only be able to claim arrears of annuity or arrears of pension within the six years before the claim:

“Assume a beneficiary who has an entitlement to be paid out of the trust property but who does not have a proprietary interest in specific trust property, for example, an annuitant where the annuity is not charged on the trust property or a pensioner under a trust-based pension scheme. Assume that more than six years earlier the trustee misappropriated the trust fund (i.e. he converted it to his use) and stopped paying the annuity or the pension. On Mr Legge's approach, the beneficiary would be entitled to an order that the trustee restore the trust fund; the trustee would not have a limitation defence under s.21(3) because the case would come within s.21(1)(b). Assume then that the beneficiary obtained an order that the trustee restore the trust fund and that the trustee did so. If the beneficiary were then to claim the arrears of annuity or the arrears of pension, the beneficiary could not recover the full amount of the arrears but would be restricted to arrears within the six years before the claim to recover the arrears was brought; the trustee would have a limitation defence under s.21(3) and the case would not, on Mr Legge's approach, be within s.21(1)(b).”

### **Dr Mendes' position**

56. Ms Bell contends that the claim against ESRC was fully constituted in contract – breach – and tort – breach and loss – on the date of Dr Mendes' redundancy. This was a one-off breach which set in motion a chain of damage.
57. Ms Bell refers to several well-known cases in this field.
58. *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627: In relation to damage for tortious claims, damage (a) is “any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency...things like loss of earning capacity, loss of a chance or bargain, loss of

profit...”; and (b) must be loss which falls within the measure of damage applicable to the wrong in question. See p1630D, p1630F and also *Forster v Outred & Co* [1982] 1 WLR 86. The starting point is to identify the relevant measure of loss, by comparing (a) what the claimant’s position would have been had there been no breach, and (b) the claimant’s actual position. The cause of action accrues when that comparison first reveals a loss.

59. In *Knapp v Ecclesiastical Insurance Group plc* [1998] PNLR 172, it was held that a cause of action against an insurance broker for giving negligent advice before the policy was taken out arose at the inception of the policy. As Hobhouse LJ said at p178:

“It is immaterial that at some later time the damage suffered by the plaintiffs became more serious or was capable of more precise quantification. Provided that some damage has been suffered by the plaintiffs as a result of the second defendant's negligence which was ‘real damage’ (as distinct from purely minimal damage) or damage ‘beyond what can be regarded as negligible’ that suffices for the accrual of the cause of action.”

60. *Phillips v National Grid Gas plc* [2025] EWHC 693 (KB) involved an employee who was entitled to a (discretionary) pension if his employment terminated by reason of incapacity. In 1999, the employee was injured in an accident at work and never returned to work. In 2002, he was dismissed. The reason given in 2002 (and again in 2008) for termination was capability due to ill health, and the trustees of the pension fund refused to pay out. The employee sued, saying that the employer had breached duties to state all opinions with reasonable skill and care and to exercise its discretion rationally and in good faith. The claim was struck out as being time barred. On appeal, Lavender J held that any cause of action arose in 2002 and 2008, so any claim was indeed statute barred. The employee submitted that he suffered loss, and a fresh cause of action arose, every month he was not paid the pension which he said he should have been awarded. Lavender J held, at [84]:

“In my judgment, the claimant has not suffered a fresh loss every month. In relation to the 2002 opinion, for instance, his case is that, if the defendant had correctly performed its duty, it would have expressed the opinion in 2002 that he had been dismissed for incapacity and the trustees would have decided to award him a pension. It is clear that his alleged loss is the pension and that he suffered that loss in 2002. The fact that the pension would have been payable monthly for the rest of his life (subject to the possibility of suspension, revocation or reduction of the pension) did not mean that he suffered a fresh loss every month. The claimant could have sued in 2002 for damages assessed by reference to the value of the pension. The present case is, in this respect, akin to the situation in *Jalla*, where there was a single tort, albeit with lasting consequences.”

61. *Jalla & Anr v Shell International Trading and Shipping Co Ltd & Anr* [2023] UKSC 16 is the Supreme Court’s decision concerning liability for an oil spill in Nigeria. It was held that the oil spill was a one-off event and not a continuing nuisance which arose afresh each day, even though the loss was ongoing. The cause of action accrued when the land was affected by the oil spill.

62. Ms Bell therefore submits that Dr Mendes’ causes of action in contract and tort were complete at the time of his redundancy. That is when his entitlement to the enhanced

pension (his Beckmann rights) crystallised, and when ESRC refused to provide the full value of those rights to him.

63. In essence, Mr Brown makes very similar points. He says that there is no continuing breach or potential series of future breaches, but a one-off breach – the failure to ensure that Dr Mendes was entitled to his benefits.

## **Discussion**

64. The starting point is to focus on the alleged breach of duty. I have set out above how that is pleaded. It is in summary a failure to provide the Beckmann rights or their substantive equivalent.
65. The underlying claim was not a claim against the pension scheme trustees, who have paid Dr Mendes in accordance with the scheme.
66. In the present case, I agree with Mr Chew that what ESRC had to provide was a scheme of substantive identity, and there is no difficulty in saying what that was. It was to ensure that Dr Mendes received regular payments reflecting his Beckmann rights (I can for the moment ignore any potential distinction between monthly and annual payments). I also agree that – as described by Hildyard J – this obligation transferred to ESRC as it was not an obligation which vested in the pension trustees.
67. The problem has arisen because ESRC failed to ensure that the pension scheme was funded so as to pay Dr Mendes in accordance with his Beckmann rights. As the correspondence in the bundle shows, ESRC had calculated what it would pay into the Amec Pension Scheme by reference only to the period of service with ESRC.
68. It seems to me entirely clear that as at the date of redundancy there was – on the pleaded case – a breach and an immediate loss.
69. On the day before redundancy, Dr Mendes was entitled to his Beckmann rights, and ESRC was obliged to fund the Amec Pension Scheme so that those rights would result in payment of the enhanced redundancy benefit. As at the date of the redundancy, ESRC had failed to do so. Dr Mendes was thus immediately worse off than he was the day before. This was as a result of the failure by ESRC to provide those rights and was an immediate loss to Dr Mendes, as there was no obligation on the trustees to do anything more than pay without the Beckmann rights as that was the extent to which the Scheme had been funded.
70. The analogy with claims for annuities or periodic payments is in my judgment a flawed one. The claim by Dr Mendes is not for an annual or periodic payment. It is for damages to put him into the position he would have been in but for the breach of duty. Mr Chew said that the decision as to how that should happen was a matter for ESRC, and referred to Pollard, *Employment Law and Pensions* 2nd ed §53.20-21, §54.14(c), §54.16, which states that while the transferee employer could put in place benefits through a pension plan or some other setting aside of a fund, it can also be treated as an unfunded liability. That seems to me to miss the point, which is that this is not a claim for underpayments each month, which therefore gives rise to a new claim each month, but rather is a claim for a one-off damages award representing the loss, in other words, of a capitalised lump sum appropriately discounted for early receipt.

71. The reason for this is that the obligation to provide the Beckmann rights was breached by ESRC immediately upon redundancy. The actual monthly payment obligation is on the trustees of the fund. That is not what this claim is for. There was no obligation on ESRC to pay Dr Mendes anything monthly or annually.
72. TUPE requires that the transferred employee has the same benefits as before or benefits of substantive equivalence or identity thereto. This is clear from *Mitie v French* (*supra*) and *Proctor & Gamble v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 1257 (Ch), which I will refer to as “P&G”.
73. The entitlement of the transferred employees in *P&G* was held in the EAT as “participation in a scheme of substantial equivalence but one which is free from unjust, absurd or impossible features”. See *P&G* at [121]:

“It does seem to me that part of the problem in this case is nomenclature. The naming and definition of ERBs [early retirement benefits] may tend to obscure the fact that ERB is simply a name for a package or bundle of economic benefits, some already fulfilled, some prospective, some contingent, some barely more than in the nature of an expectation. What is required to achieve the safeguarding of the rights of transferring employees is to ensure the provision from some source of an equivalent result in respect of the individual benefits comprised in the bundle. What to my mind is plainly required is to unpack the rights comprised in the package marked ‘ERB’, forget nomenclature, and split out rights which have already been fulfilled, are already vested and will remain exercisable against the P&G Fund trustees, from the remainder (which transfer to SCA).”

**B. What is the correct limitation period? Is it 6 years or 12 years or is there no applicable limitation period?**

**D’s position**

74. Mr Chew advances two contentions.
75. First, that the claim should be treated as a claim by a beneficiary under a trust to recover trust property in the possession of the trustee or previously received by the trustee and converted to his use. By section 21(1)(b) of the LA, no limitation period applies.
76. Secondly, in the alternative, that the claim is a claim upon a specialty (the deeds of SPLAS) such that any limitation period which started running on redundancy on 20 May 2017 will not expire until 20 May 2029. Section 8 of the LA provides for a 12-year limitation period for an action upon a specialty.
77. Mr Chew says that the starting presumption is a 6-year limitation period, but that would be inconsistent with the principle of equivalence; a claim against the trustees would not be subject to a limitation period, and so neither should the claim against SG.
78. As I have indicated, the right which was lost was to a substantial equivalent benefit. Mr Chew says that the Serco redundancy benefit was payable by a trustee to a beneficiary, in respect of which no limitation period applies: see *Axminster* at [156]:

“...a claim by a beneficiary against the Trustee for payment of arrears of pension would be ‘an action to recover from the trustee trust property’ within section 21(1)(b) and it being admitted that the Trustee is in possession of the trust property, the beneficiary is able to rely on section 21(1)(b) so that there is no period of limitation in relation to such an action.”

79. As a claim to a substantially equivalent benefit, Mr Chew contends that it must have the same protection as the original right, or a claimant would be worse off.
80. In *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank Plc and ors* [2018] EWHC 2839 (Ch); [2019] Pens. L.R. 5, the court was considering the necessity to equalise GMP benefits between men and women from 17 May 1990 and 5 April 1997. Section 134 of the Equality Act 2010 provides for a 6-year limitation period in relation to claims for pension arrears for breach of an equality rule, but the pension members contended this should be disapplied as it breached the European principle of equivalence. The position is summarised at [424] which has echoes of SG’s submissions in the present case:

“To make good his submission [that there is an infringement of the equivalence principle], Mr Short has to establish two propositions. The first proposition is that a claim by a member of a pension trust for arrears of payment to which he was entitled under a pension trust is a claim by a beneficiary under a trust to recover from the trustee trust property in the possession of the trustee within s.21(1)(b) of the Limitation Act 1980 so that there is no limitation period imposed by the 1980 Act in respect of such a claim. The second proposition is that the provision in s.134 of the EA 2010, which imposes a six-year limitation period on such a claim, where the claim is based on a breach of an equality rule, infringes the European law principle of equivalence which requires a claim to a remedy for breach of a right conferred by European law to be treated in no less favourable a way than a similar domestic claim would be treated.”

81. Both submissions were accepted: see [433, 437].
82. The equivalence principle was then summarised by reference to the European Court of Justice decision in *Levez* [1999] 2 C.M.L.R. 363 and the following principles were set out at [440]:

“(1) it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law;

(2) it is compatible with Community law for national rules to prescribe, in the interests of legal certainty, reasonable limitation periods for bringing proceedings; normally, reasonable limitation periods do not infringe the principle of effectiveness as it cannot be said that this makes the exercise of rights conferred by Community law either virtually impossible or excessively difficult, even though the expiry of such limitation periods entails by definition the rejection, wholly or in part, of the action brought;

(3) the rules laid down by the domestic legal system must not be less favourable than those governing similar domestic actions (the principle of equivalence);

(4) it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law comply with the principle of equivalence;

(5) the Court of Justice can provide the national court with guidance as to the interpretation of Community law, which may be of use to it in undertaking such an assessment;

(6) the principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar;

(7) the principle is not to be interpreted as requiring member states to extend their most favourable rules to all actions brought in the relevant area of law;

(8) in order to determine whether the principle of equivalence has been complied with in a particular case, the national court must consider both the purpose and the essential characteristics of allegedly similar domestic actions;

(9) whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.”

83. Morgan J held at [447]:

“In the present context, having regard to the purpose of the various claims which have been identified and their essential characteristics and bearing in mind Lord Briggs’ explanation [in *Total Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 1310, [2018] UKSC 44] as to the operation of the no most favourable treatment proviso, I hold that the relevant comparator is a claim by a beneficiary under a pension trust for arrears of payments when he has been underpaid for whatever reason. Given that such a claim is, by reason of s.21(1)(b) of the 1980 Act, not subject to a limitation period, it infringes the European principle of equivalence for s.134 of EA 2010 to impose a six-year limitation period on the type of claim being considered in the present case.”

84. In *Hughes (supra)*, it was held that “a statutory right of compensation against a statutory corporation is different from a claim by a beneficiary of a trust to recover trust property from trustees”: [215].

85. Mr Chew says that the only analysis that puts Dr Mendes in the same position he would have been in is by reference to a section 21(1)(b) LA claim.

86. In the alternative, Mr Chew says that the relevant period is 12 years. The claimed benefit arises under the SPLAS rules. SPLAS was established by deed. The failure to provide Dr Mendes’ entitlement thus gives rise to a claim under a speciality.

## **C's position**

87. Ms Bell says that Dr Mendes has no claim against the trustees of any of the pension schemes, and so the analogy with a section 21(1)(b) LA claim is not made out, and the claim which Dr Mendes had was a simple contractual/tortious one. Again, Mr Brown agrees.

## **Discussion**

88. I agree with Mr Chew that the question I have to decide is how the present claim – which is neither a claim for benefits against a trustee, as in *Lloyds*, nor a claim for statutory compensation against a statutory body, as in *Hughes* – is to be treated.
89. In my judgment the claim which Dr Mendes had was a contractual claim; it was a failure to provide him with his entitlement under his contract of employment when that right was triggered by redundancy. The claim he had under TUPE was a tortious claim. I agree with Ms Bell that a claim by Dr Mendes in respect of his lost Beckmann rights is a claim for breach of contract, not a claim in respect of trust rights nor a claim under a specialty, and nor should it be treated as equivalent.
90. In *Hughes* at [213] it was said:
- “A claim by members of a pension scheme for underpayment of benefits has different legal characteristics. It involves a claim by persons who are beneficiaries under a trust to recover trust property from the trustees of the scheme. The characteristics of the claim, or cause of action, are very different from a claim against the Board.”
91. The underlying claim in the present case is not the same. The loss of Beckmann rights is not to be treated as the loss of trust rights, in my judgment.
92. I also agree with Mr Brown's analysis. The obligation on ESRC was to ensure that Dr Mendes would obtain his contractual benefits. It had been SERCO's obligation to enrol Dr Mendes in the SERCO scheme, which entitled Dr Mendes to a package of benefits. That obligation then transferred to ESRC. There was never an obligation on ESRC to pay – ESRC's obligation was to ensure that Dr Mendes received the benefits to which he was contractually entitled. His claim is to damages for the failure to procure those benefits, and not an obligation to pay.
93. Thus, in my judgment, the authorities which deal with payments into a pension fund have no application here. The trustees never had trust property, so I do not agree that a 12-year period applied (and therefore it cannot apply by analogy).

## **Conclusion**

94. For these reasons, I answer the preliminary issues as follows:
95. The relevant limitation period for Dr Mendes' (lost) claims against ESRC was 6 years. There is no equivalence with any other limitation period such that the limitation period here should be anything other than 6 years.

96. No fresh cause of action accrues on each occasion when a pension payment was or would have been due. This confuses loss with quantification. The date of breach was the date of redundancy and that was when loss was sustained.

*(End of judgment)*