Appeal No. UKEAT/0083/14/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
on 22 July 2014
Judgment handed down on 1 August 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

MS L PALMER — APPELLANT

THE ROYAL BANK OF SCOTLAND PLC — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL WILSON (of Counsel) Instructed by: Bromets Jackson Health Solicitors LLP Kirkgate House Tadcaster Yorkshire LS 24 9AD
For the Respondent	MR BRIAN CAMPBELL (Solicitor) Brodies LLP Solicitors 2 Blythswood Square Glasgow G2 4AD

SUMMARY

AGE DISCRIMINATION

The Respondent Bank decided to restructure the division in which the Claimant worked. She amongst others was consequently at risk of redundancy. Just prior to the decision as to restructuring, the Bank had also decided to adjust its Voluntary Early Retirement ("VER") scheme, so that only those who were at least 55 at the date of leaving employment would be entitled to an immediate pension payable without actuarial reduction for early receipt. Previously the minimum age had been 50. The Bank was persuaded by the employees' union to delay the introduction of this adjustment until after the restructuring was complete. Employees at risk of redundancy, including the Claimant, had already indicated whether they chose to accept voluntary redundancy (for which a generously enhanced payment was available) or wished to be redeployed if this were possible, with those who would be over 55 being offered a third choice, that of VER. Now that the adjustment was to be delayed, those who would be at least 50, but less than 55, were allowed to revisit their options, with the third option now being made available to them as it had not been before. The Claimant (aged 49) complained that the failure to permit her too to revisit her choice unlawfully discriminated against her on age grounds. She had chosen the redundancy payment option, but if permitted to choose again would now elect for redeployment, believing that it would take some time before the fact that there would be no job for her was identified, and she would then be old enough validly to opt for VER. An ET held that she was not in a comparable position to those between 50 and 55, since (a) she was 49; and (b) her route to gaining VER would be different. If that were wrong, the policy of permitting those between 50 and 55 to revisit their choices was aimed at reducing compulsory redundancies, and was a proportionate means of doing so. **Held:** The ET was entitled to conclude that less favourable treatment had not been established, since the comparators could lawfully have chosen VER but the Claimant at her projected date of leaving

employment could not. This did not fall foul of the principle expressed by the C.A. in **Lockwood v Department for Work and Pensions**, since in the present case the Claimant could not lawfully have been offered VER at her age – there was a statutory prohibition against it. If, however, that were wrong, the ET had permissibly identified a legitimate aim, and decided the means adopted towards achieving it were appropriate, but had not sufficiently balanced the importance of achieving the aim against the discriminatory effect on the group, of which the Claimant was part, of being denied the chance to revisit their options after the delay in making the adjustment to the policy on VER.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Despite the general prohibition on discrimination on the grounds of age, an employer remains entitled to provide enhanced redundancy benefits to those who have reached a specified minimum age, and to provide such a person with a pension which, though offered early, is not actuarially reduced. To do is not unlawful: Section 61 (8) of the **Equality Act 2010** enables regulations which provide for it. They are the **Equality Act (Age Exceptions for Pensions Schemes) Order 2010**, which by Article 3 incorporate a number of exceptions to the general prohibition on age discrimination as set out in a Schedule to the Regulations. One of the exceptions, set out at paragraph 10 of Schedule 1, provides it is not unlawfully discriminatory to provide that an early pension may be offered without actuarial reduction. However, by statute (the **Finance Act 2004**), the minimum age at which such a scheme can be offered is 50.

2. Prior to 11th June 2012, the Royal Bank of Scotland (of which the National Westminster Bank in which the Claimant worked is a constituent part) operated a pension scheme which took full advantage of this exception. It provided that employees could in appropriate circumstances be offered voluntary early retirement terms which included the payment of a pension at age 50 without any actuarial reduction. On 11th June 2012, a new scheme was announced: such a benefit would now only be open to those of 55 years of age or more.

3. Separately, but only 8 days later, the National Westminster Bank determined on a significant reorganisation of its specialist advice section. The Claimant worked there. She had worked some 30 years for the Bank, and was 49 years old. Her fiftieth birthday was on 19th November 2012. She was told that she was likely to be made redundant, and given the choice of one of two options: to accept voluntary redundancy, on generous terms (giving her a gross

payment just short of £78,000) or redeployment, if that was possible. She was not offered voluntary early retirement ("VER") because she was too young. She would not have been offered VER even if the age of entitlement for VER had remained at 50, for again, at 49, she would have been too young.

4. Those employees who were entitled, under the revised scheme, to VER (those who would be over 55 at the date of their projected dismissal) had the additional choice of a third option as well as redeployment or voluntary redundancy: VER.

5. After statutory consultation with the trade union representing employees, the Bank changed tack on the date its revised pension scheme would come into effect. Those who would have been eligible for VER under the unamended pension scheme from the age of 50, would now be offered that option, and the change to the scheme would only take effect after the planned reorganisation had been completed.

6. Those employees who were at risk of redundancy as a consequence of the reorganisation, and who would be at least 50, but below 55 at their projected date of dismissal were therefore added to those who, being over 55, had VER as a third choice. Those who would not reach the age of 50 by the projected date of their dismissal were not given it.

7. The Claimant complained it was unfair to her to give those who would be over 50 at their projected date of dismissal a further choice, in light of the retention of the pre-existing eligibility of VER to those over 50, without also giving her a choice to revisit her choice in light of the change of the minimum age that was to be applicable. Her case was that the Respondent's failure to offer her the chance to change her choice of option from voluntary redundancy to redeployment was direct discrimination on the ground of age. Those older than

she, who were otherwise in comparable circumstances, had been permitted to change their option (provided they did so within a 2 day window from August 8th to 10th 2012) but she was not.

8. Her complaint came before an Employment Tribunal at Manchester (Employment Judge Cook, Mr Tyndall, Mr Goodwin) which for reasons delivered on 24th October 2013 dismissed her complaint.

9. Her complaint had been made under Section 13 of the Equality Act 2010, which materially provides:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**
>
> **(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."**

10. The Tribunal held that there was no less favourable treatment since the Claimant could not identify others who were in materially the same circumstances as her (a requirement of Section 23 (1) of the **Equality Act 2010**) ("the comparator issue"), such that section 13(1) could not be satisfied and in any event, if they were, then nonetheless the discrimination sought to achieve a legitimate aim (the avoidance of compulsory redundancies) and the Bank had shown its treatment of the Claimant to be a proportionate means of achieving that aim ("the justification issue") such that section 13(2) was satisfied by the Bank.

11. The Claimant appeals against both those conclusions.

The Comparator Issue

12. The Claimant asserted that those employees who were allowed to revisit their choice, now that the option of VER was available to them, were materially in the same circumstances (age

apart) as was she. The Tribunal found that was not so for two reasons. First it held that they were entitled to take VER before leaving the Respondent's employment since they would then be aged at least 50, whereas the Claimant would only become 50 after her projected date of dismissal (which fell 10 days before her 50th birthday). Second:

> **"…the Claimant would have changed her nomination to that of '*redeployment*' had she been given the option, whereas others in her would be comparator group changed their own nomination from '*voluntary redundancy*' to '*volutary early retirement*'. We find that this was a material difference."**

In making these findings, and in particular the first, it relied upon the case of **Lockwood v Department for Work and Pensions** which by then had been determined by the Employment Appeal Tribunal, but in respect of which the decision of the Court of Appeal (at [2013] EWCA Civ 1195) had not yet been given.

13. The first ground of appeal was that the Tribunal impermissibly took into account the age of the comparators as a material difference between them and her – the difference depended entirely on when they, on the one hand, and she, on the other, became 50. It thus took into account as a material difference that which the Claimant was saying was unlawfully the cause of the less favourable treatment of which she was complaining. This logic could not withstand the analysis of the Court of Appeal in **Lockwood**. The Bank accepted this was so in its Answer, but Mr Campbell, for the Bank, submitted that the second factor still held good. He summarised it as being to the effect that the process or route which the Claimant would have had to follow in order to receive VER would be a materially different route from that taken by the proposed comparators: they could opt for VER, whereas the Claimant could not lawfully do so. Instead, in the light of the restoration of 50 as the age of eligibility for VER, her plan was to change her option from voluntary redundancy to redeployment. She assessed the chances that there would be a job for her as slim. Therefore it was likely, she thought, she would be liable for dismissal by reason of redundancy. Because of the time it would take to investigate redeployment, and reach this decision, she would then be over 50. She would then be eligible

for VER, and although acceptance of an employee for VER was not automatic she thought there would be a good chance that the Bank would permit her to take it. Accordingly, by opting for a route which was likely to lead to compulsory redundancy, she would obtain the same benefits as if she had exercised the option offered to her comparators, who were opting directly for a benefit which did not require the probability of compulsory redundancy.

14. Mr. Wilson's retort to this on behalf of the Claimant was that when carrying out the comparison of the Claimant and comparators in order to show that she had been less favourably treated it was not permissible to take into account as material any circumstances which were related to the age of the Claimant or her comparators. For this, he relied, as the Claimant had in respect of the first ground, on the Court of Appeal's reasoning in **Lockwood**. At paragraph 34 Rimer LJ observed:-

> **"In a race discrimination case, … if a black complainant is alleging discrimination at work on the ground of his race, the comparator will usually be a white person who is otherwise is in the same, or in a not materially different, position. It is obvious that once such a comparator has been identified, the Tribunal cannot hold the relevant circumstances of the two cases to be different on the ground that the comparator is white and the complainant is black and so regard the comparison as invalid. The whole purpose of the comparison is as an aid to seeing whether or not the way in which the comparator was or would have been treated in the relevant circumstances support the claimant's allegation that he was subjected to less favourable treatment on the ground of the protected characteristic."**

In Lockwood itself, where a woman of 26 complained that she was discriminated against because those over 35 with the same length of service would have been entitled to a considerably larger sum than she was under a voluntary redundancy scheme, the difference of age had been regarded by the Employment Tribunal and the Appeal Tribunal as a material difference between the two cases. The Tribunal had taken into account the fact that because Ms Lockwood was younger she could (in their view) adjust more easily and rapidly to the loss of a job than someone who was older, and hence her circumstances were materially different. However in the view of the Court of Appeal "those considerations were… nothing more than features of being 26 rather than 36".

15. In my view, the logic of Rimer LJ's approach in **Lockwood** provided an unassailable answer in favour of the appeal in that case. However, it is not transferable to the present case merely because the fact that the Claimant would have to adopt a circuitous route in an attempt to obtain the same practical result was a result of the very discrimination which she was attempting to remedy. The logic of **Lockwood** assumes that the discrimination is unlawful, and prohibited. Though that was true in **Lockwood**, it is not the case here. Discrimination between those under and those over 50 was actually required by Statute. The fact is that she was precluded by law from taking direct advantage of a VER scheme whereas her comparators were not. Whereas in **Lockwood** the distinction was one of eligibility under a scheme, in respect of which it was not unlawful to pay Ms Lockwood the additional benefit to which those over 35 were entitled, in the present case it was one of eligibility which it would be unlawful to allow to the Claimant. It is true that the difference arose because of age. However, in this respect to rely upon the age of the beneficiary of the scheme would not be to discriminate unlawfully. The difference between the comparison between the black and the white person in Rimer LJ's example, and the present, is that in that case the relevant treatment of both would have been equally lawful or equally unlawful, just as on the facts of **Lockwood** there was no statute which placed her in a different position from those with whom she sought comparison, whereas in the present the treatment of the comparators would be lawful and the same treatment of the Claimant would not.

16. It follows that I consider that the difference in "route" to a benefit upon which the Tribunal relied was because the Claimant on the one hand and her comparators on the other were in materially different circumstances. She could not claim VER at the projected date of her dismissal. They could. It was this difference which reflected in the different route to obtain the benefit. The circumstance was not caused by any unlawful discrimination on the ground of age, but by the lawful discrimination required by statute.

17. A simple way of expressing the difference between the Claimant and her comparator groups is that they had available to them a third legitimate option which they had not previously had to consider, whereas the Claimant had only the same two options permissibly available to her.

The Justification Issue

18. The decision I have reached on the "comparator issue" is sufficient to dispose of the appeal. However, in case I am wrong in that conclusion I shall express my views on the justification issue in any event. Following the Supreme Court decision in **Seldon v Clarkson Wright and Jakes** [2012] UKSC16, IRLR 590 aims may be considered legitimate within the meaning of Section 13(2) of the **Equality Act 2010** only if they are objectives of a public interest nature and consistent with the social policy aims of the State (paragraph 55 of Lady Hale's judgment, agreed by all the members of the Court). The aims of that nature which the Employment Tribunal thought were legitimate in the present case were (i) minimising compulsory redundancies; (ii) not artificially prolonging a time-bound process; (iii) fairness to other employees, specifically those displaced and seeking a new role; (iv) saving cost and preventing a windfall. In oral argument, Mr Wilson freely accepted that (i) was legitimate, though the Notice of Appeal had contended the opposite. He also volunteered that although the other aims were not in his submission legitimate (being focussed upon the position of the employer and without regard to matters which could be said to involve the public interest), the Tribunal's conclusion as to justification would not be invalidated if its conclusions as to proportionality in respect of the first aim, first accepting that the means adopted were appropriate for achieving the aim, then holding them reasonably necessary in order to do so, were upheld. He was right to do so, not least since this reflected the approach taken by the Supreme Court itself in **Seldon**. There the Tribunal had identified five possible legitimate aims,

three of which the Supreme Court regarded as coming within that description though two did not. Ultimately when the matter returned for a second time to the Appeal Tribunal (**Seldon v Clarkson Wright and Jakes (No.2)** UKEAT 434/13: 13th May 2014) the Respondents in that case relied on only two of the original five aims. The fact that an employer, or Tribunal, had mistakenly identified some aims which on analysis were not legitimate did not mean to say that its conclusion was necessarily invalid, provided that it accepted a legitimate aim and for permissible reasons held the means adopted to achieve it to be appropriate and reasonably necessary for the purpose. Though I see considerable force in Mr Wilson's criticisms in respect of (ii) to (iv) as falling short of being legitimate aims it is not therefore necessary for me to consider them further.

19. In the event it was in respect only of minimising compulsory redundancies that the Tribunal expressly considered (at paragraph 20) whether objectively it was a social policy aim and therefore legitimate. The Tribunal expressed reasons for so holding – that that aim was "embodied in case law, legislation and in ACAS' function" which, though concisely expressed, show that the Tribunal considered the legitimacy of the aim, and clearly articulated permissible reasons for upholding it.

20. Grounds (d) and (e) of the five lettered grounds in the notice of appeal respectively focussed upon the next legal questions to be addressed: whether the means chosen were appropriate and reasonably necessary in order to achieve those aims. Mr Wilson argued that the Tribunal's reasoning did not go beyond considering whether minimising compulsory redundancies might be a legitimate aim – it did not conduct the structured approach to be derived from **Seldon** itself. He submitted that it first should have identified the treatment sought to be justified, second considered whether that treatment was appropriate to achieve the aim which had been identified; and third whether it was reasonably necessary in order to do so.

21. On three occasions in its judgment the Tribunal declared itself satisfied that the proportionality argument was made out. By that expression it was rolling together the questions of appropriateness and reasonable necessity. The first such assertion was at paragraph 22:

> **"The Tribunal accepts that the exclusion of the Claimant from the re-opening of the options window was proportionate. Those who did not… qualify for VER were not given this option. The reason is that they were not 50 and we are satisfied that the proportionality argument is made out"**

22. The second was at paragraph 24:

> **"We are satisfied that the treatment of the Claimant was a proportionate means of achieving [the] legitimate aim [of minimising compulsory redundancies]. Had the Respondent allowed the Claimant to opt for redeployment, she would inevitably have been made… compulsorily redundant."**

The third was at paragraph 25:

> **"Further, we have considered the (necessarily limited) argument on proportionality and are satisfied that in this case it is made out. The evidence we have heard was that only one person – the Claimant and possibly another, her witness Mr Talbot – would have become 50 had they been allowed to re-submit their options and had they elected for and manipulated the redeployment scheme."**

23. Mr Wilson complained that the approach demonstrated by these citations was superficial, was not grounded in principle, and gave no consideration to the question whether the measure if appropriate was necessary. Proportionality, comprehended by the words "reasonably necessary" involves balancing the discriminatory impact upon a group of which the Claimant is part against the importance of the object to be achieved. The practical consequence as identified by Lady Hale at paragraph 66 of **Seldon**, accepting that the adoption of a general rule as opposed to a series of responses to particular individual circumstances was itself an important element in justification, was that there was a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of a business. In **MacCulloch v ICI plc** [2008] IRLR 846, the Appeal Tribunal considered whether in the case of a scheme which provided for an increased redundancy payment to those who satisfied one of

two criteria - greater length of service, and greater age - a Tribunal had rightly identified legitimate aims (to reward loyalty, to give larger payments to those who would be more vulnerable in the job market, and to encourage older workers to leave making job opportunities available for those who are more junior, avoiding compulsory redundancy and managing change) but did not properly attempt to determine whether the means adopted were proportionate to those aims. At paragraph 37 in the Judgment of Elias J the Appeal Tribunal thought that words used by the Tribunal did not eliminate the possibility it had made the false assumption that if the aims were legitimate then the discrimination was justified, since "nowhere is there any express reference to the need to balance the reasonable needs of the business with the discriminatory effects on the Claimant."

24. Mr Campbell accepted that the Tribunal had not said expressly why it thought the scheme here, which necessarily excluded the Claimant from re-visiting her options, was proportionate. It was, however, reasonably clear why it thought that so. The **McCulloch** case was different because once the Tribunal there had identified an aim as legitimate it seemed it assumed that all else followed as to proportionality, whereas in the present case the Tribunal had engaged with both questions. The aim of the scheme was avoiding compulsory redundancy. The Claimant's proposed course – to opt for redeployment leading inevitably to compulsory redundancy - was diametrically opposed to such an aim. Such a route to achieving VER was the only route open to those in the same position as the Claimant. Hence to permit an employee to choose again between two options, when she had already chosen the option which would lead away from compulsory redundancy would, as it would in the case of anyone in her position, only made it less likely that the aim could be achieved: to permit her to revisit a choice of two options was to allow her to choose the option which would lead towards compulsory redundancy, which could not have advanced the aim at all. Although the Tribunal did not specifically draw attention to this contradiction, it is what it had in mind in paragraph 24. It thus dealt with the question of

appropriateness. As to proportionality, in effect the Tribunal had considered the discriminatory effects of the rule. They were limited to the Claimant and possibly Mr Talbot.

Discussion

25. Though it does not set out any prescription as to the approach to be followed, **McCulloch** makes it clear that a Tribunal considering justification needs to consider sufficiently each step in the reasoning process. Since there are three principal matters to be considered this necessarily involves three main questions, to be addressed in turn: (1) whether the act, policy or rule said to require justification pursues a legitimate aim (which in a case of alleged age discrimination will be a pubic interest matter in accordance with Lady Hale's judgment); (2) whether the means adopted to achieve that aim (in most cases this will be a policy or rule affecting a group) is appropriate to achieving it; (3) whether if the aim is legitimate and the means appropriate, it is no more than is reasonably necessary to do so. This involves a balance of the discriminatory effects (usually of the rule itself, though it must be remembered as Elias J pointed out in **McCulloch** that a member of the group may argue that the rule should permit of exceptions, just as in the present case she might have complained that her employers could have permitted a widening of the numbers entitled to have choice, without doing any violence to the aim). This balancing exercise, usually conducted by reference to the adverse effects of a measure upon a group as a whole, balanced against the means sought to be achieved, and the deleterious effects which might result from the introduction of any other scheme (since it will often be the case that if one means of addressing an aim is rejected, there may need to be another attempted, which might bring its own problems whether by giving rise to its own discriminatory effects, or other disadvantageous practical consequences), is always likely to be contentious, and the reasoning needs to be sufficiently articulated.

26. This Tribunal did not have the benefit of any authority clearly directing it to adopt a structured approach such as recommended in the previous paragraph. Further, a Tribunal judgment must be read appreciating the pressures of time under which Tribunals in recent history have operated, resulting in judgments which may not be the finest products of refined legal draftsmanship. A judgment must be read as a whole. Taking that approach, it is clear that a policy permitting those who would be entitled on the projected date of their dismissal to reconsider their choice, now that VER was available to them, and excluding those others, who did not now have third choice to consider, was appropriate toward minimising compulsory redundancies. Some of those who might have opted for redeployment, involving a substantial chance of compulsory redundancy, would now elect voluntarily for early retirement. The exclusion was of those who could not legitimately take that option. So far as those who were in the position of the Claimant of having chosen a voluntary exit from service, to provide them with a choice of re-visiting their options would involve a risk of their choosing compulsorily to be made redundant instead, which would contradict the very aim which was sought to be achieved. That in itself makes the means appropriate. Though the Tribunal did not use those words, it is plainly what it meant in paragraph 24.

27. Accordingly, the Tribunal addressed the substance of the first two questions. The third question is not easy to address in a context in which the Tribunal has already considered that there is no less favourable treatment by denying the Claimant the choice contended for. On this part of the argument, it has to be approached upon the hypothetical basis that the policy did discriminate unlawfully between those of different ages, subject only to justification. The discriminatory effect would be to prevent those in the same category as the Claimant from gaining a substantial benefit which those only a shade older were granted in full.

28. Here, however indulgently I read paragraph 25, it cannot be said that the Tribunal expressly directed itself as to drawing the balance. It never identified the disadvantages caused by the Bank's approach in order to balance against them the need to take the measures it proposed in order to address the aim it sought to achieve.

29. Accordingly, if I had been satisfied that the Appellant should succeed under the "comparator issue", I would (though just) have allowed the appeal on the basis of insufficiency of reasons, and have remitted the matter to a Tribunal. I have not in the event found it necessary to determine whether that would have been the same, or a different Tribunal.

Conclusions

30. Although for the reasons I have given the justification decision was not sufficiently reasoned by the Tribunal, it was entitled to reach the decision it did, for the reasons it gave, in respect of the comparator issue, and this appeal therefore is dismissed. At the conclusion of this judgment, as I did at the conclusion of oral argument, I would like to express my thanks to the advocates for the quality, and in particular the realism and focus, of their respective submissions.