Appeal No. UKEAT/0566/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 October 2013

Before

THE HONOURABLE MR JUSTICE MITTING

MR C EDWARDS

MR G LEWIS

MS P HERON — APPELLANT

SEFTON METROPOLITAN BOROUGH COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS P HERON (The Appellant in Person)
For the Respondent	MR T KENWARD (of Counsel) Instructed by: Corporate Legal Services Dept Sefton Metropolitan Borough Council Maedaven House Trinity Road Bootle Merseyside L20 3NJ

SUMMARY

AGE DISCRIMINATION

Age discrimination. Whether local authority required by an enactment to treat female employee aged over 60 less favourably than younger colleagues in calculation of contractual redundancy payment set by reference to statutory scheme. No.

THE HONOURABLE MR JUSTICE MITTING

1. The Claimant was born on 6 July 1950. On 28 August 1995 she began employment with the Training and Enterprise Council, a body set up by central Government but one whose terms and conditions did not include the Civil Service Compensation Scheme, to which we will refer in due course. On 29 March 2001 her employment was transferred to the Learning and Skills Council, another central Government agency, but one whose terms and conditions did.

2. The continuity of her employment and her rights were preserved under the predecessor to **Transfer of Undertakings (Protection of Employment) Regulations 2006**. On 1 April 2010 her employment was again transferred to Sefton Metropolitan Borough Council, Sefton, on the same conditions with minor irrelevant variations. On 8 July 2010 notice of dismissal by reason of redundancy was given to her, expiring on 30 September 2011. The Claimant was then aged 61. She had 10.5095 years of reckonable service under the Civil Service Compensation Scheme, as did younger colleagues who were also dismissed by reason of redundancy at the same time. They, however, negotiated an agreement with Sefton, under which they were not required to serve out their notice but were paid two months' pay in lieu of notice.

3. The Claimant did not accept that proposal because it was put to her as part of a compromise agreement, which would have required her to abandon the argument and claim that she now brings. Consequently, she alone of the dismissed employees served her notice period.

4. She received six months' pay as a redundancy payment. It was not subject to the statutory cap set out in part 11 of the **Employment Rights Act 1996**. It was based upon her actual gross pay. Her younger colleagues all, as we have said, with the same length of service

and reckonable service as her received a redundancy payment based upon their years of reckonable service, 10.5095 years.

5. Aggrieved by the obvious difference in treatment between her and her colleagues, the Claimant complained to the Employment Tribunal. The Employment Tribunal identified two determinative issues. One, were Sefton in breach of contract in paying only six months' redundancy pay to the Claimant; two, if not, did Sefton treat the Claimant less favourably than they did treat, or would have treated another employee in relation to the amount of the redundancy payment, because of her age, contrary to s. 13(1) of the **Equality Act 2010**.

6. The first issue requires the terms of the Claimant's contracts of employment and those of comparable employees aged below 60 at the date of dismissal, as to the calculation of a redundancy payment, to be examined. When the Claimant was employed by the Learning and Skills Council she was in employment of a kind listed in Schedule 1 to the **Superannuation Act 1972** (see Schedule 1, paragraph 6(1) of the **Learning and Skills Act 2000**, which added employment with the Learning and Skills Council to that list). Section 1(1) of the **Superannuation Act 1972** empowers the Minister of the Civil Service to:

> **"(a) […] make, maintain, and administer schemes […] whereby provision is made with respect to the pensions, allowances or gratuities which […] are to be paid to or in respect of such of the persons to whom this section applies as he may determine."**

7. Section 1(4)(b) applied section 1(1) to employment in any of the kinds of employment listed in Schedule 1. "Schemes" made and amended by the Minister were required to be laid before Parliament and approved under the negative resolution procedure. The Civil Service Compensation Scheme 1994 was made by the Minister and laid before Parliament under section 1, as were all subsequent amendments. The version of the scheme applied by Sefton in the case of the Claimant was laid before Parliament on 22 December 2010 and not disapproved.

8. A difficult issue might have arisen in relation to the current version of the scheme of a kind that is presently before the Court of Justice in Luxembourg, namely whether or not amendments to the scheme subsequent to the transfer of employment to an employer which is not within the statutory scheme apply to the terms of employment of an affected individual. That difficult issue does not arise for decision in this case because the Claimant accepts that, by one means or another, the terms of the current version of the Civil Service Compensation Scheme apply to her.

9. It is common ground that on the transfer of employment from the Learning and Skills Council to Sefton, the Claimant remained contractually entitled to benefit from the Civil Service Compensation Scheme in the event of dismissal by reason of redundancy. Relevant provisions of the scheme are as follows. Part 12.5, headed "Compulsory Redundancy Terms" provides:

> **"12.5.1 This Part applies to a person ("P") if P—**
>
> **(a) has at least two years Service; and**
>
> **(b) leaves Service in circumstances where Compulsory Redundancy terms apply.**
>
> **12.5.2 If this Part applies to P, P is eligible for a lump sum, which is the lesser of—**
>
> **(a) an amount calculated in accordance with rule 12.5.4; and**
>
> **(b) the Compulsory Departure Maximum.**
>
> **[…]**
>
> **12.5.4 An amount if calculated under this rule by—**
>
> **(a) determining the length of P's Reckonable Service in years; and**
>
> **(b) multiplying one-twelfth of P's Pay by the length of P's Reckonable Service."**

10. The "Compulsory Departure Maximum" is defined in Part 12.1 as having the meaning set out in rule 12.1.7. 12.1.7 provides:

"For the purposes of rule 12.5.2(b), the Compulsory Departure Maximum in relation to a person ("P") is—

(a) where P is below Pension Age on P's last day of Service the lesser of

(i) P's Pay; and

(ii) the Tapering Maximum

(b) where P is at or above Pension Age on P's last day of Service, half of P's Pay;"

We need not trouble with the Tapering Maximum, which applies only to someone aged between 59½ and 60.

11. The Claimant's entitlement under her contract after its transfer to Sefton is, therefore, clear. She was entitled to a redundancy payment calculated by reference to half of her monthly pay subject to a cap of 12 times, or, in simple terms, half a year's pay. Because her reckonable service was 10.5095 years, the cap applied to her. Her contractual entitlement was, therefore, different from that which it would have been had she been aged less than 60 at the date of dismissal.

12. The second issue, therefore, arises. Making a payment to an employee with at least two years service who is over 60 on dismissal by reason of redundancy, which is half that which would be paid to a similar employee similarly dismissed who is under 60, is clearly less favourable treatment. It is because of a protected characteristic: age. It amounts to direct discrimination under section 13(1) of the **Equality Act 2010**, unless justified under section 13(2) or otherwise deemed not to be prohibited. If so, it is an unlawful act of discrimination under section 39(2).

13. Sefton advanced two reasons why it was not unlawful: one, it was not deemed to be a contravention of section 39(2) by paragraph 1(1) of Schedule 22 to the 2010 Act; two, it was a proportionate means of achieving a legitimate aim and so justified under section 13(2). The

Employment Tribunal upheld Sefton's case on issue one but said that Mr Kenward, counsel for Sefton, "rather skimmed over" the second issue and that it was "not Mr Kenward's defence to the age discrimination claim". The Tribunal found for Sefton on the first issue.

14. Schedule 22 to the 2010 Act provides:

> **"Statutory authority**
>
> **1(1) A person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristics specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column."**

The first column specified "Parts 3 to 7", the second, "Age" and the third, "A requirement of an enactment".

15. "Enactment" is defined, as regards England, by section 2(1)(2) of the 2010 Act as:

> **"(a) an act of Parliament**
>
> **[…]**
>
> **(d) Subordinate legislation."**

16. "Subordinate legislation" is defined in section 2(1)(2) as respect England as:

> **"(a) subordinate legislation within the meaning of the Interpretation Act 1978."**

17. Section 21(1) of the **Interpretation Act 1978** defines "Subordinate legislation" as:

> **"Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act."**

18. The Civil Service Compensation Scheme was a scheme "made" by the Minister for the Civil Service under section 1 of the **Superannuation Act 1972** and laid before Parliament. It is, therefore, "subsidiary legislation" as defined in section 2(1)(2) and is, therefore, "an enactment" within paragraph 1(1) of Schedule 22 to the 2010 Act. It provides for the difference in treatment between employees dismissed by reason of redundancy who are over and under 60 at the date of dismissal, but it does not require that difference to be respected. A requirement is something which means that the person subject to it cannot do otherwise, hence the words of paragraph 1(1) of Schedule 22, "anything P must do pursuant to a requirement".

19. At one stage during the course of argument Mr Kenward for Sefton suggested that the local authority was prohibited by other enactments from making a payment in the sum claimed by the Claimant, but that argument, upon proper analysis did not hold water and he rightly did not pursue it. It is, therefore, unnecessary for us to refer further to it.

20. Although the Civil Service Compensation Scheme provided for the difference in treatment, it did not require even the Minister for the Civil Service to give effect to it, still less did it require Sefton to do so. This scheme did not apply directly to the Claimant's employment by Sefton. Its terms were incorporated into her contract of employment by Sefton when it was transferred to her. From that moment onward, the terms became contractual not statutory so that even if the scheme must be interpreted as requiring Sefton to pay no more than six months pay, any requirement in relation to the Claimant was not a requirement of an enactment. It was a requirement of a contract which incorporated the terms of an enactment.

21. For the exception in paragraph 1(1) of Schedule 22 to the 2010 Act to apply the enactment must have direct effect upon the particular circumstances of the Claimant. On the facts of this case it did not. Further, and in any event, even if it had done it would have required

to have been justified. Further, and in any event, it seems that Sefton did not regard themselves as bound not to depart from the terms of the scheme because, as part of the compromise agreement to which we have referred, they agreed to grant two months' pay in lieu of notice in addition to the 10.5095 years reckonable service to those of their employees who were dismissed by reason of redundancy but were aged less than 60.

22. It follows, therefore, that Sefton's argument that they were required by an enactment to discriminate between the Claimant and younger dismissed employees should have been rejected by the Tribunal. In not rejecting it, the Tribunal based its conclusion upon a basic error of law, which we can and should correct. In theory, that does not dispose entirely of the appeal because Sefton faintly raise in their Grounds of Resistance a justification argument under section 13(2) of the 2010 Act. What they said in paragraphs 42 to 44 of their Grounds of Resistance was the following:

> **"42. The legal defence of justification potentially applies to the use of a provision which would otherwise, at face value, involve discrimination on the grounds of age. This would potentially mean that the Tribunal would need to be satisfied that the six months cap which was applied amounted to a 'proportionate means of achieving a legitimate aim' (Equality Act 2010 s.13(2)).**
>
> **43. In *Loxley v BAE Systems Land Systems Ltd* [2008] ICR 1348, EAT it was held that provisions in a redundancy scheme preventing employees of retirement age receiving redundancy payments because they were already entitled to a pension could be a legitimate feature of the scheme. It would be for the Tribunal to decide whether the exclusion of an employee from the scheme in question had achieved a legitimate objective and had been proportional to any disadvantage suffered.**
>
> **44. However, the simple position is that the CSCS is a statutory scheme. The Council had no discretion in the calculation of the Claimant's lump sum. In relation to age discrimination, under Equality Act 2010 Schedule 22 paragraph 1, the Council does not contravene the provisions in respect of age discrimination where it does anything which it must do pursuant to the requirement of an enactment. This will include complying with an instrument made by a Minister of the Crown under an Act."**

23. Accordingly, it is clear from the Grounds of Resistance that while not formally abandoning any attempt to justify discriminatory treatment under section 13(2), they did not rely on it substantively. In his witness statement, Mr Dale, the Head of Corporate Personnel for Sefton, devoted a single paragraph to the issue of justification, paragraph 46:

> **"46. It is important to consider the rationale for the compulsory lump sum being halved in the case of an employee who had reached the applicable Pension Age. Ordinarily an employee will have lost his or her only source of income. They are being compensated for the fact that they find themselves in that situation (and assisted through it). In the case of a person of 'Pension Age' the position is different, as illustrated by example (c) in the Civil Service Compensation Scheme December 2010 'Guidance for Pension and Service Centres' which gives the example of 'David' who is 63 years of age and a pension scheme member. He earns £24,000 per year and has eight years service. He is compulsorily redundant. His payment is calculated at 6 x £24,000/12. The example ends by stating that 'David's pension (and any pension commencement lump sum he chooses to take) will come into payment immediately after his last day of service'."**

24. On that sketchy evidence, even if the issue had been advanced seriously as a reason to dismiss the claim, it would not have been open to the Tribunal to conclude that the statutory justification under section 13(2) was made out. The evidence of Mr Dale gets nowhere near identifying, let alone justifying, the "legitimate aim" required for the defence of justification to succeed under section 13(2), still less to permit the Tribunal to conclude that it was a proportionate means of achieving a legitimate aim.

25. In current circumstances when, as is notorious, men and women over 60 remain in large and increasing number members of the active labour force and may well require income from earnings to maintain their standard of living, the idea that the simple fact that a woman over 60 might be able to draw her state and civil service pension, so justifying a difference in treatment between her and a younger colleague will not do. Statistical evidence, no doubt collated by and available to central Government, would be required to begin to justify the difference in treatment, especially now that the age of compulsory retirement in the civil service has been raised from 60 to 65.

26. Where, as here, a statutory scheme incorporated by contract into the contract of employment of a local government authority not listed in Schedule 1 to the **Superannuation Act 1972** is in issue, it is likely that the local authority would have to justify the difference in treatment by reference to local conditions and the circumstances of their

employees looked at as a whole. Mr Dale made no attempt to do that, understandably, for it was his view that he was required to act as he did under the Civil Service Compensation Scheme.

27. Accordingly, on the material presented to the Tribunal by Sefton, the only answer which could have been given was that the justification was not made out. Mr Kenward, in a valiant effort to rescue the difficulty into which Sefton have been placed by the stance adopted before the Employment Tribunal, has submitted that if we are against him on the first and determinative issue we should remit the matter to the Tribunal to re-determine justification. We do not accept that submission. Sefton chose the ground upon which it fought this claim. On appeal it has lost on that chosen ground. Like any other litigant, it cannot be granted the benefit of running a different case or, at any rate, a case only vestigially run and which they now wish to flesh out at a remitted hearing. Litigation must come to an end, parties must deploy their best argument first time round and not seek a second bite at the cherry when their chosen argument fails.

28. There remains one issue to be determined. In her submissions, the Claimant faintly contended that she should be entitled to a redundancy payment calculated not by reference to her reckonable years of service but by reference to the payment including two months pay in lieu of notice actually paid to her younger colleagues. This was not an issue expressly dealt with by the Tribunal, for understandable reason, but we understand it to be common ground that the two months' pay in lieu of notice was not, expressly at least, an increase in the reckonable years of service upon which the payment was calculated but a separate payment made to the Claimant's younger colleagues to induce them to accept the package proffered. The same was offered to her. For reasons which are entirely understandable and which we have already set

out, she rejected it. She rejected it because it would have meant abandonment of her meritorious claim of age discrimination.

29. Her position is, therefore, is not precisely comparable with that of younger colleagues when it comes to calculating reckonable service. She is entitled, in our judgment, to a redundancy payment calculated by reference to her reckonable service as if she were not being treated less favourably than someone who was less than 60 at the date of dismissal. Her reckonable service was 10.5095 years, therefore, instead of the payment which she did receive, £16,881, she should have received £29,481.77. We allow her appeal. We direct that Sefton pay that sum to her as a contractual entitlement.