Appeal No. UKEAT/0415/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 3 June 2015
Judgment handed down on 21 July 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

SITTING ALONE

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(1) THE TRUSTEES OF SWANSEA UNIVERSITY PENSION & ASSURANCE SCHEME
(2) SWANSEA UNIVERSITY APPELLANTS

MR A WILLIAMS RESPONDENT

JUDGMENT

APPEARANCES

For the Appellants	MR KEITH BRYANT QC (of Counsel) Instructed by: Blake Morgan LLP Bradley Court 11 Park Place Cardiff CF10 3DR
For the Respondent	MR RICHARD O'DAIR (of Counsel) Instructed by: Didlaw Garden Studios 71-75 Shelton St London WC2H 9JQ

SUMMARY

DISABILITY DISCRIMINATION – Justification; Disability Related Discrimination

The Claimant accepted ill-health retirement at 38, because his disabilities were such that he could no longer continue in post. He was entitled to a pension calculated as if he had worked on until retirement age, which was to be paid immediately upon retirement and without actuarial reduction, but based upon his pensionable salary at the date of ill-health retirement. At that date he was working half time, having reduced his hours by agreement to accommodate his disabilities. He complained that to pay him only half what a full-time employee would have had discriminated against him, being unfavourable treatment in consequence of something arising from his disability, contrary to s.15 **Equality Act 2010**. An ET accepted this case. On appeal, it was held that the Tribunal had failed to answer its own questions as to the meaning of "unfavourably" and in addressing it applied the wrong test, adopted the wrong approach, failed to recognise that anyone who could legitimately claim ill-health retirement under the scheme had to be disabled, and reasoned from inappropriate analogies. As to justification, the ET appeared at one point to adopt the University's aim as legitimate, but at another suggested that the justification was concerned solely with cost (a question which logically related to the aim, not to the means); analysed proportionality in part by considering the employer's conduct in failing to consider potential discrimination (at a time when such discrimination was not prohibited), when it was the objective effect of a decision which fell for consideration, not the subjective processes by which it was adopted; and in part by postulating alternative means of achieving the aim without such discriminatory impact, none of which were identified or described sufficiently. The ET's decision that the Claimant was unfavourably treated because of something arising in consequence of his disability could not stand, and it was remitted to a fresh Tribunal for complete rehearing.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. The Claimant suffers from Tourette's Syndrome, obsessive compulsive disorder, depression and unspecified allied psychological problems. For some ten years he worked full-time as a technician at Swansea University. Then, to accommodate the effects of his disability he asked that his hours should be reduced. The University agreed. By successive requests, each of which was agreed, his hours reduced to half what would have been full time hours by the end of July 2011. He worked on for a while after this, but although he took time off work for medical treatment, this was not as successful as had been hoped. The Doctors concerned with his case came to realise that he was permanently incapable of fulfilling the duties of his post. He therefore accepted ill health retirement on 30th June 2013 at the age of 38. Under the rules of the pension scheme applicable to him employees were entitled to a pension on retirement at age 67, but not earlier, unless retiring when their ill health was such that they were plainly incapable of continuing in work. In the latter case, employees would be entitled not only to the immediate payment of pension – without actuarial reduction – in respect of the work they had already done (accrued pension) but also to an enhanced pension. This was also paid without actuarial reduction for early receipt as if they had continued working until normal retirement age (in the Claimant's case 67) continuing to receive the salary they had been receiving when they retired. This was plainly an immensely favourable arrangement for anyone eligible for it. Those eligible for it were necessarily disabled (within the meaning of the **Equality Act 2010**). Any other 38 year old who left the service of the University at that age would have no prospect of receiving the payment of any accrued pension entitlement until they reached what would have been their normal retirement age, nor any prospect of receiving any enhanced pension. It might be thought even more favourable to the Claimant since he had

begun employment before 2011, and was thus entitled to the benefits of the scheme: the scheme was then closed to new entrants.

2. Nonetheless, the Claimant complained that he had been unfavourably treated because of something which had arisen in consequence of his disability, contrary to Section 15 of the **Equality Act 2010**. In effect, he argued that it was discriminatory not to pay him double the amount of enhanced pension that he was due to receive. He argued that if he had been employed full time at the age of dismissal, his enhanced pension would have been double that actually provided under the terms of the scheme. However, because he had reduced his working hours to half, and his final pay was thus half of the full time rate, his enhanced pension was only half. The reason he was working half time was to accommodate his disability. The payment was thus made as it was in consequence of his reduction of hours.

3. Section 15 of the **Equality Act 2010**, under the heading "Discrimination arising from disability" provides:-

> **"(1) A person (A) discriminates against a disabled person (B) if –**
> **(a) A treats B unfavourably because of something arising in consequence of B's disability and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim"**

His treatment met the requirement of Section 15(1)(a). It was for the University or the Trustees of the Scheme to justify that treatment in accordance with 15(1)(b), and neither could do so.

4. An Employment Tribunal at Cardiff (EJ Cadney, Mr Fryer, Mr Clark) upheld these claims in a judgment of 29th July 2014. The University and Trustees of the Pension Scheme appeal against that decision, and there is a cross-appeal in one respect by Mr Williams.

The Tribunal Decision

5. There was little if any dispute on the material facts before the Tribunal. The argument before it was almost entirely how those facts should be analysed.

6. Though at paragraph 22 the Tribunal posed the question what "unfavourable" meant in the context of a Section 15 claim, and recognised that it required some form of reference point, against which that which was favourable or unfavourable might be measured, it did not directly answer this question. It recognised, however, that the issue was a novel one: the parties could give it no assistance by way of authority.

7. The Tribunal expressed its conclusion as to unfavourable treatment at paragraph 32 in these terms:

> **"Our conclusion is that the Claimant is correct and that he has of necessity been treated unfavourably in that his disability has caused him to have a lower pension than he would have done had his disability not caused him to be working part time. In essence we accept the Claimant's submission set out above that the disadvantage is apparent from the scheme itself. The contention that there is no unfavourable treatment in our judgment rests essentially on the submission that the scheme is a particularly generous one. However fact (sic) that the scheme is particularly generous and that the Claimant is in absolute terms much better off than he might have been in a differently constructed scheme does not alter the fact in our judgment that he has been treated unfavourably in that he has been placed at a disadvantage in the application of the rules of this particular scheme."**

8. This reasoning therefore (a) adopted the Claimant's submission, and (b) regarded the scheme as being that which had created what it saw as inherently disadvantageous treatment.

9. Though Mr O'Dair, for the Claimant, argued that the Tribunal did not identify the scheme itself as the source of the discrimination – in paragraph 32 it referred, for instance, to the "application" of the scheme - I reject that submission. In paragraph 24, part of the submission of the Claimant which the Tribunal appeared to accept was that "one only has to

look at the scheme rules to discover the disadvantage suffered by the Claimant and therefore the unfavourable treatment"; in paragraph 39, though the Tribunal was there examining whether the unfavourable treatment was objectively justified, its focus was on whether the Trustees appreciated the effect of the relevant rule at the time of formulating the scheme rules; and in the last sentence of that paragraph it referred to "…the discriminatory impact of the scheme…". In paragraph 41 it talked of the Respondent having "unwittingly constructed a discriminatory pension scheme…". This led to an ultimate conclusion in paragraph 42 (albeit this was specifically in respect of justification) as follows:

> **"In our judgment the critical question is whether the scheme rules treat the Claimant unfavourably within the meaning of Section 15".**

These repeated references show that the Tribunal thought it was the scheme itself that was productive of the discrimination complained about.

10. At paragraph 32 the Tribunal adopted the Claimant's argument that the meaning of "unfavourable" equated to that of "detriment" (as used in the **Equality Act 2010).** Case law as to "detriment" showed that it had to be viewed very broadly, and be seen from the perspective of the employee concerned. By contrast, it rejected an argument Mr Bryant QC, on behalf of both the Trustees of the pension scheme, and the University had advanced. He argued that it could not mean the same since the parties were agreed that the legislative purpose in adopting the word "unfavourably" was to identify a concept distinct from that of "less favourable treatment" and thereby avoid the problems demonstrated by the decision in **Mayor and Burgesses of the London Borough of Lewisham v Malcolm** [2008] 1 AC 1399, HL. The House of Lords there reversed the understanding which the Court of Appeal had first adopted in **Clark v Novacold Ltd** [1999] IRLR 318, C.A, which had been followed over the 9 years since **Novacold**, as to the appropriate comparison to be made in cases of alleged discrimination on the ground of disability. Mr Bryant had argued that Parliament enacted Section 15 in the terms it did to reinstate the approach which had been taken in **Novacold**, observed that even on

that approach the Claimant here would fail, and submitted that therefore "unfavourable" should be seen in that light.

11. At Paragraphs 29 and 30 the Tribunal floated the idea that treatment might be regarded as unfavourable if the facts giving rise to a complaint that it was unfavourable could also readily have founded a complaint either that there had been a failure to make a reasonable adjustment, or that the provision (here, of the scheme) was indirectly discriminatory. It thought that the facts here could readily have done either, and that this supported a conclusion that the treatment of which the Claimant complained was "unfavourable". As to those points, the Tribunal said it had been cautious in considering them:

> **"…as they are of necessity speculative and the parties have not addressed us as to them. They have not formed a fundamental part of our reasoning but they do appear to us to be permissible speculations."**

I take it from this, therefore, that it formed part of the reasoning, even if not "fundamental".

12. It was not in dispute that if there had been unfavourable treatment it arose in consequence of the Claimant's disability.

13. Having by this process of reasoning identified that there was unfavourable treatment the Tribunal turned to the question arising under Section 15(1)(b): that of objective justification. This required it to ask whether the means adopted by the Respondent sought to achieve a legitimate aim and were proportionate (i.e. reasonably necessary and appropriate) to doing so. It accepted the legitimate aim proposed by the Respondent as being:-

> **"…the provision or operation of a viable defined occupational pension scheme for employees of the second Respondent which provides benefits at an appropriate and affordable level to all eligible members of the scheme whether disabled or otherwise without placing an undue financial burden on**

> **the scheme including but not limited to the availability of appropriate immediate enhanced ill-health pensions for those unable through illness to continue in their scheme"**

14. In deciding that the conduct of the University and Trustees was not a proportionate means of achieving this aim, the Tribunal's reasoning again proceeded by incorporating the Claimant's submissions as correct (it did so expressly in the first sentence of paragraph 41). In doing so, it adopted submissions Mr Goodfellow, then appearing for the Claimant, had made by reference to **R (Elias) v Secretary of State for Defence** [2006] EWCA Civ 1293, IRLR 934 to the effect that if justification was not considered at the time of formulating the relevant rule there would be significant practical difficulties in establishing it later: and, as a matter of fact, found that the Trustees did not appreciate the effect of Rule 15.5 which related the enhanced payment to the salary which the Claimant was receiving at the date of termination of his employment. The Tribunal commented:

> **"self-evidently they did not therefore at that time consider that basing enhanced benefits to ill-health retirees on the final salary was a necessary means of ensuring the viability of the scheme. Secondly they equally self-evidently did not consider any alternative methods of achieving the same overall result without the discriminatory effect".**

Adopting the principle stated by Elias P in **Redcar and Cleveland Borough Council v Bainbridge** [2008] ICR249 at paragraph 102:-

> **"It is inherent in the principle of proportionality that where different means of achieving a particular object could be achieved, the one which has the least discriminatory effect should be chosen."**

it then summed up these points stating:

> **"As in this case the proportionate means of achieving the aim involves restricting the sums paid out by way of pension the Claimant submits that there are any number of ways in which the generosity of the scheme could be lessened achieving the same or greater savings without any discriminatory impact. As the discriminatory impact of the scheme was not appreciated by the trustees they have necessarily never considered any alternative means of restricting the sums paid out."**

15. The other strand of his reasoning was that the Respondent's argument related purely to cost and was indistinguishable from that rejected by the Supreme Court in **O'Brien v Ministry of Justice** [2013] IRLR 315 at paragraphs 69 and 74.

16. The ultimate conclusion was expressed in paragraph 42, the first sentence of which I have already referred to above:

> **"In our judgment the critical question is whether the scheme rules treat the Claimant unfavourably within the meaning of Section 15. If, as we have found, they do we do not accept that restricting benefits to one class of ill-health retirees is a proportionate means of achieving the legitimate aim of maintaining a viable scheme for the reasons given above"**

The Appeal

17. The University argues that the Tribunal's findings in respect of both unfavourable treatment and justification were in error.

18. It submits that the Tribunal was wrong to find on the facts that the Claimant could have suffered a disadvantage and therefore unfavourable treatment, and that this was apparent from and inherent in the scheme itself. Its conclusion that the treatment was unfavourable was based at least in part on the speculation (to adopt its own word) at paragraphs 29 and 30 concerning other possible causes of action which might have arisen on the facts. In assessing these, the Tribunal missed the essential point that anyone who obtained enhanced ill-health early retirement would necessarily be disabled.

19. As to justification, the Tribunal accepted the aim as legitimate, but criticised the means as relating entirely to cost. This was incoherent, since whether there was a pure cost argument, or whether there was something more than a saving of cost to be achieved by the aim, it was a

question of aim and not of means of achieving the aim. Moreover, the Tribunal took into account the reasoning of the University for adopting the scheme as it was, as at the time it adopted it, apparently applying the approach adopted in **R (Elias) v Secretary of State for Defence**, when it should have appreciated that what mattered was whether in the eyes of the Tribunal, on an objective viewing, the means were reasonably necessary and appropriate to achieve the aim desired. In looking at the question whether the scheme was justified at its inception, the Tribunal missed the point that what had to be justified was the discrimination caused by the application of the scheme at the time that that took place – which was when the Claimant retired.

20. In response, Mr O'Dair submitted that the word "unfavourably" was an ordinary English word, the application of which was a matter of fact. It was unnecessary and wrong to formulate a gloss on the statute: if, however, one were needed, what was "unfavourable" should be interpreted as equivalent to that which was a "detriment" as understood in discrimination law. A wide meaning was given to that phrase, from the perspective of the employee. Such an approach, rather than the comparative approach argued by the Appellants, was appropriate because it avoided the **"Malcolm"** mistake, and included within it a determination of that which was reasonable, thereby acting as a check on subjectivity. Though leading to a broad concept of unfavourable treatment, this could then be controlled by the defence of justification. The decision was not, as the Appellants suggested, perverse; the Tribunal did not base its reasoning on speculation; and the argument as to justification was entirely dependent on cost. Moreover, as Underhill J observed in **HM Land Registry v Benson** [2012] IRLR 373 paragraph 36, "aims and means" did not necessarily sit in watertight compartments. Since the Appellants had not considered alternative means of achieving their aim, it was difficult to make

out a case of justification: and the simple truth was that the Tribunal did not accept that there was no less discriminatory way of providing a viable pension scheme.

21. By way of cross-appeal, the Respondent argued that finding that the Appellants had a legitimate aim at paragraph 36 was perverse, since it was a secondary finding of fact which could not stand with the primary findings of fact made in paragraph 41, nor with the Supreme Court authority of **O'Brien v Ministry of Justice**.

Discussion

22. The Tribunal posed itself questions as to the meaning of "unfavourably" in Section 15 of the **Equality Act**. Answers to those questions were required, but it did not give them directly.

23. One of the difficulties in dealing with cases of discrimination on the grounds of disability is that although every person who is treated as disabled by the **Equality Act 2010** is defined as such by application of a common definition, the disabilities of each can be very different and may share few common features. An individual may be disabled physically, or mentally, from working or at work. Different faculties or functions may be affected, and to differing degrees. In the present case, the effect of the disabilities of some of those entitled to take ill-health retirement might permit retirement from work a very short time after first manifesting their disability; others with different disabilities might soldier on for some considerable period. The position of a person suffering from a stroke might differ significantly from that of a person with multiple sclerosis, and both of those from that of a person with a cancer: but all would undoubtedly be classed as "disabled" for the purposes of the **Equality Act**, since the definition of disability (in section 6 of the **Equality Act 2010**) is:-

> **"(1) A person (P) has a disability if –**
> **(a) P has a physical or mental impairment, and**

(b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability - …
(b) A reference to persons who share a protected characteristic is a reference to persons who have the same disability…

(6) Schedule 1 ("Disability: Supplementary Provisions") has effect."

Schedule 1 provides so far as is material, under Part 1 (headed "Determination of Disability") at paragraph 2 (headed "Long Term Effects") as follows:-

"(1) The effect of an impairment is long term if –
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

24. Accordingly, anyone who is permanently incapacitated so that they cannot work in the foreseeable future is disabled, whether or not the disability is brought about as a result of a slow and progressive process, by recognition of a continuing state of affairs which renders continued work untenable, or by reason of some sudden cataclysmic physical, neurological or mental event.

25. It follows that those who are so significantly disabled as to be eligible for ill-health retirement under the terms of the scheme would be entitled to its benefits; and, conversely, no one would be entitled to the benefits of the scheme unless sufficiently seriously disabled. By comparison with any non-disabled person, a former employee having taken ill-health retirement would be treated favourably. To hold the opposite would be perverse. The scheme rules provided for this. In short, the scheme rules (taken overall) favoured those who were disabled. It could not be otherwise. It was obviously the intention in making them that they should do so.

26. I cannot, therefore, accept the Tribunal's view that the pension scheme was discriminatory as against those who were disabled. That is manifestly perverse. Had the Tribunal appreciated that anyone who succeeded in their claim for ill-health retirement was necessarily disabled it could not legitimately have concluded as it did.

"Unfavourably"

27. As to the reasoning by reference to other possible discrimination claims, the meaning of the word "unfavourably" cannot, in my view, be equated with the concept of "detriment" used elsewhere in the **Equality Act 2010**. The word "unfavourably" is deliberately chosen. So, too, the choice not to use the word "detriment" must be assumed to be deliberate: the draftsman would have been well aware of the use of the word "detriment" elsewhere within the **Equality Act**, and avoided it. Nor, as the parties were agreed, does the word "unfavourably" require a comparison with an identifiable comparator, whether actual or hypothetical, as would the description "less favourable". "Less" invites evidence to be provided in proof of "less than whom?"; "un.." is by contrast to be measured against an objective sense of that which is adverse as compared with that which is beneficial.

28. Section 15 as such was introduced into the **Equality Act 2010** for the first time. The word "unfavourably" is used elsewhere in the Act in respect of provisions which have a longer pedigree. Thus in Section 18, a person is held to discriminate against a woman if in a protected period in relation to a pregnancy of hers that person treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of it (Section 18(2): see also Sections 18(3) and (4)). In this use it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in

consequence of their disability. Since the word "unfavourable" is the same word in section 15 as it is in section 18, in the same part of the same Act, it is likely that the draftsman had in mind that it would mean much the same in both.

29. I accept Mr O'Dair's submission that it is for a Tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be. Sometimes this may be obvious: as for example, where a person may suffer a life event which would generally be regarded as adverse – taking the **Malcolm** case as an example, eviction; or being surcharged; being required to work harder, longer, or for less. A person who is asked, on pain of discipline, to perform at a rate which he cannot achieve because of his disability would be treated unfavourably if he were then to be subjected to that discipline, or threatened with it: this would not be directly because of his disability, but because of that which arose from it – his inability to perform work at the same speed or with the same efficiency. In a case such as this the contrast with the **Malcolm** approach is clear – for in **Malcolm**, the question would be whether an able bodied worker in the same position without the disability, who did not complete work at the rate or to the standard required would be subject to discipline. This approach is both

consistent with and reflective of the sense in which "unfavourably" is applied in a case coming within section 18.

30. This is not the approach which the Tribunal took. It was in error to adopt the Claimant's analysis as set out at paragraph 23 of its judgment. The comparison there was between a person suffering a heart attack or stroke compared to a person whose disability worsened over time. However, the Tribunal wrongly conceived the former not to be disabled. The paragraph following built upon this concept.

31. The Tribunal's approach at paragraphs 29 and 30 was also mistaken. In paragraph 29, the Tribunal considered what the position have would been if the Claimant had brought a reasonable adjustment claim. Had he done so, he would have been asserting a failure to comply with a duty under Section 20. Section 20(3) of the **Equality Act 2010** provides, so far as material, that the duty exists

> **"…where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled…"**

and is

> **"..to take such steps as it is reasonable to have to take to avoid the disadvantage…"**

32. This relies upon a provision, criterion or practice ("PCP") being established. The Tribunal thought that the Claimant here would have identified a provision, criterion or practice that

> **"…the scheme rule which determines payment of enhanced benefit on the basis of final salary"**

put or would put him at a substantial disadvantage in comparison with a non-disabled employee. This is simply not so: for the scheme only applied to those who were disabled. The

Tribunal's argument (it was not one advanced by or even offered to the advocates for their consideration) was misplaced.

33. When the Tribunal turned at paragraph 30 to deal with indirect discrimination it said, delphically, "…again on our analysis the PCP would have been readily identifiable…". It did not expressly identify the PCP it had in mind. Nor is it clear in context what it was. The principal difficulty, however, with its analysis is applying the wording of Section 19 of the **Equality Act** to it. So far as material, that Section provides:-

> **"(2)…A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic**
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it**
> **(c) it puts, or would put, B at that disadvantage and**
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim"**

The Tribunal continued in its reasoning at paragraph 30 to compare disabled employees (as a class, and without defining the disability suffered) as being more likely to work part time immediately prior to ill-health retirement (presumably) than were those who are not disabled. It is difficult to see how the Claimant could succeed in such a case. If the PCP is the scheme, insofar as it provided for ill-health retirement, then it could only operate in favour of those who were disabled. If the analysis were to descend to the detail of the particular disability suffered by members of the group being considered, it would need to be established that the Claimant together with others sharing his particular disability were at a disadvantage compared with those who did not have that particular disability but had some other. This is not an analysis which the Tribunal attempted. It is, however, easy to see that many suffering very different disabilities would be given precisely the same advantage or disadvantage as was the Claimant. In short, there would be very little prospect of any claim for indirect discrimination succeeding.

The Tribunal's conclusion to the opposite effect was untenable. I understand that the points raised by the Tribunal at paragraph 29 and 30 were not put to Counsel for argument. They were not permissible speculations, yet they formed part of the reasoning. Though not regarded as central to the ultimate decision, the fact they were set out and explained in some detail shows that in the eyes of the Tribunal they were nonetheless material. A conclusion based in part on flawed reasoning cannot stand.

34. There is a further reason for thinking that the example of the "reasonable adjustments" claim should in the circumstances of this case have persuaded the Tribunal towards an opposite conclusion to that to which it came. The reduction in hours was one which the Claimant requested. The University willingly acceded to his requests. It fulfilled its duty under the **Equality Act 2010** to make reasonable adjustments by doing so. If it was a reasonable adjustment in the light of his disability to reduce the Claimant's hours of work, then the University was legally obliged to make that reduction: but if the reduction in hours was also held to be the consequence of the Claimant's disability so as to render the reduced weekly payment for his labour unfavourable treatment within the meaning of section 15, the Act would in one breath be requiring the University to reduce his hours, but in the next be obliging it to pay the Claimant as if there had been no such reduction. It was submitted to me in argument that the duty to make reasonable adjustments has never yet been held to go so far as to require an employer to pay employees for work which they have not done and can no longer do because it is medically undesirable for them to do it, and **O'Hanlon v Revenue and Customs Commissioners** [2007] ICR 1359, CA, was cited for this. Though I am less certain that such a conclusion can necessarily be excluded in all circumstances as beyond that which it is reasonable for an employer to be obliged to do, I would accept that any argument advancing it will usually face at least a significant uphill struggle (see for instance the points made by

Sedley LJ in **O'Hanlon** at para. 100), and if there are indeed any circumstances in which such a case succeeds they are likely to be exceptional.

35. I should add that there is very little other reasoning to support the interpretation of "unfavourably" which the Tribunal must have adopted in order to hold that the Claimant here had been treated unfavourably when a scheme which provided significant benefits to those who were disabled, as was he, was applied to him. Had it first answered the questions it had posed itself, discovered the answers set out at paragraphs 28 and 29 above, and applied that approach it is difficult to think it would have come to the conclusion it did.

36. The fact that the Claimant was treated less favourably than those who, also disabled, and subject to the same ill-health retirement scheme, had a higher final salary than he did cannot assist the Claimant, since such reasoning adopts a test of less favourable treatment – in these circumstances, less favourable treatment than that given to others who were disabled, but whose disabilities came on suddenly – rather than applies the relevant word ("unfavourable"). The parties are agreed that that word was deliberately chosen so as not to be the same as "less favourable": and that a "less favourable treatment" test is inappropriate. The Tribunal may not have appreciated that it was in practice applying a "less favourable treatment" test, having eschewed it in theory, when (albeit apparently thinking that the hypothetical stroke victim postulated before it was not disabled within the Equality Act) it accepted that the Claimant was treated unfavourably because the hypothetical victim would have been earning more at the date of ill-health retirement and would receive a proportionately larger pension than would the Claimant, the effect of whose disabilities intensified more slowly. However, that is what it did, and it was wrong to do so.

37. Since the Tribunal applied the wrong test, adopted the wrong approach, failed to recognise that anyone who could legitimately claim ill-health retirement under the scheme had to be disabled, and reasoned from inappropriate analogies, its decision that the Claimant was unfavourably treated because of something arising in consequence of his disability cannot stand.

Justification

38. That conclusion is sufficient for the appeal to succeed, since any argument as to justification follows only if unfavourable treatment is first established. Without knowing what is unfavourable about the conduct of which complaint is made, and why it is so, a Tribunal is in no position to draw the balance between its discriminatory effect and the legitimate aim it is said to serve.

39. Nonetheless, I have heard full argument as to justification, and should briefly express my views in case this matter goes further.

40. In my view the Tribunal also fell into error when it simply adopted the arguments of Mr Goodfellow. It thought (at paragraph 39) that there was considerable force in his submission (which later, at paragraph 41, it expressly adopted) that the Trustees had significant difficulty in justifying the discriminatory effect of the relevant scheme rule since they had never considered the potentially discriminatory effect of that rule. It found they did not "at the time of formulating the scheme rules appreciate the effect…". Therefore they did not consider at that time that "..basing retirement benefits to ill health retirees on their final salary was a necessary means of ensuring the financial viability of the scheme..", nor did they consider any alternative method of achieving the same overall result: they might, for instance, have found other means of restricting the sums paid out by the scheme.

41. This approach derived from comments made in **R (Elias) v Secretary of State for Defence** at paras. 128-33, but did not have regard to the principle that when considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter whether the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and Tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it was achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a Tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a Tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted. This is the force of the principle in **R (Elias) v Secretary of State for Defence**. But the "**Elias**" principle does not convert a Tribunal's task from determining whether the measure in fact taken can be justified before it, objectively, into one of deciding whether the alleged discriminator simply did not consider the question, or did not ask if there were alternatives. Case law is all one way on this: see **Seldon v Clarkson Wright & Jacques** [2012] UKSC 16; [2012] ICR 716 at paragraph 60 per Lady Hale: the aim "need not have been

articulated or even realised at the time when the measure was first adopted", and per Lord Hope at paragraph 76: "..it does not matter if [the decision maker] said nothing about this at the time or if they did not apply their minds to the issue at all"; echoing the Court of Appeal's reasoning in **Health and Safety Executive v Cadman** [2005] ICR 1546 at para. 28. See also the analogous approach taken (in respect of justification where a breach of fundamental human rights is alleged) in **R (SB) v Denbigh High School** [2007] AC 100 (see especially per Lord Bingham at paragraph 31), and in **Belfast City Council v Miss Behavin' Ltd** [2007] UKHL 19.

42. The Tribunal accepted the argument that the time to assess whether there was objective justification was when the scheme rules were made, not at the time of their application to the Claimant. However, as Mr Bryant QC pointed out, at the time they were made there was no equivalent to Section 15 of the **Equality Act 2010**: the basis for the Trustees having at that time supposed the scheme to be discriminatory was accordingly left unexplained by the Tribunal. The decision would thus be in error if that was the right time at which to assess justification. As it happened, Mr. Bryant argued that justification should have been considered by reference to the time of the allegedly discriminatory treatment, which in this case was mid-2013. The Tribunal was in error in that respect, too, for it did not consider it by reference to that occasion. He is plainly right in this, assuming that the Tribunal properly held a legitimate aim to have been established.

43. In my view, he is right, too, to submit that it is insufficient for a Tribunal in a case such as the present to say that there were "any number of ways in which the generosity of the scheme could be lessened, achieving the same or greater savings without any discriminatory impact" without identifying any particular way it had in mind, and what the evidence was

which established it as a reasonable and less discriminatory way of achieving the legitimate object postulated. **HM Land Registry v Benson** [2012] IRLR 373 was a case in which a Tribunal held that because the Land Registry could have avoided potential discrimination in the process of selecting retirees from amongst those who applied for voluntary retirement by allowing all those who applied to retire on the terms of the scheme, its decision not to choose to permit the Claimants to take retirement (to do so would be within the most expensive bracket, because of the age-range within which they fell) was discriminatory. It could not be justified. This was reversed on appeal. At paragraph 37 of the judgment, Underhill J (President) said that the applicable principle:

> **"…seems to us to be that an employer's decision about how to allocate his resources, and specifically his financial resources, should constitute a "real need" – or, to revert to the language of aim and means, a "legitimate aim" – even if it is shown that he could have afforded to make a different allocation with a lesser impact on the class of employee in question. …... The task of the employment tribunal is to accept the employer's legitimate decision as to the allocation of his resources as representing a genuine "need" but to balance it against the impact complained of. "**

44. When looking at possible alternatives, the Tribunal in the circumstances of the present case, like that from which the appeal came in **Benson**, failed to consider whether the means chosen was a reasonably necessary way of achieving the aim which the Trustees had in mind: it was not balancing the allocation of funds the employer legitimately decided to provide through the scheme, having in mind its aims, against the discriminatory impact it produced.

45. Finally, the Tribunal identified as legitimate the aim quoted above – yet went on in its paragraph 41, apparently where it was considering whether the means adopted to achieve that aim were reasonably necessary and appropriate to do so, to describe the argument for the Trustees as one purely of cost, and to reject justification on that basis. Mr Bryant QC complained that whether the aim was purely that of cost-saving was a matter for consideration in deciding the legitimacy of the aim, and was not to be asked when addressing the means. It

was incoherent to find with one breath that the aim was legitimate – which it could not be if it were purely cost – and in the next breath to hold that the plea of justification failed on the basis it was all about cost and nothing else.

46. The Claimant submitted that at paragraph 41 the Tribunal was considering whether there was a legitimate aim, and not just means, but in the alternative cross-appealed as perverse the Tribunal's conclusion at paragraph 36 that the aim was legitimate.

47. In my view, it is clear in paragraph 36 that the Tribunal was determining the aim, and whether it was in fact legitimate, and that it was not purporting to do so in paragraph 41 as the Claimant argued. Paragraph 36 was the only one under a dedicated sub-heading: "Legitimate Aim". The Tribunal said there was no specific reason for disputing the aim it set out as legitimate. It went on to describe the real issue as being that of proportionality. The judgment then turned to consider proportionate means. Again, there was a specific sub-heading to that effect. It is clear that the two – aim on the one hand, proportionality of means on the other – were kept distinct and separately analysed.

48. Accordingly, as a matter of analysis, the Tribunal should have enquired as to whether the means adopted were necessary and appropriate (proportionate) to achieving the aim it had recognised. At paragraph 41 it did not restrict itself to this.

49. Whereas it may very well have been that the Tribunal intended to say there that the only justification put forward was that of cost, whichever way one analysed the matter, it did not do so. The analysis it adopted is thus open to the charge of inconsistency which the University brings. As to the cross-appeal, I cannot reject the aim propounded as necessarily perverse,

though surprised that the aim of the University in setting out the rules of the scheme was only that of affordability, and not also that of providing good financial security for its employees (particularly if they should become incapacitated whilst in the service of the University) to encourage both their recruitment and retention. Despite the absence of such additional words in the present case, I cannot say that on the material before it the Tribunal was in effect bound to reject the postulated aim as illegitimate.

Conclusions

50. The appeal succeeds, on each ground on which it was argued. The cross-appeal fails. Since I cannot say that there is necessarily only one result to which a properly directed Tribunal could come, and the application of the proper test as identified above to the facts established in evidence is one for a fact-finding Tribunal of first instance, then in accordance with the decision in **Jafri v Lincoln College** [2014] ICR 920 CA the matter must be remitted.

51. Since the decision below is as flawed as I have found it to be, the Tribunal expressed a firm view from which it might not be easy to resile, and none of the other factors referred to in **Sinclair Roche & Temperley & Ors v Heard & Anor** [2004] IRLR 763 (EAT Familiar Authority 19) at paragraph 46 is sufficiently persuasive against remission to a fresh Tribunal, that is what I order. The claim will be for complete rehearing. Neither party is to be held to the contentions they made in argument in the present case, though each is to be held to their pleadings unless a Tribunal permits their amendment.