EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Medlycott**

Respondent: **Department for Work and Pensions**

Heard at: **London Central** **On: 5,6 November 2019**
Before: **Employment Judge Goodman**
Mr T. Robinson
Mrs F. Betts

Representation
Claimant: **in person**
Respondent: **Mr A. Henderson, counsel**

RESERVED JUDGMENT

1. The respondent did not make unlawful deductions from the claimant's wages.

2. The respondent did not discriminate against the claimant because of age.

REASONS

1. This case is about the payment of a responsibility allowance to the claimant.

2. There is a claim of unlawful deductions from wages, on the basis that the allowance was "properly payable" to him under the respondent's policy.

3. There is also a claim of age discrimination, that the reason for not paying the allowance, even when he argued his case fully in an internal grievance process, was that the allowance would increase the pension value, and he was close to drawing his pension; it is argued that the decision not to pay was materially influenced by his age, and so discriminatory.

Evidence

4. The tribunal heard evidence from:

Tony Medlycott, the claimant
Lindsay Tickle, his line manager from February to October 2018
Sarah Thompson, the HR Business Partner who advised Ms Tickle
Mandy Howells, who heard the claimant's grievance about the refusal
Stuart Griffiths, who heard the appeal against the grievance decision
Paschal Kane, the claimant's line manager from January 2019, and a comparator for the discrimination claim.

5. There was a refreshingly slim bundle of documents containing relevant policies, notes, letters and emails, but it had some baffling pagination.

Findings of Fact

6. The respondent is the government department responsible for policy and administration of state benefits and pensions, with many offices spread across the country.

7. The claimant joined the department in 198. He is now at grade 7. He is senior operations manager (or cluster manager) responsible for running two work capability assessment (WCA) centres, one in London and one in Birmingham.

8. He is now aged 60. His age and length of service mean that despite the changes to public service pension changes of the last decade he remains in the Classic pension. When he retires later this year he will be paid an annual pension of 50% of the best of his last three years' salary.

9. Younger civil servants, or recent joiners, are in the Alpha pension scheme. This pays a defined benefit pension, so like the Classic, the pension paid is related to years of service, but as a multiple of his average salary over his whole career, not the best of the last three years.

10. The two WCA centres were set up in 2015 as a project to provide some comparison to the private market provision of the service which the department then relied on. There was some concern about the quality of private market provision. At the project stage each centre had a grade 6 (which is senior to a grade 7) in overall charge, though neither was based at a centre. The claimant had operational control of both centres. As they became fully operational, the grade 6 layer thinned out. From March 2017 the WCA centres were a much smaller part of the workload of the grade 6.

11. Each centre employed healthcare professional (HCP). One was a doctor and one was a nurse. They were recruited from outside to lead and manage the teams of contracted healthcare professionals who carried out occupational suitability assessments on applicants for state employment benefits. The two employed HCPs were recruited at grade 6. This was because civil service salary levels are such that it would be difficult to recruit or retain medical professionals for less than the going rate for a grade 6. They did not join the department with the training or experience of managing people within the civil service structure that would usually be expected of a grade 6, and they had to manage teams of contracted professionals, and ensure the quality and performance of their teams.

12. The day to day tasks of teaching them to learn civil service ways, develop

policy for clinical governance, and manage others, fell on the claimant. The formal line management tasks of 1:1 monthly meetings, annual appraisal, and any disciplinary issue or complaint remained with the grade 6. In practice as she or he was not based at either centre, day to day tasks that would otherwise fall to a line manager were handled by the claimant.

13. There is no doubt that the claimant was and is excellent at his job, not just in daily operations, but taking initiatives too. The three annual appraisals we have seen show this. He achieved series of a box 1 markings, the top assessment, which carried a performance bonus for the year of £1,100, though this payment is not consolidated for pension purposes. The appraisals record that he was comfortable managing upwards and directing the two grade 6 clinical leads. He was "giving them not only support for performance management, but also leading on strategic direction, including… clinical governance". For a period of some months in 2016/17 he also covered for the grade 6 lead during absence, without being paid a temporary duties allowance. From March 2017 he had less recourse to a grade 6, had he wanted support.

14. The respondent has a Responsibility Allowance Policy. It provides that a civil servant is entitled to a responsibility allowance if he does one of three things. For this claim we are concerned only with the first. It is paid if you:

> "manage or supervise colleagues with the same grade as yourself for a period of at least one full day or more. It will not be paid for less than a full day".

15. The policy says that to qualify there must be management or supervision for at least one full day. This is a threshold for payment. It does not mean payment is related to the time directly spent on the management or supervision activity; it is paid as a proportion of the annual allowance for each month that the person carries this responsibility.

16. There is a procedure for allocating the payment, which says: "when a manager considers it necessary for a member of their team to supervise or manage others of the same grade, the manager must select the most suitable person from within the team". The manager must base this on knowledge of performance, and be prepared to justify the decision to other team members. The reasons for the decision must be recorded and made available to other team members.

17. Within the two WCAs managed by the claimant, a responsibility payment for managing the two HCP clinical grade 6s has always been made to whoever has been the grade 6 at the time, both before and after March 2017. If the reasons for any of these decisions were recorded, the respondent has not been able to produce the documents. We conclude that most likely this requirement was overlooked.

18. The allowance is in round terms £2,000 per annum; there are small increases each year. Unlike a performance bonus, it counts as pensionable salary.

19. The claimant had always known about the responsibility payment, but had not thought to claim it. In October 2018 he learned by chance that it was pensionable. He calculated that while the allowance itself, once taxed, was

not substantial, even for the three years past, but the added value (another £1,000 per annum) to the pension payable to him for life, and after that as a proportion to his widow, made it worth claiming.

20. At his 1:1 meeting on 19 October 2018 with his new line manager, Lindsay Tickle, he asked about getting the responsibility allowance. She took it up with the HR Business Partner, Sarah Thompson, telling her she effectively managed the clinical grade 6s, but he claimant supervised them on a day to day basis, not her.

21. Sarah Thompson advised that the policy did not give the manager discretion. In any case, she said, the claimant did not have ultimate management responsibility for the two HCPs, as that lay with Ms Tickle, even if as a matter of practice the claimant directed them as part of his role of ensuring smooth running of the centres.

22. Ms Tickle conveyed this to the claimant on 9 November, conceding in a conciliatory way that it was: “a really difficult one because as you say on a day-to-day basis you guide, supervise etcetera to ensure the smooth running of the DWP assessment centres and of course they are G6 equivalents because that’s where their salaries have been aligned rather than being a G6 as we would know it.” The claimant protested that the policy did not speak of line management, but of supervision, and that was what he was doing. He was asked to give examples. He listed them, including supervision of decision about their deployment and recruitment, being their only point of call for advice, coaching, mentoring, and staffing and contractual issues. He chaired the senior leadership team. He drafted and signed off the clinical governance guide. He managed access to their time by others. He dealt with the agency supplying healthcare providers. Ms Tickle was sympathetic and consulted HR again; she noted that from March 2017 there may have been a change in the burden of day to day supervision, and that the appraisals recognised what he did. HR was also given the role profile for the claimant and the grade 6s. HR advised still that “managing upwards” (a phrase used in the appraisals) was often done by staff at many grades, but it did not mean he carried responsibility. There was no scope for grievance because in any case the policy did not cover those who managed people on a higher grade than themselves.

23. The claimant lodged a formal grievance on 22 November. He argued the interpretation of the policy confused accountability with responsibility. The allowance was usually awarded to manage “spans of controls”, not to run teams or be accountable. Further, his role was unique, in that he had to manage more senior staff. He had worked on HR for 6 years himself and knew that common sense had to be exercised in unique situations like this one. To the existing list of what he did he added that he had resolved conflicts between the HCPs and contracted staff and other DWP staff, which would normally fall to a line manager.

24. Mandy Howells, a grade 7 then acting up in a grade 8 role, was appointed to decide the grievance. There was a meeting to hear the claimant on 5 December. To the earlier examples he added that other employed doctors in DWP were in policy roles and did not require the supervision of those in operational roles. It was unfair that he had had to take on additional responsibility with the dilution of grade 6 support, while the responsibility

payment continued to go to the grade 6 above him.

25. Mandy Howells wrote to the claimant on 7 January 2019. She stated the line manger had no autonomy to award responsibility allowance outside the policy. The policy required him to be in the same grade as those he supervised. In any case, his activity with regard to the clinical grade 6s did not amount to line management responsibility. It was part of his role for service delivery in the centres, where those who work "view you as their natural leader".

26. The claimant appealed on 8 January. He set out the history. He pointed out that recent grade 6 line managers were spending less than 10% of their time on the centres, and Ms Tickle's successor had lasted only two months without making contact at all. He did the supervisory work, and "the sticking point seems to be a literal reading of the policy around managing and supervising people in the same grade as opposed to a grade higher". When it was written, it could not have been envisaged that a grade 7 like him would be actively daily supervising clinical grade 6s. Finally, the policy did not talk about accountability, which by default fell to him.

27. Stuart Griffiths heard the appeal. He is grade SCS1, which is one above grade 6. He read the documents, had a discussion with the claimant about what he did, and spoke briefly to the "policy owner" that is, the person in HR whose task it is to keep the particular policy under review. He was told it could not extend to someone not in the same grade. On 8 February he wrote turning down the appeal. "The decision-maker was correct in her interpretation that TRA is designed to be paid the people of the same grade as the person they are line managing. In this particular situation there was someone of the same grade who was being paid TRA for undertaking the line management duties". Giving evidence, Mr Griffiths acknowledged that in fairness the claimant ought perhaps to get the allowance, but that was not what the policy said.

Relevant Law
The Unlawful Deductions Claim

28. Employment tribunals have power to make awards to serving employees where there have been unlawful deductions from wages. Wages are defined in section 27 of the Employment Rights Act 1996:

> ""wages", in relation to a worker, means *any sums payable to the worker in connection with his employment*, including—
>
> (a) any fee, bonus, commission, holiday pay or *other emolument referable to his employment, whether payable under his contract or otherwise*,"
>
> (Emphasis added).

29. A deduction is defined in section 13 as the difference between what is "properly payable" and what is actually paid.

30. **New Century Cleaning Co Ltd v Church 2000 IRLR 27,** a case involving unilateral cuts in piece rates, holds that "payable" means it must be a legal entitlement, even if the provision is not in the contract of employment:

> "The word "payable" clearly connotes some legal entitlement. The adverb "properly" is also consistent with a legal requirement but is not necessarily limited to a contractual entitlement. This is confirmed by the provisions of s.27(1)(a) which show that the wages "properly payable" may not be due under the contract of employment. But the words "or otherwise" do not, in my view, extend the ambit of "the sums payable to the worker in connection with his employment" beyond those to which he has some legal entitlement."

31. An entitlement is not the same as a discretion. Discretionary bonuses are not entitlements until they have been declared: **Mouradian v Tradition Securities and Futures (2009) EWCA Civ 60.**

Discussion

32. On the wording of the policy the responsibility allowance is to be paid to someone who manages or supervises someone on the same grade as him. Both the claimant and Mr Griffiths acknowledged that this was intended to, and did, cover teams where a line manger may have an unusually large number of staff reporting to him, such that the work involved in annual and mid-term appraisals, monthly one to one meetings, day to day supervision and so on, would be inordinate, and delegating these duties for some of the staff to those below him to take on supervision of their peers would remove some of the pressure. This is known as "span breaking". The claimant was not on the same grade as the HCPs, he was a grade below. On the letter of the policy he does not qualify for the payment, whatever duties he performed.

33. He argues that the spirit of the policy requires that he should be treated as on the same grade, either because in practice he did the work of a grade 6 in managing their day to day activity (though he never assumed the formal responsibility for accountability), or, alternatively, that they were anomalously graded and in all but name were grade 7s.

34. The respondent argues that there is no discretion in the operation of responsibility allowance policy. Some policies permit management discretion (for example, special leave of absence) and others do not (annual leave).

35. The difficulty here is that while the payment of responsibility allowance for the two grade 6s to another grade 6 when he, a grade 7, was doing a lot of the work might be unfair, courts and tribunals are not concerned with whether pay is fair, but with whether a particular rate or additional payment is part of the agreed bargain between employer and employee. Tribunals decide what the proper rate of pay is, not what it ought to be. The only apparent exceptions to this are where the facts may indicate a discriminatory reason for an apparent lack of fairness, such as, in equal pay claims, sex, or, as claimed here, age.

36. The tribunal finds that on a matter as central to the work-wage bargain of employment as pay, if there was any discretion, the policy would say so. Within such a large employer, discretion in pay matters could give rise to undesirable anomalies. It may be said there is some exercise of discretion in awarding the performance bonus, but the respondent has clear guidelines for such awards, and a process involving moderation between teams to see that the guidelines are applied equally. The discretion element is governed by agreed rules. There is no such provision in responsibility allowance

37. We do not dispute, and neither in reality did the respondent, that in fact the claimant did a great deal of supervision that might otherwise fall to a line manager. (We were not impressed here by Mr Kane's evidence that he did not need to be troubled by the claimant about an HCP pulling out of a meeting at short notice for no very good reason and without arranging cover, and then that he, Mr Kane, had in fact sorted it, so it was not the claimant's responsibility in any event. We speculate this was because by now there was some lack of goodwill on one side or the other because of the grievance outcome). The difficulty for the claimant is that he was not on the same grade as the clinical HCPs. That means that whatever he did with respect to their supervision he was not entitled to the allowance. In practice this was covered by his existing job description, which was to ensure the smooth running of the centres. We do not accept the argument that morally he should get the payment, because market rate of pay for doctors was the reason they were on grade 6. We do not know how they would have been graded had there been a job evaluation. Like it or not, they were on grade 6, and he was not. As Mr Griffiths put it, in many organisations there are examples of juniors in effect managing for, or better than, the more senior people who should be doing it, but that does not alter their grade or pay. We recognise the truth of that.

38. As he was not on grade 6 we do not need to make a finding as to whether he qualified by his supervision activity, even if he did not formally appraise them, or carry responsibility for discipline of complaints. Some of the respondent's witnesses (Ms Tickle for example) acknowledged he did supervision. Others said the two terms – management and supervision – were synonymous, or at least they were for the purpose of applying this policy. In that case we would have been concerned that their argument was circular – that "management or supervise" meant formal line management, and nothing else. Nevertheless, the witnesses knew of very few examples in practice of the allowance being paid, and the only examples known were where there had delegation of formal line management tasks – the "span breaking" - to take the pressure off a manager with large numbers to formally line manage. Noone knew of any example where it was paid for day to day supervision only.

39. On the fairness point, there were other routes open to the claimant. He could have asked for his job to be regraded, which should be done where there is a major change in circumstances. That might have been appropriate from March 2017, though we have little evidence on what practical difference that made to day to day activity. He could have applied for promotion to another grade 6 post, on the basis of his record of achievement. It is also the case that his considerable efforts were rewarded by performance bonus. The lack of responsibility allowance may have been unfair, but it was not a legal entitlement.

40. Our conclusion is that the responsibility allowance was not properly payable to him. The claim for unlawful deductions from wages does not succeed.

Age Discrimination
Relevant Law

41. The Equality Act by section 13 prohibits less favourable treatment because of a protected characteristic, in this case, age. It is the one characteristic where an employer has the opportunity to justify the discrimination, but the

department simply denies discrimination occurred, and does not seek to justify anything.

42. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

43. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.

44. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. A tribunal may consider the employer's explanation first, especially if there if it is not clear of there is a material comparator – **Shamoon v Chief Constable of Ulster Constabulary (2003) IRLR 285**. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88 -** but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

Discussion

45. Was there less favourable treatment, either in the refusal by Ms Tickle to agree to payment, or in Ms Howells turning down the grievance, or Mr Griffiths turning down the appeal? Less favourable implies a comparison. The claimant named as actual comparators Mr Kane, a grade 6, and an unnamed other, also grade 6, who briefly followed Ms Tickle and preceded Mr Kane. They both got the allowance for supervising the clinical grade 6's. As it happens we do not know the age of either, but judge from appearances that Mr Kane is some way off claiming pension. The issue is whether they were materially comparable, as unlike them the claimant was not a grade 6 – which

was in fact the respondent's reason for refusal. They are also not comparable, because the grade 6 actual comparators did no supervision, but did carry formal line management responsibility for doing appraisals, monthly one to ones and so on, even if one of them may not have had time or opportunity to exercise it.

46. The alternative is a hypothetical comparator - the claimant, or someone just like him, who was, say, 10 or 15 years younger, and so not in striking distance of the final years if in the Classic scheme. We must ask whether a younger version of the claimant would have got the allowance. For that we need to examine the reason the respondent gave, which on the face of it would have applied to a younger man in the claimant's role and on grade 7, and what facts the claimant has proved.

47. The claimant argues that his claim was not taken seriously or investigated properly because the respondent thought he was "an old man taking a punt" to get more pension. Either they did not want to pay because of the cost of increased pension, or they thought the problem would go away soon when he retired, and there would be no loss of goodwill by leaving him unsatisfied.

48. What has the claimant established? His employer knew he was close to retirement, though exactly when is not shown; we assume his managers could have made a deduction from his length of service and probable age. They did not know which scheme he was in, but those close to him in age and seniority could have guessed it was Classic, where the final years' salary was important. They also knew, because he told Ms Tickle so at the outset, that his reason for wanting the responsibility allowance was because he now knew it was pensionable. They may not have mentioned it in the decisions, nor was it discussed it at their meetings, but he had put it into their minds. The claimant did not seek to suggest to the three decision makers when questioning them that the amount of his pension had influenced their decisions, and we know that at least two of the three were sympathetic to the claimant's case for making an exception if they could. We are probably being asked to infer that it entered into the calculations of the Human Resources department when they advised the decision makers at each stage.

49. Against that is the fact that Ms. Thompson of HR, when asked, did not know if performance bonus was pensionable, suggesting pension was not something she thought about much. It was common ground (we had no formal evidence or documents) that while an employer pension contribution related to staff pay goes each year to the civil service pension scheme from the DWP's budget, the amount of pension paid to their retired staff does not come from their budget but from the scheme. That suggests that the pension issue had little value to the department, contrasting with its significant value to the claimant. Further, if a younger person, in the Alpha scheme, got a responsibility allowance, that would count to their pension, as it relates to their career average pay. Though they might have to earn it for many years before it had the same impact on pension value as for the last three years in the Classic scheme, from the department's point of view the cost was equal whatever the age of the recipient.

50. The claimant does not establish on these facts that the stated reason why the respondent did not pay the allowance, namely his grade, was not the real reason, or that his age and proximity to retirement had anything to do with it.

The hypothetical younger man on grade 7 would have received the same answer – that he could only get it if he was on grade 6. There is nothing on which we could base a finding that an exception would have been made for a younger man but not the claimant

51. The claimant suggested that the department's decision to fight the claim was based on a costs benefit analysis related to the value of the pension, as the back pay of itself was not of sufficient value. We do not conclude that this shows pension value was a reason for the decision not to give him a responsibility allowance. They may not wish to set any kind of precedent for discretion administering a policy that does not admit discretion. There is also the reputational damage of settling a discrimination claim that has not been withdrawn. Whatever the reasons the respondent has not settled the case, they are not obliged to settle it, and they can fight it whatever the value if they consider it without merit in law. We do not draw any inference from that decision.

52. Nor do we consider any failure of investigation of his grievance was related to age. The respondent did not interview witnesses in essence because Ms Tickle, and others, accepted his description of what he did. They did not need to have it supported by others. They took account of his job description (of January 2017) and that of the clinical grade 6s, and his own line manager. He did not argue that the job description had to be revised after the March 2017 change, and on the facts known to us it is not clear what difference this made to the claimant's responsibilities. At its strongest, the argument is that Mr Griffiths should have pushed harder to get the "policy owner" to revise the policy to take account of the claimant's apparently unique circumstances where he supervised (but did not line manage) more senior grades. We do not see how we can infer that age was the reason for any lack of push on his part. He was seeking to understand the policy as it was, not get it changed, a process which would have involved extensive consultation within the department and with staff representatives.

53. In conclusion, both claims fail for the reasons given. We want to emphasise however that the claimant was an exceptionally able and effective manager of the centres. His request for payment of the allowance in these unusual circumstances was genuine and entirely understandable, and was thought by some of his managers to be a fair point. It is just that he cannot show entitlement as a matter of law, nor can he show that he did not get it because he was close to retirement.

Employment Judge Goodman

Date 7th Nov 2019

JUDGMENT SENT TO THE PARTIES ON

08/11/2019

FOR THE TRIBUNAL OFFICE