Appeal No. UKEAT/0143/18/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 18 November 2019
Judgment handed down on 25th February 2020

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

CHIEF CONSTABLE OF GWENT POLICE

APPELLANT

MR S PARSONS AND MR D ROBERTS

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Ms Hilary Winstone (of Counsel) Instructed by Chief Constable of Gwent Police Headquarters Cowbridge Road Bridgend CF31 3SU
For the Respondents	Mr Colin Banham (of Counsel) Instructed by Slater and Gorden 90 High Holborn WC1V 6LJ

SUMMARY

DISABILITY DISCRIMINATION

The Claimants were police officers in their 40s who were disabled under Equality Act 2010 and in possession of "H1 certificates" which allowed them immediate access to "deferred pension" on leaving the police.

They left the force under the police "voluntary exit scheme" (analogous to a redundancy scheme) and their "compensation lump sums" were capped at six months' pay, when they would otherwise have received 21 and 18 months' respectively, because they were in immediate receipt of "deferred pension".

The Claimants brought successful claims against the Chief Constable on the basis that capping the compensation lump sums was discriminatory under section 15 Equality Act.

On appeal the EAT upheld the decision of the ET on each of the three issues on which the ET had found in favour of the Claimants:

(1) capping the compensation lump sum was clearly "unfavourable treatment"; there was no reason to bring into account the "deferred pension" which they also received on leaving the force in considering the relevant treatment; and **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC 65 was distinguishable in that the relevant treatment in that case was classified as "the award of a pension" which could not be said to be unfavourable, as opposed to "capping the compensation lump sum", which clearly could;

(2) possession of H1 certificates (which was the cause of the immediate receipt of deferred pension and therefore the decision to cap the compensation lump sum) was clearly "something arising in consequence of [their] disability" since the certificates were based on exactly the same impairments as the (admitted) Equality Act disabilities;

(3) on the material put before the ET by the Chief Constable he had not established that the unfavourable treatment was justified under section 15(1)(b) of Equality Act; the financial

material did not show that the Claimants would receive more from the full compensation lump sum than they would receive in earnings by remaining with the police to retirement age as in **Kraft Foods UK Ltd v Hastie** [2010] ICR 1355; the mere fact that they were in immediate receipt of the "deferred pension" was not sufficient to establish that the compensation lump sum amounted to a windfall and the Chief Constable had not advanced or provided the material necessary to support any other case (see **Loxley v BAE Land Systems Munitions and Ordinance Ltd** [2008] ICR 1348).

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal against a decision of the employment tribunal sitting in Cardiff (Employment Judge S Davies, Ms M Walters, Ms J Southall) dated 12 January 2019 upholding claims by Mr Parsons and Mr Roberts against the Chief Constable of the Gwent Police under section 15(1) of the Equality Act 2010 based on the fact that the "compensation lump sums" paid to them under the force's "voluntary exit scheme" were capped at six months' pay when they elected to leave the force under the scheme with effect from 31 January 2017.

2. Section 15(1) provides:

> **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**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

There was no issue that the two Claimants were "disabled" for the purposes of the Equality Act at the relevant time.

Facts

3. The Claimants were longstanding officers with the Gwent Police. Mr Parsons was born on 28 September 1968 and joined the force on 7 June 1993; he was 48 years old and had over 23 years' service when he left the force. Mr Roberts was born on 22 December 1972 and joined up on 2 November 1998; he was 44 and had over 18 years' service when he left.

4. Both men (Mr Parsons on 10 June 2016 and Mr Roberts on 20 January 2015) had been certified for the purposes of regulation H1 of the Police Pensions Regulations 1987 as "disabled from performing the ordinary duties of a member of the police force" but they had not been allowed to retire on the grounds of ill health since, although they were suffering from physical conditions or injuries which prevented them using reasonable force or running after criminals, they were still able to perform valuable "back office" functions. They continued on full pay; in Mr Parsons' case it seems this amounted to more than £42,000 pa.

5. Possession of an "H1" certificate carried with it an important potential advantage under the Police Pensions Regulations. I was not taken to the Regulations themselves (nor, it appears, was the ET) but, as it was set out in paragraph 4 of Ms Winstone's skeleton argument and explained to me on behalf of the Chief Constable, the position was as follows. An "ordinary pension" under regulation B1 was payable only to an officer who retired after 25 years of service or had reached the age of 55. An "ill health award" under regulation B3 could be awarded to an officer who retired on the ground that he was permanently disabled; although both Claimants were eligible to retire on this basis the Chief Constable exercised his discretion to retain them. An officer who left the force with at least five years of service who was not entitled to a pension or award under any of regulations B1 to B4 could receive a "deferred pension" under regulation B5; this became payable only on the date of retirement (which I understand for these purposes to be at age 60). However, possession of an H1 certificate enabled an officer in the position of the Claimants to access a regulation B5 pension immediately on leaving the force rather than having it deferred until that date of retirement.

6. As the ET say at paragraph 15 police officers are not employees and their roles cannot be made redundant. However, as part of the public-sector austerity measures and in order to assist police forces to reduce staff (and accordingly their ongoing wage bill), on 1 January 2013 the

Secretary of State acting under regulation 14A of the Police Regulations 2003 introduced a "voluntary exit scheme" which is clearly analogous to a voluntary redundancy scheme. This enabled police pension authorities (in effect the Chief Constable) to pay a "compensation lump sum" to officers who left the force voluntarily. The scheme (which formed Annex DA to the Regulations) laid down detailed provisions as to when a compensation lump sum would be payable and how much could be paid. In short, the "compensation lump sum" amounted to one month's pay multiplied by the officer's years of service, up to a maximum of 21 months' pay. Where, however, the officer was at or over "Pension Age", the compensation lump sum was capped at six months' pay (or "half pay" as it is put at paragraph 3(a)(ii) of Annex DA), with a tapering provision where the officer was approaching "Pension Age". "Pension Age" was defined in the Annex (at paragraph 5(i)) as "the age at which the member is first entitled to receive payments on account of an ***ordinary pension*** (my emphasis) under such Police Pensions Regulations as are applicable to the member". Annex DA also provided at paragraph 1(i) that the pension authority could impose such further qualifications for receipt of a compensation lump sum as it thought fit and at paragraph 1(j) that payment of the compensation lump sum was at the discretion of the pension authority and that the scheme was not to be construed as giving any person an absolute right to such a payment.

7. The Gwent Police adopted the "voluntary exit scheme" in July 2016. The definition of "Pension age" in the relevant Gwent scheme document states that it is the age "… at which the individual would be eligible to receive their pension assuming they left the service on the agreed date for voluntary exit", ie omitting the word "ordinary" (see para 3.6); however, it does not appear that this change was designed to deal with the issue raised by these proceedings relating to officers with H1 certificates and none of the important "worked examples" in Appendix A to the document contemplates the case of an such an officer.

8. The Claimants applied to leave the Gwent force under the voluntary exit scheme, Mr Roberts on 28 July 2016 and Mr Parsons on 20 September 2016.

9. On 22 September 2016 Robert Hart, the head of payroll services, wrote to Nigel Stephens who was the Chief Officer with responsibility for resources and therefore, as I understand it, responsible for the administration of pensions on behalf the Chief Constable. Mr Hart said this:

> **"… we are currently processing VES applications.**
>
> **There is one issue that requires your determination as it is not explicit in the [relevant] Home Office Circular nor Regulation 14A Compensation Lump Sum on Voluntary Retirement (sic). It concerns Officers that have applied for VES who also hold a H1 Certificate …**
>
> **Because the H1 Certificate enables a deferred pension to be paid with immediate effect then VES applicants who have the H1 Certificate would gain financially by leaving through VES rather than ill health; in certain cases they would also gain financially rather than remaining as a serving Officer with 30 yrs service. It was not the intention of the Home Office to enable officers to secure financial gain when developing the VES scheme.**
>
> **This can be best seen in the illustration below, which is based on the actual example of an officer who has 23 years' service, has applied for VES and also has the H1 certificate.**
>
> **[table: see paragraph 25 below]**
>
> **The VES Regulations state that Officers approaching retirement must have their VES Payment tapered and that Officers that have reached Pension age are only entitled to a maximum of 6 months.**
>
> **I seek your endorsement of this approach."**

Although it is not entirely clear from the email what the suggested "approach" was it can be inferred that the writer was seeking endorsement for paying the Claimants only six months' pay by way of compensation lump sum. Mr Stephens responded by saying "Having discussed and considered I am happy to endorse and this will be the principle for all decisions in such circumstances".

10. For some reason, there was another email (also before the ET) from Mr Hart to Mr Stephens dated 16 November 2016 in similar but not identical terms. The illustration given is based on an officer aged 48, with 21 years and 8 months service and an H1 certificate. The second email states:

> **"… I need to bring to your attention … a situation which is not covered by the Home Office Circular … and Regulation 14A … The issue concerns those Officers that have applied for VES and hold a H1 Certificate …**
>
> **The VES Regulations basically state that those Officers approaching retirement must have their VES Payment tapered, and Officers that have reached Pension age are only entitled to a maximum of 6 months.**
>
> **The H1 Certificate allows a deferred pension to be paid with immediate effect which means that some of the VES applicants will be financially better off going under VES than ill health and in some cases better off than if they remained as a serving Officer with 30 yrs service. This can be best seen in the illustration below.**
>
> **[table: see paragraph 25 below]**
>
> **It would seem prudent to amend our Force Policy if possible to exclude those with H1 Certificates from applying, or to let them go on ill health.**
>
> **Please can you review and advise accordingly."**

I have not seen any reference to a reply to this latter email.

11. In November 2016 the Claimants were informed that their lump sum compensation would be capped at six months' pay on the basis that "differing factors" applied to them. On 28 November 2016 Mr Stephens informed the Claimants' Police Federation representative in an email that the reason for the application of the cap was that the Claimants would be financially advantaged as they were due to receive a pension and "…to protect the public purse and to ensure the policy is delivered as intended the force is therefore applying tapering to the calculation of VES for those officers with H1 certificates."

12. In due course on 16 December 2016 the Claimants signed declarations which stated among other things:

> **"I understand that the reason for the offer [of early termination of my Service] by Gwent Police was to reduce budgetary costs in the light of on-going budgetary rationalisation and I have taken the opportunity to apply under the Scheme in order to pursue life or work choices elsewhere."**

The Claimants left the force on 31 January 2017. They were each paid compensation lump sums capped at six months' pay, rather than 21 or 18 months' respectively. In Mr Parsons' case this involved a payment of £21,354; if he had received the maximum payment based on 21 months' pay it would have been £74,550, or over £50,000 more. In Mr Roberts's case, the difference

between a compensation lump sum based on 18 months' pay and one capped at six months' pay would have been of the order of £40,000.

13. Following departure, they also applied for and were granted "deferred pensions" under regulation B5 on the basis of their H1 certificates which were based on their actual length of service and were payable with immediate effect as from 1 February 2017.

The ET's decision and the issues on the appeal

14. There were three agreed issues relating to the section 15 claim set out in paragraph 4 of the Reasons:

> **"[1]Did the following constitute "something arising in consequence of the Claimants' disability: the issue of H1 certificates.**
>
> **[2] Did the Respondent treat the Claimants unfavourably because of the issue of H1 certificates? The Claimants rely upon capping of the VES payments to 6 months' pay as unfavourable treatment.**
>
> **[3] In so far as there was such treatment, was this treatment a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aim: the need to properly manage the authority funds."**

The ET found in favour of the Claimants on each issue and the Chief Constable says on appeal that their finding on each involved an error of law.

15. Before turning to consider the issues, I note that it was implicit in the way issues [1] and [2] were framed that there was no issue that the reason for the application of the six months' cap was that the Claimants had been issued with H1certificates; also, logically issue [2] came first and I shall consider them in that order. In relation to issue [3], although the "legitimate aim" is there described as the need to properly manage the authority funds, it is clear from paragraph 68 of the Reasons that ultimately the legitimate aim the Chief Constable relied on was that of preventing the Claimants receiving a "windfall".

Did capping the compensation lump payment amount to "unfavourable treatment"?

16. Since the ET's decision the Supreme Court has given Judgment in **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC 65 upholding the Court of Appeal's Judgment. At para [12] Lord Carnwarth sums up the position succinctly as follows:

> **"… section 15 appears to raise two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?"**

In this case the ET found in effect that the "relevant treatment" was the application of the six-month cap to the compensation lump sums which would otherwise have been paid to the Claimants under the voluntary exit scheme and that this treatment was clearly "unfavourable".

17. On appeal the Chief Constable maintained in effect that the ET were wrong in this conclusion because (a) under the terms of the scheme the Claimants only ever had a right to a compensation lump sum subject to the six months' cap; (b) the ET were wrong to consider the benefits received by the Claimants under the voluntary exit scheme without reference to those received under the police pension scheme since the two were "inextricably linked"; and (c) the case was indistinguishable from **Williams** where the relevant treatment was found not to be unfavourable. I consider these points in turn.

18. There was an issue between the parties as to whether on a proper interpretation of the terms of the voluntary exit scheme the Claimants were prima facie entitled to receive a compensation lump sum with or without the application of the six months' cap. On the material I have seen it is pretty clear that the Chief Constable was not obliged to apply the cap under the statutory scheme in Annex DA because the Claimants had not reached "Pension Age" as defined therein since they were not entitled to receive payments of "ordinary pension" under regulation B1 but rather immediate payment of "deferred pension" under regulation B5; and it is notable in this context that the Chief Constable did not seek to rely on paragraph 1 of Schedule 22 to the

Equality Act which would have been the obvious provision to rely on if the statutory scheme obliged him to apply the cap in their cases. As to the scheme as specifically adopted by the Gwent Police, the issue may be a moot one, but I do not consider that it matters for the purposes of these claims, which are not based on any kind of contractual entitlement but rather on an allegation of discrimination. It seems clear that those who drafted and administered the scheme had not contemplated the issue which arose in relation to the Claimants by virtue of their H1 status and that Mr Stephens made a specific decision that the six months' cap should be applied in their case because of that status. It is that decision which the Claimants say was discriminatory by virtue of section 15 of Equality Act.

19. The ET considered that the compensation lump sum payable under the voluntary exit scheme and the Claimants' ability to access "deferred pension" by virtue of their H1 status under the Police Pensions Regulations were separate matters and that "no comparison [was] required" when considering whether the Claimants had been treated unfavourably (see paragraph 66 of Judgment). The Chief Constable says this was an error. He stresses that both the pension and voluntary exit schemes were administered by the police pensions authority and that the money for both came from the same source; and plainly, the voluntary exit scheme makes reference to the Pensions Regulations and the Pensions Regulations were relevant to the administration of the voluntary exit scheme. However, the two schemes had separate purposes and the voluntary exit scheme was introduced long after the pension scheme was instituted and in my view the ET was entitled, as it did, to consider the compensation lump sum separately from the Claimants' pension entitlements. In any event, it seems to me that the question of whether and to what extent the ability to receive the "deferred pension" meant that the compensation lump sum should be limited properly arose for consideration in the context of the issue whether the Chief Constable could justify the cap.

20. The Chief Constable relies on the decision in the **Williams** case and says that this case is indistinguishable from it. In **Williams** it was decided that the claimant had not suffered unfavourable treatment because the "relevant treatment" was the award of a pension which he would not have received at all if he had not been disabled and that the award of a pension could not be construed as unfavourable. In this case the "relevant treatment" was identified as the application of a cap to a payment that would otherwise have been substantially larger. It seems to me plain that the two cases are quite different and that the ET was entitled to distinguish **Williams**.

Were the H1 certificates "something" that arose in consequence of the Claimants' disabilities?

Were the H1 certificates "something" that arose in consequence of the Claimants' disabilities?

21. In **Pnaiser v NHS England** [2016] IRLR 170 Simler P set out the proper approach to section 15. So far as the "something" is concerned she said this at paragraph [31]:

> **"(d) … the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**
>
> **(e) … the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**
>
> **(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator."**

22. The ET found as a matter of fact at paragraph 62 of the judgment that the issuing of the H1 certificates arose in consequence of the Claimants' disabilities. They say this is "… plain from the face of the H1 certificates themselves and was not disputed by the [Chief Constable]". That finding on the face of it seems to me unassailable: the impairments relied on for the purposes

of establishing the (admitted) statutory disability which are set out at paragraph 30 of the Claimants' grounds of complaint are indeed identical to those set out in the relevant H1 certificate in each case.

23. The Chief Constable says on the appeal that in making this finding the ET has somehow wrongly conflated the two separate definitions (ie that for H1 status and that for Equality Act "disability"). He says, rightly, that it is possible in some circumstances that can be imagined to have H1 status but not be "disabled" for the purposes of the Equality Act (or indeed vice versa) and that it is the H1 status which gave rise to the entitlement to early receipt of a deferred pension rather than the Equality Act disabilities. I am afraid this point is just misconceived: the only issue in relation to this part of the case was whether, objectively speaking and assessing the matter robustly, the Claimants' H1 certificates arose in consequence of their (statutory) disabilities: the fact that the tests for the issue of H1 certificates and disability were different and that only the former gave rise to a right to early receipt of deferred pension was not relevant to that issue.

Was the Chief Constable able to justify the treatment?

24. The principles of law relevant to this part of the case, which I take from the decisions of the EAT in **Loxley v BAE Land Systems Munitions and Ordinance Ltd** [2008] ICR 1348 and **Kraft Foods UK Ltd v Hastie** [2010] ICR 1355, seem to me to be as follows:

(1) Once a prima facie case of discrimination arising from disability is shown the onus is on the employer to establish justification;

(2) This involves showing that the unfavourable treatment (ie in this case capping the payments to the Claimants) was a reasonably necessary and proportionate means of achieving a "legitimate aim";

(3) Saving money is not in itself a legitimate aim but preventing a "windfall" could in principle be one;

(4) Entitlement to receive immediate benefits from a pension fund might justify exclusion from (or a cap or limit on the amount of) a payment under a redundancy scheme but that is not inevitable in every case; it will depend on the nature of the redundancy scheme and the pension scheme and an analysis of the financial benefits which would arise under them (see: **Loxley** case at paras [37] to [41]); (Note that in **Loxley** the ET had found that exclusion from the redundancy scheme in question was justified but, although they had been provided with a lot of financial information they had failed to analyse it or the general issue of justification properly and the matter was remitted to a fresh ET.)

(5) However, a cap imposed to prevent an employee recovering more under a redundancy scheme designed to compensate him for loss of earnings than he would have received in earnings if he had remained in his employment and worked to retirement age will necessarily constitute a proportionate means of achieving the legitimate aim of preventing a windfall (see: **Loxley** at para [37] and the decision in **Hastie**).

25. The only financial material put before the ET by the Chief Constable in support of his case on justification was that contained in the tables in Mr Hart's emails dated 22 September and 16 November 2016. These, as I understand them, simply showed (a) the lump sum pension payment and annual pension that an officer retiring with 30 years' service at age 56 would receive (b) what someone in (roughly) Mr Parson's position would receive by way lump sum and annual pension on taking "ill health retirement" and (c) what that person would receive by way of "deferred pension" (lump sum and annual pension) combined with a "VES Payment" either amounting to 21 months' or six months' pay. There was, however, no material relating to someone in Mr Robert's position or any attempt to show the overall financial effect on either of

the Claimants of giving up his career with the police early under the voluntary exit scheme; this I imagine would have involved at least a consideration of what he would have earned if he had stayed with the police to normal retirement age and a comparison of the value of his pension in each of the two scenarios.

26. On this limited material the ET rejected the Chief Constable's case on justification finding, among other things, (a) that the **Loxley** and **Hastie** cases did not assist him and (b) that the Chief Constable had not demonstrated any "windfall" in fact or that applying the six months' cap was necessary to prevent any windfall. On appeal the Chief Constable says that the ET were wrong in these findings; they were wrong to distinguish the two EAT cases and indeed (a) the fact that the Claimants were able to receive a "deferred pension" immediately meant that they had received a windfall and (b) the windfall amounted to the difference between the compensation lump sum they would each have received without the application of the cap and that based on the six months' cap; and nothing else was relevant to the issue (see: paragraph 35 of Ms Winstone's skeleton argument).

27. On a careful reading of **Loxley** and **Hastie** it is plain that the ET were right to conclude that they did not help the Chief Constable. This was not a case like the one I identify at paragraph 24(5) above where the relevant employee (or officer) was approaching normal retirement age and would inevitably receive more from an uncapped redundancy payment than he would have earned if he continued to work until that age and, as I say, the ET was not presented with financial information as to the overall effect of the Claimants' giving up their careers with the police early; nor, as I understand it, was the Chief Constable's case put in that way.

28. However, as is clear from the **Loxley** decision at paragraphs [37] to [41] as outlined at paragraph 24(4) above, the mere fact that someone is entitled to immediate receipt of a pension on departure will not by itself be sufficient to establish a justification for capping a payment under a redundancy scheme; in order to reach that conclusion, it would be necessary to analyse the nature of the two relevant schemes and the benefits payable under them. The onus was on the Chief Constable to present to the ET his case for justification and the material on which he relied to support that case. But all that the Chief Constable put before the ET were the figures in Mr Hart's emails and the **Loxley** and **Hastie** cases; in my view that was clearly not sufficient to raise a justification case based on preventing a windfall or otherwise. In fairness to the Chief Constable I note that Mr Hart's emails say that the H1 certificate and the right to immediate payment of "deferred pension" meant that… some of the VES applicants will be financially better off going under VES than ill health and in some cases better off than if they remained as a serving Officer with 30yrs service." However, as I understand it, no case was made based on a comparison between "going under VES" and "going under … ill health" and it is hard to see how such a case would have been articulated (especially as the Chief Constable had prevented the Claimants "going under … ill health"). As for the comparison with remaining "as a serving Officer with 30yrs service", as I have indicated the absence of financial information as to what the Claimants would have earned if they had remained with the police meant that this was not a sustainable basis for establishing justification.

29. In the circumstances I consider that the ET were entitled to reject the Chief Constable's contention that he was justified in capping the payments made to the Claimants and I reject this part of the appeal.

Conclusion

30. For all those reasons the Chief Constable's appeal is dismissed.