



EMPLOYMENT TRIBUNALS

Claimant: Mr D Pelter

Respondent: Buro Four Project Services Ltd

Heard remotely via CVP **On: 2 and 3 February 2021**
4 February 2021 (in chambers)

Before: Employment Judge Davidson
Mr T Robinson
Mr S Godecharle

Representation

Claimant: Mr R Bhatt, Counsel
Respondent: Ms A Mayhew, Counsel

RESERVED JUDGMENT

The Claimant's complaints of direct age discrimination and indirect age discrimination fail and are hereby dismissed.

REASONS

CVP

1. The following provisions applied to this hearing:
 - 1.1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.
 - 1.2. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.
 - 1.3. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.

- 1.4. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal
- 1.5. The participants were told that it was an offence to record the proceedings.
- 1.6. Evidence was heard from the Claimant and Stephen Slade (Respondent's Finance Director).
- 1.7. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

ISSUES

2. The issues before the tribunal were agreed between the parties and are as follows:
 1. The Claimant brings the following claims:
 - a. Direct age discrimination pursuant to s13 Equality Act 2010 ("EA 2010");
 - b. Indirect age discrimination pursuant to s19 EA 2010.

Direct Age discrimination

2. Was the Claimant treated less favourably by the Respondent or does the Third Party PHI Scheme entered into by the Respondent fall within the exception provided by paragraph 14(1), Schedule 9 of the Equality Act, 2010? If so, what, if any, of the allegations brought by the Claimant (see below) fall within this exception?
3. With regards to paragraph 2 above, the acts of less favourable treatment alleged by the Claimant are:
 - a. The Respondent's decision to provide PHI in respect of which payments will cease on the Claimant's 65th birthday;
 - b. The Respondent's failure to update the PHI policy applicable to the Claimant to comply with paragraph 14(1) Schedule 9 EA 2010;
 - c. The Respondent's decision not to transfer the Claimant to a PHI policy that would pay out beyond his 65th birthday; and
 - d. The Respondent's decision to cease PHI payments to the Claimant on the Claimant's 65th birthday.

4. If so, was the reason for this less favourable treatment because of the Claimant's age?
5. The Claimant relies on the following comparators:
 - a. An employee aged under the age of 65 years who would be in need of PHI benefits; and/or
 - b. A hypothetical comparator.
6. Without prejudice to paragraph 5, the Claimant avers that the acts stated at paragraph 3 amount to conduct which is inherently discriminatory on the grounds of age.
7. If the Respondent's treatment is discriminatory as alleged, was it nevertheless a proportionate means of achieving a legitimate aim? The Respondent relies on the following aim(s):
 - a. staff retention;
 - b. succession planning;
 - c. fair distribution and/or implementation of benefits;
 - d. retaining competitiveness in the open labour market or at all;
 - e. ensuring the smooth transition of senior executive roles.

Indirect Discrimination

8. Is the following PCP properly so defined:
 - a. The Claimant's case is that the following PCP is applicable:

That employees who are in receipt of PHI payments (and therefore "in claim") are not permitted to join or transfer to a more favourable PHI scheme that would pay out beyond age 65 years
 - b. The Respondent's case is that the following PCP is applicable:

providing a PHI Scheme through a Third Party the terms of which are dependent on the date of the entry point to the PHI Scheme.
9. Did the alleged PCP fall within the exception provided by paragraph 14(1), Schedule 9 of the Equality Act, 2010?
10. Did that PCP place employees over the age of 59 (in respect of the 2016 scheme) and 61 (in respect of the 2017 scheme) years at a particular disadvantage as those employees were more likely to be in receipt of PHI payments?
11. Was the Claimant placed at such a disadvantage?

12. If so, was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim? The Respondent relies on the following aim(s):

- a. staff retention;
- b. succession planning;
- c. fair distribution and/or implementation of benefits;
- d. retaining competitiveness in the open labour market or at all;
- e. ensuring the smooth transition of senior executive roles.

Limitation

13. Are all, or some, of the Claimant's claims out of time?

14. Do the acts alleged amount to conduct extending over a period within the meaning of s123(3)(a) EA 2010?

15. If not, is it just and equitable to extend time?

Remedy

15. The Claimant seeks:

- a. The continued provision of PHI benefits, on the current basis, for the remainder of the period of his ill health/disability or at the very least until age 66 years (which is the Claimant's state pension age).
- b. Injury to feelings;
- c. A declaration as to the existence of the implied term particularised at paragraph 14 above; and
- d. Declarations that the Respondent's actions or purported actions as detailed above are age discriminatory whether directly or indirectly.

EVIDENCE

3. The following evidence was before the tribunal:

3.1. The tribunal heard oral evidence from the Claimant and from Stephen Slade (Respondent's Finance Director).

3.2. The tribunal also had access to the following documents:

- 3.2.1. Bundle of documents (approximately 800 pages)
- 3.2.2. Agreed Facts
- 3.2.3. Agreed List of Issues

- 3.2.4. Skeleton Argument for each party
- 3.2.5. Statutory provisions
- 3.2.6. Bundle of authorities

FACTS

4. The agreed facts are as set out below with some additional findings of fact of the tribunal included:

Background

1. The Claimant's date of birth is 7 March 1955.
2. The Claimant reached the age of 65 years on 7 March 2020.
3. The Claimant was a founding shareholder and Director of the Respondent. In 2003, the Claimant and the three other founding shareholders and Directors sold their shares in the business. Consideration for the sale of the shares was based on audited financial results and payment was spread over 10 years.
4. The Directors of the Respondent (both former shareholder and non-shareholder Directors) entered into new Directors Service Agreements dated 7 March 2003 (the "DSA") which were drawn up by the Respondent.
5. Clause 2.2.1 of the DSA provides for a notice period of 18 months.
6. Clause 2.3 of the DSA provides as follows in respect of the Directors' retirement age:

2.3 Notwithstanding any other terms in this Agreement, the Director shall retire at the Company's normal retirement age for Directors which at present is 60 (the "Retirement Age") whereupon the Agreement shall terminate with immediate effect unless the Company in its absolute discretion continues to employ the Director after the Retirement Age upon such terms as the parties to this Agreement shall agree. Should the Retirement Age conflict with any statutory or regulatory provision applicable to the Company, the Retirement Age shall be varied to conform with such provision.

7. The DSA also provides for the Directors to benefit from Permanent Health Insurance ("PHI"). Clauses 8.2 and 8.3 state as follows:

8.2 The Company shall effect permanent health insurance ("PHI") for the benefit of the Director upon such terms as shall provide for the payment to the Director throughout the period of his/her ill-health or disability with the exception of the first 26 consecutive weeks thereof sums at a rate per annum equal to 75% of fixed annual salary on the date such absence commences less any state sickness benefits received by the Director provided always that such insurance is available at standard rates and subject also to the rules of such PHI Scheme and restrictions due to previous medical history.

8.3 The PHI will include the payment of employer pension contributions with the fixed annual salary being increased during a claim period at a rate per annum equal to the lower of RPI or 5% provided always that such enhancements are available at the standard rates and subject also to the rules of such PHI Scheme and restrictions due to previous medical history.

8. The Respondent entered into a PHI policy with UNUM on 1 March 2011 (the “**Third Party PHI Scheme**”). The relevant sections of the Third Party PHI Scheme provide as follows:

1.4 Once a **member** is **incapacitated** the terms and conditions of the **policy** immediately prior to his **incapacity** will continue to determine his **benefit**.

2. **Deferred Period** means the period of time from the date that a **member** becomes incapacitated until the date the benefit becomes payable. The deferred period applicable to each eligibility category is specified in the schedule.

Terminal age means for each **member** the age at which they will cease to be a member. The terminal age applicable for each eligibility criteria is specified in the schedule.

4.7 Termination of membership

4.7.1. A **member** ceases to be a **member** on the earliest of the following:

(c) The date he attains his **terminal age**.

5.1 Entitlement for payment of benefit

Benefit is paid when a member is incapacitated, was **actively working** on the day immediately prior to the start of the incapacity, and evidence has been provided to **Unum** which satisfies **Unum** of incapacity. Payment of **benefit** will begin on the first day after the end of the **deferred period** and will continue to be paid for the duration of the **incapacity**, as long as the individual in respect of whom the **benefit** is paid remains a **member** of this **policy**.

9. The Schedule to the Third Party PHI Scheme provides as follows:

terminal age	65 th birthday
basic benefit	75% of a member's insured earnings then less both the ESA basic and the ESA wrac the total of basic benefit plus any additional benefit in respect of employee pension contributions in relation to the member is subject to a maximum

of 80% of the **member's insured earnings**
additional benefits **employer's** pension contributions are insured at the rate of such amount as shall be agreed from time to time, in writing, between the **policyholder** and **UNUM**

The Claimant's illness and claim under the Third Party PHI Scheme

10. In 2007, the state pension age (**SPA**) for three of the Respondent's Directors increased from 65 years to 66 years in accordance with the Pensions Act 2007.
11. On 1 March 2011 the Respondent renewed its PHI insurance and entered into the Third Party PHI Scheme. On 6 April 2011 the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 came into effect which abolished the default retirement age and amended paragraph 14 schedule 9 of the Equality Act 2010 to its current form.
12. In March 2011 the Claimant had a health scare and underwent medical investigations for arrhythmia.
13. During March 2011 until the start of July 2011, the Claimant was at work in the Respondent's Abu Dhabi office, where he had been seconded. The Claimant underwent a coronary stent intervention in London in Easter 2011. The Claimant took 3-days sick leave after the procedure and returned to work in Abu Dhabi.
14. On 3 July 2011 the Claimant went on sick leave. The Claimant has not returned to work with the Respondent since 3 July 2011 and remains on sickness leave. The Claimant is currently unfit to work as a Director of the Respondent.
15. The Claimant was afforded access to the Third Party PHI Scheme as set out above on the date that the Claimant's sickness absence commenced, i.e. 3 July 2011. The Respondent submitted the Claimant's Claim under the Third Party PHI Scheme in November 2011 and the Claim was formally accepted by UNUM, 18 months later, on 5 March 2013.
16. The Claimant is currently claiming PHI benefits of £16,716.35 per month under the Third Party PHI Scheme. Payments ceased on 7 March 2020, which is the Claimant's 65th birthday. UNUM has stated that thereafter no further payments will be paid by them.
17. The Claimant's state pension age on 3 July 2011 was 65 years.
18. On 3 January 2012, Schedule 4 to the Pensions Act 1995 was amended by the Pensions Act 2011 to the effect that the Claimant's state pension age was increased from 65 years to 66 years (see Schedule 4, paragraph 6 Pensions Act 1995).
19. During the period in which UNUM refused the claim and after the change to his pension age, the Claimant instructed lawyers to advise him on his position.
20. On 26 November 2012 the Claimant resigned as a Director of the Respondent in accordance with clause 10.5 of the DSA and on that date he became an employee pursuant to clause 10.6 of the DSA. On 27 November 2012 the Respondent wrote to the Claimant to confirm his

resignation as a Director. The letter confirmed the continued payment of salary and provision of benefits. Included within the list of benefits was "Permanent Health Insurance - up to age 65".

21. In January 2016, the Respondent sought to change the PHI scheme with Unum to extend cover to scheme members Actively At Work (AAW) on the scheme's cease age of 65 to a new cease age of 70 years. The PHI scheme was changed with Unum in February 2016 and cover was backdated to 8 March 2015 (the "**2016 Unum Policy**"). Two employees, Mr Birch (d.o.b 8 March 1950) and Mr Offord (d.o.b 1 November 1950), who had exceeded the terminal age of the Respondent's previous PHI policy as they were 65 years old or over were added to the 2016 Unum Policy. Both were AAW and neither were claiming PHI at that time. The Claimant was not transferred to the 2016 Unum Policy nor was a quote requested from Unum in respect of the Claimant.
22. In December 2016, the Respondent conducted a review of the rates offered by different PHI insurance providers. Following this review, in early March 2017 the Respondent transferred its PHI cover from Unum to Aviva (the "**Aviva Policy**"). Cover was backdated to start from 3 March 2017 and covered employees until the policy cease age of 65 and to an extended benefit to 70 if AAW on reaching their 65th birthday. The Claimant was not transferred to the Aviva Policy nor was a quote requested from Aviva in respect of the Claimant.
23. At about the time that the Respondent was moving its policy to Aviva, an employee (Sue Gunnar) was on sickness absence due to an accident and was in the 26 waiting period before claiming under the PHI Scheme. The Respondent asked whether Aviva would take on that liability but was told that if her absence was due to an event before cover started, she would have to claim under the UNUM policy. She would need to be AAW before her cover would be provided by Aviva. We understand that this is in accordance with industry norms.
24. According to the Claimant, he became aware of the change to his state pension age in 2017 or 2018 when listening to Radio 4's Money Box programme.
25. In April 2019, the Claimant raised the issue of the correct date on which his PHI should cease and the parties were in discussions on the issue in May and June 2019 but were unable to resolve their differences.
26. On or around 30 June 2019 the Respondent terminated the Claimant's employment giving him 18 months' notice such that the Claimant's employment would cease on 31 December 2020. The Claimant's PHI payments ceased on 7 March 2020 and the Respondent has advised that no further payments will be made under the Third Party PHI policy beyond that date.
27. The Claimant commenced early conciliation on 7 August 2019 and presented his ET1 on 13 August 2019.

LAW

5. The relevant law is as follows:

Statutory provisions

Section 13 Equality Act 2010 Direct discrimination

- (1) Direct age discrimination occurs where because of age, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

Section 23 Equality Act 2020 Comparison by reference to circumstances

- (1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

Section 39 Equality Act 2010 Employee and applicants

- (2) An employer (A) must not discriminate against an employee of A's (B) ...
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service...

Paragraph 14 Schedule 9 Equality Act 2010 Insurance Exception

It is not an age contravention for an employer to make arrangements for, or afford access to, the provision of insurance or a related financial service to or in respect of an employee for a period ending when the employee attains whichever is the greater of—

- (a) the age of 65, and
- (b) the state pensionable age

Section 19 Equality Act 2010 Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purpose of subsection (1), a PCP 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.
- (3) The relevant protected characteristic is age.

Section 123 Equality Act 2010 Time Limits

- 1)...a complaint within section 120 may not be brought after the end of-

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.

...

- (3) For the purposes of this section –
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.

Authorities

We were referred in particular to the following authorities:

Witham v Capita Insurance Services Limited Case No 255488/2012, a decision at first instance of the Newcastle Employment Tribunal in February 2013. In this case, the claimant's benefits under a PHI scheme stopped at age 55 and he was denied the opportunity to join a more favourable PHI scheme because he was not actively at work when applying to join. The tribunal found that the claimant had been subjected to unlawful age discrimination using a 'but for' test and the respondent's justification argument failed. The claimant's complaint of indirect discrimination was also upheld.

Hall v Xerox 2014 UKEAT/0061/14/JOJ was a claim for discrimination under the Fixed Term Employees Regulations by an employee whose fixed term was due to expire during the 26 waiting period for PHI and whose PHI claim was therefore rejected by the insurer, despite the fixed term being renewed by the employer. The EAT held that the tribunal was entitled to conclude that the reason the claimant did not get the PHI benefit was because the insurer refused to pay. It was an act of the insurer, not the employer.

Smith v Gartner 2016 UKEAT/0279/15/LA was a claim for age discrimination arising from the ending of a PHI benefit at age 60 (the retirement age when the scheme was entered into) instead of 65, the retirement age at the time the benefit stopped. The insurer refused to make further payments and the claimant was unable to join a different scheme as she was already claiming under a scheme and was not 'active at work'. The EAT held that the commitment of the employer is to put in place insurance that will cover certified permanent disability (subject to the rules of the scheme) and not to continue paying salary itself. Having found no breach of contract, the EAT's observations on the discrimination issue are *obiter* but the conclusion was that there was no direct age discrimination because the reason the claimant did not benefit from the new Scheme was that she was already the recipient of benefits under the old scheme and did not meet the conditions of the new scheme. The difference in treatment was not due to age but due to being in receipt of benefits and not actively at work.

DETERMINATION OF THE ISSUES

6. We determine the issues as follows:

Direct Age discrimination

- 6.1. The claimant brings his claim under section 39(2)(b) of the Equality Act. We must therefore determine whether the respondent has discriminated against the claimant in the provision of access to benefits, in particular the PHI benefit.
- 6.2. We find that the Respondent's obligation to provide 'access' to benefits in a non-discriminatory way applies to the provision of the PHI benefit to all employees regardless of their protected characteristics. We find that all employees were entitled to join the PHI scheme and the conditions for eligibility were not unlawfully discriminatory. The benefit itself included a potentially age discriminatory element in that the terminal age for the receipt of benefits was 65. At the time the scheme was entered into, the Claimant's retirement age was 60 (under the terms of the DSA) and his state pension age was 65. The scheme, at that date therefore fell within the exception contained in paragraph 14(1) Schedule 9 of the Equality Act 2010 and did not amount to unlawful discrimination on grounds of age.
- 6.3. We find that once the benefit is crystallised, it is no longer a matter of 'access' as the benefit has been triggered and access has been actualised.
- 6.4. We do not accept the claimant's contention that there is a continuing obligation to renew the terms of the benefits received by the claimant where the terms are those imposed by the insurance company providing the benefit.
- 6.5. We find that the reason the Claimant's payments under the PHI scheme stopped in March 2020 was because he had reached the age of 65. It was therefore directly connected to his age, which was the terminal age under the PHI policy. This was within the rules of the UNUM scheme which the Claimant was claiming under, since he made his PHI claim in July 2011. This was the act of UNUM who, in accordance with the provisions of the agreement with the respondent dated 2011, did not pay out to the claimant after his 65th birthday. Applying the decision of the EAT in *Hall v Xerox*, we find that the discriminatory act was that of UNUM, not the Respondent.
- 6.4. We accept the Respondent's position that it would have been impossible to transfer him to another scheme while he was claiming benefits as he was a known liability and not a risk which an insurance company could assess. This was not directly related to his age but to his status as a person claiming a PHI benefit under the scheme. The claimant states that there was an element of unknown risk as the claimant could have got better or

died. We find that these eventualities were sufficiently remote for an insurance company to regard them as insignificant in reducing the risk of paying out to the claimant.

- 6.5. We take note of the situation of Sue Gunner, who was denied the opportunity to transfer to a new PHI scheme while she was in a 'waiting period' for PHI benefits, having been off sick after breaking her ankle. The reason for her exclusion from transferring to a new policy was not her age but her status as a person in a waiting period to claim under a PHI scheme.
- 6.6. We also note the positions of Mr Birch and Mr Offord who were able to extend their benefits as they were 'actively at work' at age 65. The reason they were able to extend their benefits was not because of their age but because of their status as being active at work at the relevant time. The reason the Claimant was not eligible for his terminal age to be extended was that he was not 'actively at work'. We prefer the conclusions of the EAT in *Smith v Gartner* to those of the Newcastle Employment Tribunal in *Whitham v Capita*. The claimant's representative suggests that the EAT's comments are *obiter* and of persuasive authority only. Even if this is correct, we are more persuaded by that decision than the previous tribunal decision in *Whitham* which is also only of persuasive authority. We have also taken into account the fact that *Smith* is a more recent authority than *Whitham*.
- 6.7. We find that the Respondent can, as matter of law, argue justification on both schedule 9 paragraph 14 grounds and under the normal justification provisions. In this particular case, as the Claimant had a state pension age of 66, the withdrawal of benefits at age 65 does not fall within the schedule 9 paragraph 14 justification at the time the benefit was stopped although, as stated above, we find that it does apply to the scheme at the time the claimant's benefits crystallised.
- 6.8. If the terminal age of 65 is discriminatory and not within the exception in paragraph 14 Schedule 9, we go on to consider whether the terminal age of 65 was a proportionate means of achieving a legitimate aim. We take into account that cost alone is not sufficient to justify discriminatory treatment and there must be a public policy element to the justification. We do not agree with the Respondent's contention that self-funding the difference in benefit by paying the Claimant what UNUM refused to pay would affect succession planning in that the Claimant was not 'blocking' a place on the board. However, we do accept that paying a large sum out of the company's income would affect the money available for bonus and other benefits to staff which would impact the fairness of distribution of benefits and competitiveness in the labour market. The financial position of the respondent has fluctuated but the liability to the claimant constitutes a considerable sum in the context of the finances of the respondent.

6.9. We do not consider that it is necessary to identify a comparator in this case.

Indirect discrimination

6.10. We find that the relevant PCP is the provision of PHI benefits on the terms of the relevant scheme, those terms being dependent on the date of the entry point into the scheme.

6.11. We find that the PCP that employees in receipt of PHI payments (in claim) are not permitted to move to a more favourable scheme is a provision imposed by the insurer, not the respondent.

6.12. We find that the relevant PCP falls within the exception provided by paragraph 14(1) Schedule 9 as it is an insurance benefit within the terms of that definition at the date of the entry point into the scheme, when the claimant's retirement age was not above 65.

6.13. If we are wrong about that, we were not given compelling evidence that older people are more likely to claim under a PHI scheme but we are prepared to accept that this is the case. However, we find that the impact of the PCP is that an employee can be disadvantaged by having the status of being a person claiming benefits at the relevant time. There is no evidence that older people are more likely to be 'in claim' at the critical time.

6.14. We therefore find that the indirect discrimination claim fails.

Limitation

6.15. We find that the act of the respondent which gives rise to this claim was choosing the UNUM scheme to provide PHI to its employees and it is therefore a single act with continuing consequences. We accept that the claimant would not have known that there was a potential cause of action until he became aware that his state pension age was 66 and that the scheme did not, at that time, comply with Paragraph 14 of Schedule 9.

6.16. We find that the Claimant was, or was likely to be aware, that his retirement age was increasing to 66 at the time these matters were being discussed in the media.

6.17. The Claimant instructed lawyers to advise on his position regarding his employment situation in 2012. He was aware then that the scheme ended at age 65. If he was not aware of changes to his state pension age, his lawyers would (or should) have been. He is not an unsophisticated Claimant and we find it unlikely, particularly in his circumstances, that he would not be taking an interest in such matters. We accept that he was not well enough to work but he was well enough to engage with lawyers and to seek to protect his rights. At this point, the facts which give rise to this claim were known.

- 6.18. The Claimant criticises the Respondent for not making provision to deal with the potential liability arising from the scheme having a terminal age of 65. By the same token, the Claimant could have raised the issue, particularly as he had taken legal advice specifically in relation to his PHI entitlement.
- 6.19. We accept that in 2012/2013 both parties were focussed on ensuring UNUM paid out the policy but we find that the Claimant could have registered his concern about the terminal date.
- 6.20. The Claimant suggests that the Respondent should have negotiated an extra year from UNUM at the time UNUM agreed to accept the Claimant's claim under its policy. We reject this suggestion as there is no evidence that UNUM would have countenanced this but there is evidence to the contrary, taking into account the industry norms as illustrated by the case of Sue Gunnar and the facts of the authorities relied on by both parties.
- 6.21. The Respondent's position is consistent with its position in these proceedings that their obligation had been met by putting in place a PHI policy which the Claimant could (and did) access. If this is correct, the Claimant is considerably out of time.
- 6.22. If that is not correct, on the Claimant's own case, he was aware of the change to the state pension age to 66 when he listened to Money Box in 2017 or 2018 and the Claimant was definitely aware in April 2019 of the issue of the discrepancy between the PHI terminal date and his state pension age. However, he did not start early conciliation until 7 August 2019. We make no criticism of the speed of action after that.
- 6.23. We therefore find, on any reading, that the Claimant is out of time. Either seven years, one or two years or a few weeks. We then consider whether we should extend time on the basis that it would be just and equitable.
- 6.24. We find that there is some prejudice to the Respondent in examining events which took place in 2011, particularly if it is suggested by the Claimant that the Respondent should have made provision in its accounts. However, most of the facts are not in dispute and there is no major evidential prejudice, particularly as Mr Slade was in post at the relevant time.
- 6.25. We have taken account of the disability issue raised by Claimant as an explanation for delay but he has provided no explanation why he was able to act when he did but not earlier.
- 6.26. In any event, his original claim (before it was limited at the start of the hearing) was related to his allegation that the terminal age of PHI benefits being 65 was not in accordance with the contractual provision on retirement age, as retirement ages had since been made unlawful. This part of the claim does not require knowledge of his state pension age and therefore his

awareness or otherwise of the state pension age is not relevant to the time limit of the claim he submitted.

6.27. If we are right, we do not consider that it would be just and equitable to extend time, bearing in mind that time limits are to be observed strictly and taking into account the prejudice to the parties, the merits of the claim and the length of the delay.

Employment Judge Davidson

Date 15 February 2021

RESERVED JUDGMENT & REASONS SENT
TO THE PARTIES ON

16 Feb. 21

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FOR EMPLOYMENT TRIBUNALS