Neutral Citation Number: [2023] EAT 24

Case No: EA-2021-000448-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 November 2022

Before :

HIS HONOUR JUDGE MARTYN BARKLEM

- -

Between :

MR D MCGONAGLE	**Appellant**
- v -	
JAGUAR LAND ROVER LIMITED	**Respondent**

- -
- -

Duncan Bain (Bower Bailey Solicitors) for the **Appellant**
Lorna Badham (instructed by Mills & Reeve LLP) for the **Respondent**

Hearing date: 22 November 2022

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JUDGMENT

SUMMARY

DISCRIMINATION

This appeal concerns the decision of an ET dismissing a claim of age discrimination in relation to the provision by the respondent of a scheme which entitled certain leavers to the benefit of a car loan agreement plan. The ET had been critical of the way in which the respondent had sought, in the pleadings, to explain its justification claim, discrimination having been conceded only at the outset of the hearing.

The claimant did not submit an appeal to the EAT in respect of the decision, instead submitting an application to the Employment Judge who had chaired the ET for reconsideration. The Employment Judge rejected this, and the claimant appealed that decision. This route limited the scope of the disposal open to the EAT, as opposed to a "normal" appeal. It was also important to limit its findings bearing in mind that the ET would have to reconsider the case.

The EAT was satisfied that the Employment Judge had erred in finding, at the reconsideration application stage, first, that the points raised in the letter seeking reconsideration "amounted to a rearguing of the case" and, second, that the claimant had had the opportunity to give evidence and make the arguments which he wished to on the point. The EAT substituted for the Employment Judge's refusal a direction that the reconsideration should take in accordance with the relevant rules.

HIS HONOUR JUDGE MARTYN BARKLEM:

1. This is the full hearing of an appeal against a refusal by an employment judge to reconsider a decision reached by a full tribunal following a hearing on 17 to 20 August 2020. That original decision (as I shall call it) was not the subject of an appeal and the refusal to grant reconsideration is the only issue before me. It is, however, necessary to look at the background to the case.

2. The claimant was aged 54 when he took voluntary redundancy from his employment as a manager working for the respondent vehicle manufacturer. He had been employed at a time when the only pension scheme available for employees was a defined contribution scheme. An earlier defined benefit scheme ceased to be available to new members from sometime in 2009 or 2010.

3. The form ET1 had the box, "Age discrimination" ticked and box 9 contained the single sentence, "I would like reinstatement of the right to membership of the retired manager's loan agreement plan." The ET1 was accompanied by a letter from the claimant to the respondent dated 9 June 2019 headed, "Age discrimination claim details" and contained the following:

> **"JLR operates a Retired managers loan agreement plan ('RMLAP') giving JLR managers the right to retain membership of the JLR lease car scheme subject to certain conditions when they either retire or leave the company. I have attached the document related to the scheme in the appendix but, in summary, the conditions are:**
>
> **Managers at grade LL6 and above are entitled to participate in the RMLAP scheme. For the purposes of the RMLAP, retired managers are classified as follows:**
>
> - **Employees aged 55 and over who leave JLR employment and have five or more years' service, or**
> - **Employees aged below 55 retiring with an immediate entitlement to a JLR company pension benefit.**
>
> **The scheme rules make no mention of voluntary redundancy programmes or their relationship with the scheme."**

The claimant went on to say that he did not believe the rules as applied were necessary or proportionate and that the age requirement of 55 years was discriminatory and could not be objectively justified.

4. The claimant had sought to defer the effective date of his voluntary redundancy so that he would have reached the age of 55 (he was in fact aged 54 years and 8 months) but this was not

permitted. The tribunal held that this was not an act of discrimination, a finding which is not pursued on appeal.

5. The grounds of resistance accompanying the form ET3 confirm that the voluntary redundance package included for those over the age of 55 entitlement to the RMLAP. They also went on to explain that the respondent had originally had a defined benefit pension scheme which was closed to new recruits in 2010. Thereafter, all new recruits were enrolled into a defined contribution pension scheme. As members of the defined benefit scheme had been able to take advantage of the RMLAP scheme from the age of 55, the rules of that scheme were updated in 2010 so that members of the defined contribution pension scheme could also take advantage of the RMLAP.

6. By paragraph 8 of the grounds of resistance, the respondent denied that the RMLAP was age-discriminatory "as alleged or at all". It goes on to say, from paragraph 9:

> **"9. The respondent will argue that its RMLAP scheme rules and the application are a proportionate means of achieving a legitimate aim. The respondent will say that it is not business reasonable or commercially sustainable to offer legacy schemes to all leavers.**
>
> **10. In the event that the tribunal finds in the alternative, the Respondent will submit that its actions were a proportionate means of achieving a legitimate aim on the following basis:**
>
> **a. As to the business aim or need to be achieved: A reduction in the size of the Respondent's salaried headcount and associated costs, accompanied by a comfortable exit for successful voluntary redundancy scheme applicants.**
>
> **b. As to the reasonable necessity of the treatment: To ensure the continuance of the business by facilitating the implementation of the Respondent's business plan and future strategy.**
>
> **c. As to proportionality: Employees who left via the voluntary redundancy scheme were offered highly generous redundancy packages, much higher than the statutory minima, dependent on age and service.**
>
> **11. The Respondent will argue that it applied its discretion reasonably and fairly. It remains a fact that the implementation of any age limitation has the potential to be discriminatory to those who have not attained it at the material time."**

The expression "comfortable exit" was confirmed, following an order made at the preliminary hearing mentioned above, to have no particular meaning.

7. Although, by letter dated 13 March 2020, solicitors by now acting for the claimant sought further details of the justification, the respondent (by its solicitors) declined to enter into

correspondence about this. This was hardly helpful.

8. I turn now to the ET's original decision. The relevant finding was set out at the beginning of the judgment as follows:

> **"Although the age criterion in the Retired Manager's Loan Agreement Plan (hereinafter 'RMLAP') was an act of direct age discrimination, in our judgment, it was a proportionate means of achieving a legitimate aim."**

9. At paragraphs 12 and onwards, under the heading, "Issues the tribunal are asked to determine", the ET said as follows:

> **"12. Was denying Mr McGonagle access to the MRLAP for not having reached the age of 55, despite satisfying the requisite experience criterion, an act of direct age discrimination? If it was an act of direct age discrimination, was it justified?**
>
> **13. Was the refusal to extend Mr McGonagle's leaving date until September 2019 from 31 March 2019 an act of direct age discrimination? If it was an act of direct age discrimination, was it justified?**
>
> **14. Ms Badham was made aware on both the first day and the second day of this hearing that the pleaded legitimate aims for the purposes of justifying age discrimination were not entirely clear. These were clarified and I record the legitimate aims that were being put forward here. There are three individual aims being submitted as being part of the legitimate aim of intergenerational fairness when looked at objectively, and the approaches adopted being an appropriate means of achieving those aims:**
>
> **a. Not sustainable to offer legacy schemes to all leavers, therefore needed to place restrictions on access**
>
> **b. Reduction in the size of the respondent's salaried headcount and associated costs-incentivizing**
>
> **c. Provide a comfortable exit for successful voluntary redundancy scheme applicants."**

10. Having made findings of fact, the ET set out its conclusions on the three aims from paragraph

> **"51. Turning first to the third of the aims put forward, that being the aim of providing a comfortable exit for successful voluntary redundancy scheme applicants. We conclude that the respondent had not satisfied the evidential requirement in establishing that this aim was legitimate in these circumstances, nor that the aim when considered objectively was connected and went some way to meeting the public policy aim of intergenerational fairness. There was no evidence put forward of the number of persons that were successful in their application for the voluntary redundancy scheme that also benefitted from the RMLAP. There was no evidence provided as to why voluntary redundancy terminations were being included in the RMLAP scheme.**
>
> **52. Interestingly, in her closing submissions, Ms Badham tried to put forward the argument that the clear intention behind the policy as it currently stands would be to ensure a comfortable exit for those leaving into retirement. First, that would be quite some change to the pleaded case, which the tribunal would have not entertained without an application to amend, but secondly, although we made a finding that this may have been the intention at the time of the policy being introduced, we have to consider the aim of the policy at the time of the less favourable treatment. At that point, the aims of the policy had developed away from focusing on those retiring. This therefore would have led to the conclusion that that aim was not a legitimate one at the time of the less**

> **favourable treatment.**
>
> **53. Turning to the second of the aims, the reduction in the size of the respondent's headcount and associated costs. There was dispute between the parties as to whether the application of an age criterion to RMLAP would increase, have no impact or decrease the costs of the RMLAP to the respondent. In our judgment, it is not necessary for us to make any findings on this point. Put simply, we were not satisfied that the reduction of costs had any connection with the legitimate aim of intergenerational fairness. This has been pleaded in relation to the reduction of the respondent's headcount and associated costs. And although we did hear some evidence of how the reduction in the number of LL6 managers has led to recruitment in some areas and promotion. Which could have given rise to a legitimate aim of intergenerational fairness in the sense of incentivizing older workers to leave the company through the RMLAP being an inducement, which opened up roles for younger workers to either fill or be promoted into, however, this was not the respondent's pleaded case, nor was there sufficient evidence presented that would have supported this tribunal reaching such a conclusion. This pleading, when looked at objectively, is about reducing costs. And we are mindful of the case law that precludes reduction in costs being a legitimate aim for the purposes of justifying direct age discrimination."**

11. Pausing there, the ET had therefore rejected the second and third pleaded aims. It then turned to the first:

> **"54. And turning finally to the first of the aims pleaded, that being that it is not business reasonable or commercially sustainable to offer legacy schemes to all leavers. Although we remain critical as to the way that this aim is pleaded, we do consider it broad enough to consider matters pertaining to the selection of criteria to restrict the numbers of employees eligible to the scheme. Part of which relates to the age criterion, which clearly has the underlying intention of encouraging retention of individuals up to the age laid down in the RMLAP, but also then to incentivize retirement or at the very least, the leaving of the company at the age set down.**
>
> **55. The DB scheme is the legacy pension scheme. This introduced a minimum age of 55 as criterion to have continued access to the car loan plan post leaving employment by reason of retirement. In its initial guise, as understood by the tribunal, is that this scheme was set up with retiring employees in mind. This is evident in the title of the scheme itself, evident in the eligibility for DB workers in that they could only access the scheme when they started to draw a JLR Company pension benefit. Furthermore, the age of 55 is important as this remains, at least in normal circumstances, the earliest age at which an individual can start to draw an occupational pension. And therefore, in this tribunal's opinion, is a rational choice. Although we note that this does increase to 57 in 2028, something worth noting by the respondent, as this may have an impact on the future eligibility criterion of this scheme.**
>
> **56. The DB scheme closed to members in 2008, although there remains employees working for JLR still in this scheme. It is common sense that such workers, on the whole, are more likely than not to be older than workers joining JLR on the DC scheme, or at least as an average be older. The respondent, in seeking to restrict eligibility for the RMLAP, although for its own individual reasons relating to trying to avoid potential increase in costs, decided to align its restrictions to DC pension members with that of DB pension members. This, in our judgment, achieves parity of treatment between the two schemes which will include a different average age that will, we say inevitably, be existence in the two different member groups. In other words, it achieves intergenerational fairness by treating those likely older workers in the DB scheme equally in terms of eligibility criteria with the likely younger workforce in the DC scheme.**
>
> **57. In terms of appropriateness and necessity, where the aim is for parity between the DB and DC scheme, adopting the same age criterion is clearly both appropriate and necessary. It achieves parity in treatment and there would be no other less**

> **discriminatory way of doing this. As to adopt any other approach would remove such parity and have the consequence of the inequality that such an approach is trying to avoid. The selection of 55 in the current RMLAP is therefore both appropriate and necessary to achieve the legitimate aim of intergenerational fairness, that being to ensure fairness in the access to the RMLAP between those in the DB scheme and those in the DC scheme.**
>
> **58. We have taken account that the claimant voluntarily applied for VR, was aware that he did not qualify for RMLAP, had the opportunity to revoke his application throughout, and entered this agreement with full knowledge of the eligibility criteria. These were all means of alleviating the disadvantage that the rule could cause to individuals because of age.**
>
> **59. For the reasons above, we dismiss the claims in this case."**

12. By an email dated 22 September 2020, the claimant's solicitors wrote to the tribunal seeking reconsideration by the employment judge. The letter suggested that the tribunal had based its decision on a mistaken assumption that was not part of the respondent's case, the assumption that defined benefit and defined contribution members were treated differently or would have necessarily been treated differently in relation to the provisions of the RMLAP causing an age-related disparity that required remedy. It referred to the tribunal's reference at paragraph 56 referring to parity of treatment between the two pension schemes and pointed out that none of the RMLAP provisions were constrained by those schemes, neither had it been part of the respondent's case that this had been a legitimate aim.

13. The employment judge rejected the application, correctly citing the relevant ET rules and case law. He said at paragraph 7:

> **"7. I have considered carefully the matters that have been raised in the email of 22 September 2020. In my view, they amount to re-arguing of the claim. The claimant had every opportunity to give the evidence and make the arguments he wished to make at the original hearing. Applying the important principle of finality of litigation, it is not in the interests of justice to allow the claimant to re-argue his case. Nor is it proportionate to do so.**
>
> **8. Much of the application for reconsideration relates to whether the respondent had properly pleaded the legitimate aims on which it wished to rely on to justify direct age discrimination. At the hearing, on both the first day and second day, the legitimate aims, as were explained by Ms Badham as being threefold:**
>
> - **a. That it was not sustainable to offer legacy schemes to all leavers and therefore there was a need for the respondent to place restrictions on access**
> - **b. Reduction in the size of the respondent's salaried headcount and associated costs**
> - **c. Providing a comfortable exit for successful voluntary redundancy scheme applicants.**
>
> **9. The legitimate aims correspond with the legitimate aims that have been recorded in the Preliminary Hearing before Employment Judge Cookson on 14 October 2019. Although presented in a manner, which attracted the tribunal's criticism, they have**

> **been pleaded and recorded and the claimant knew of these legitimate aims very early on in the process. It is on the basis of these legitimate aims on which the decision was made.**
>
> **10. The issue of parity of treatment to members of the Defined Benefit and Defined Contribution scheme was one that was open to the tribunal, taking into account the first of the recorded legitimate aims and the evidence of Mr Tom Falshaw.**
>
> **11. There is therefore no reasonable prospect of the original decision being varied or revoked.**
>
> **12. The application for reconsideration is therefore refused."**

14. The appellant appealed and the matter was permitted to progress to a full hearing by order of HHJ Tayler, who commented that it was arguable that the basis on which the ET decided the case was not a pleaded legitimate aim, that the claimant had had no opportunity to make submissions on the point and that there was no relevant issue of parity before the tribunal.

15. I have heard argument today from Mr Bain, a solicitor, and Ms Badham of counsel, each of whom appeared below. I am grateful to them both for their written and oral submissions.

16. I intend to allow this appeal but, as discussed in argument and agreed, given the unusual route taken on this appeal, there is only one course open to me, namely, to direct that there be a reconsideration. Thereafter, the provisions of rules 70 to 73 would apply. It is therefore important that I do not attempt to make factual findings of my own, far less suggest that certain findings of the original tribunal are perverse. I am also aware, as Ms Badham reminded me, that I do not have all the evidence which was before the tribunal over a three-day hearing.

17. Similarly, whilst mindful of the submissions made today, I do not intend to set them out in detail, first so that an ex-tempore judgment can be given and second because the matter will have to be reconsidered by the employment judge or the whole tribunal and it is not helpful to dissect the judgment, at least at this stage. That said, it was accepted before me that there was no evidence before the ET as to the composition of staff who accepted voluntary redundancy in terms of their being members of the DC scheme or the DB scheme. The list of issues set out at the case management summary following the preliminary hearing on 14 October 2019 made no reference to the historic pension arrangements, so the absence of such evidence is unsurprising.

18. It seems to me that the evidence and pleaded case in relation to the application of the RMLAP

scheme was largely explanatory and of historical relevance only. By the time of the redundancy exercise, all relevant staff members, regardless of the pension scheme they were on, would be entitled to retire at 55 with the benefit of RMLAP. Any issue of parity was therefore of no obvious relevance to the decision to limit the grant of RMLAP (worth over £170,000 over a lifetime, on the claimant's case but, in any event, a substantial sum) to individuals *being made redundant* rather than facing retirement.

19. The tribunal had at paragraph 53 of its reasons ostensibly dismissed any costs argument: *"We were not satisfied that the reduction of costs had any connection with the legitimate aim of intergenerational fairness*." So what, I ask rhetorically, was the issue to which parity between the DC and the DB members was relevant in terms of the redundancy scheme? What issue of intergenerational fairness arose? It certainly was not pleaded and does not seem to have been addressed in the written evidence I have seen (but, of course, there must have been more), neither does it sit comfortably, in my judgment, with the sole aim which was not rejected by the ET.

20. I find that the employment judge erred in finding at the reconsideration application stage that the points raised in the letter seeking reconsideration "amounted to a rearguing of the case" and that the claimant had had the opportunity to give evidence and make the arguments which he wished to on the point. The issue of sustainability to offer legacy schemes to all leavers does not, on the face of it, raise an obvious issue of parity of treatment to members of the two pension schemes in the context of a redundancy scheme. Only at the hearing itself did the respondent concede direct discrimination and, as the tribunal pointed out, even then the ET remained critical as to the way that this aim was pleaded. The judge does not address the point made on the claimant's behalf that the issue of parity had not been previously raised, neither does he grapple with the other points made in the letter.

21. Essentially, the issue on which the tribunal made its determination is, in my judgment, not one which could have been gleaned from the pleadings and the list of issues, neither is it clear what evidence the ET relied upon in reaching its conclusion as to parity, having regard to the fact that redundancy and not retirement was in issue. The interests of fairness required that the claimant should

have had a chance to serve evidence and to make submissions on all issues which were live before the tribunal. This one was not, certainly at the outset of the hearing. The case clearly calls for reconsideration so that, if an error has been made or a misunderstanding arose about the nature of either party's case, it can be resolved.

22. I therefore substitute for the judge's decision (there being only one possible outcome, in my judgment) an order under rule 72(2) that the original decision shall be reconsidered at a hearing unless the employment judge considers, paying regard to any response to the notice to be provided under paragraph 1, that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing, the parties should be given a reasonable opportunity to make further representations.