EMPLOYMENT TRIBUNALS

Claimant: Mr D White

Respondent: The Secretary of State for Justice

Heard at: **Leeds Westgate (by video)** **On:** **10 & 11 February 2025**

Before: **Employment Judge T Knowles**

Representation
Claimant: In person
Respondent: Mr A Heppinstall, KC

RESERVED JUDGMENT

Regulation 41 of the Justices of the Peace Act 1949 (Compensation) Regulations 1978

The Judgment of the Tribunal upon the question referred to it under Regulation 41 the Justices of the Peace Act 1949 (Compensation) Regulations 1978, namely what falls to be deducted from the Lump Sum Retirement Compensation under Regulation 30(3)(b), is that:

1. The Claimant's claim is well founded and succeeds.

2. The deduction should be, and should only be, the amount of the lump sum that the Claimant had accrued under his Local Government Pension Scheme.

3. That amount is £88,815.20.

And in relation to the Claimant's application for a preparation time order under Part 13 of the Employment Tribunal Rules of Procedure 2024 is that:

4. The Claimant's application for a preparation time order in relation to the Respondent's abandoned application to strike out the claim is well founded and succeeds.

5. The Respondent is ordered to pay to the Claimant the sum of £1,760.

RESERVED REASONS

Issues

1. The issues for determination at this final hearing were set out at the preliminary hearing for case management on 29 October 2024 before Employment Judge Moxon as

follows:

a. What formula should be used to calculate the lump sum retirement compensation;

b. What figures should be inputted into that formula; and

c. Upon using the correct formula and correct figures, what if any lump sum retirement compensation is owed to the Claimant.

2. At the beginning of this hearing, the parties explained to me that they were in agreement over the formula to be used.

3. They further stated that they were agreed that the lump sum which would have payable to the Claimant, had he remained in active service until the age of 70 years, would be £226,769.93.

4. The parties advised me that the sole remaining question concerned the amount to be deducted from that lump sum under Regulation 30(3)(b) of the Justices of the Peace Act 1949 (Compensation) Regulations 1978 ("the Crombie Regulations").

5. The Claimant has also made an application for a preparation time order in relation to the Respondent's abandoned application to strike out the claim on 29 October 2024.

Evidence

6. The parties produced a joint bundle of documents (304 pages).

7. A supplementary bundle of documents contained the witness statements, skeleton arguments and submissions from each party upon the preparation time order application.

8. The Claimant produced a written witness statement. The Claimant gave oral evidence in Tribunal under oath.

9. I also heard affirmed evidence from the Respondent from Mr D Martin, Senior Pensions Lead who also produced a written witness statement.

10. Whilst the parties concluded evidence and submissions on the first day of the hearing, my decision making was concluded on the second day of the hearing. The parties had agreed they would not attend on the second day of the hearing and would receive my Judgment in writing.

11. References to number in brackets in this Judgment are to page numbers in the joint bundle of documents unless otherwise denoted.

Findings of fact

12. I made the following findings of fact on the balance of probabilities. These is not intended to be a complete record of all the evidence that I heard and read. It is intended to be a short summary of those points relevant to my conclusions.

13. Whilst the Claimant's view differs from Mr Martin's view as to what should be deducted from his retirement compensation under the Crombie Regulations, there are no material differences between them as to facts.

14. I understand that the Crombie Regulations are so named after their draftsman.

15. The Claimant's date of birth is 17 March 1954.

16. On 1 October 1976 he began his relevant employment within the Magistrates Courts until his employment as a Justices' Clerk was terminated on 31 January 2005.

17. The arrangements for the termination of his employment were covered by a compromise agreement dated 20 September 2004.

18. This is not a claim for breach of contract but I set out key provisions of the compromise agreement because they record the intent of the parties at the end of the Claimant's employment as a Justices' Clerk.

19. The parties to that agreement set out that the Claimant's employment as Justices' Clerk would end on 31 January 2005 and he would be paid:

a. Resettlement Compensation under Part III of the Crombie Regulations,
b. Long-term Compensation under Part IV and
c. Retirement Compensation upon attaining normal retirement age (70 years of age) under Part V.

20. The Respondent agreed to the immediate payment of pension benefits on 1 February 2005 under the agreement, subject to the annual pension being deducted from the Long-Term Compensation under the Crombie Regulations.

21. It is important to note therefore that the Claimant is retiring early and is receiving a lump sum and annual pension benefits from the Local Government Pension Scheme ("LGPS"), plus Resettlement Compensation under the Crombie Regulations, plus a long-term compensation under the Crombie Regulations (effectively a top-up to his pension to provide for his early loss of office), and would on his normal retirement age at age 70 years become entitled to retirement compensation, consisting again of what is effectively an annual pension top-up and a further lump sum payment under the Crombie Regulations.

22. These regulations were repealed in 2011 and were at that time by some people been considered too generous when compared to schemes for loss of office more widely applicable in the civil service.

23. The Crombie Regulations' degree of generosity is not a matter for me to consider. My interest is in what rights and obligations they grant.

24. The Claimant received an annual pension from 1 February 2005 through the LGPS.

25. He also received the lump sum that he was entitled to at that time, based upon his service to 31 January 2005, £88,815.20, tax free, under the LGPS.

26. His annual pension was in effect topped up by the Long-Term compensation under the Crombie Regulations until he reached normal retirement age.

27. The Crombie Regulations provide for a transition to new arrangements when a relevant person reached normal retirement age. This is known as "Retirement Compensation".

28. The Crombie Regulations make provision for an annual payment after normal retirement age, and for a lump sum payment, subject to the provisions set out in those Regulations.

29. What the parties are in disagreement over in this case is the Crombie Regulations lump sum payment payable in 2024 when the Claimant reached normal retirement age.

30. When the Claim was originally brought, there was also a dispute concerning the annual payment of Retirement Compensation, but the parties tell me that this has been resolved between them and is no longer an issue in dispute.

31. The Claimant's evidence is that his lump sum should be paid in accordance with the formula set out in his compromise agreement, which seeks to give effect to the Crombie Regulations, and has estimated figures set out in that annex.

32. The Claimant claims that his service should be uprated by 15 years before the 1/80ths formula is applied to his deemed rate of pay.

33. The only figure that should be deducted, according to the Claimant's evidence, is the £88,815.20 lump sum he was actually paid in 2005.

34. The worked example in the compromise agreement does just that, although they are estimated figures given that there will be uprating to salary in the future.

35. But it is clear that whoever was involved in the drafting of the compromise agreement considered that it was the amount of the lump sum paid in February 2005, I recall the Claimant says it was actually paid and received 10 February 2005, under the LGPS which would be in that amount.

36. Mr Martin accepts that they have not used that formula. It is his evidence that under the instructions that his department works to it is the annual retirement compensation payment that is multiplied by 3 to produce the lump sum payment amount. This, in his view, ensures that an allowance is made for the pension actually in payment.

37. A difficulty with the written evidence from Mr Martin is that he has written his statement based upon Regulation 18 of the Crombie Regulations predecessor, the 1965 regulations, which have no application in the Claimant's case.

38. He corrected his statement and told us that was a mistake on his part.

39. However, his statement is expressly dealing with the wording of Regulation 18 in the 1965 regulations, which differs from Regulation 30(3)(b) of the Crombie Regulation in their 1978 format. They are totally different provisions. He was not asked to give supplementary evidence, and therefore had not specifically given evidence concerning Regulation 30(3)(b) until questioning.

40. I did take Mr Martin to the wording of regulation 30(3)(b) and asked him whether or not that was what the Respondent had done, to which he responded "not to the letter".

41. I find Mr Martin's explanations for what the Respondent has done and why perplexing and confusing.

42. There is no basis that I can see for his evidence that the calculation should be the annual payment times three. It appears to be that he is following instructions, but cannot explain why those instructions have been given.

43. This case does not turn on facts or on evidential differences.

44. But it is important to set out the facts otherwise the parties will not be able to see that the claim and the response, and the evidence produced in support of the parties' positions, has been considered.

45. The facts do in any event provide important context and background to the question that I need to determine, but it is clear that my focus should be on the rights and obligations created by the Crombie regulations, in the background context which produce the question which has been referred to me.

Submissions

46. The parties have provided written submissions which are lengthy. I have taken these fully into account but would like here to focus upon the main points of contention

between the parties given that they have made progress upon the issues between them.

47. The Respondent's submission is that the Claimant is only entitled to lump-sum retirement compensation under Regulation 18(2) which says a "lump sum equal to the amount to the amount of his accrued retiring allowance".

48. The Respondent takes me to the definition of accrued retiring allowance in Regulation 2(1) and draws my attention to the fact that accrued retiring allowance makes no provision for uprating of service, i.e. it is only the Claimant 28.337 years that are taken into account, not the 43.337 years which he would have worked if his employment continued until his normal retirement age.

49. The Claimant submits that there is no basis for deducting the accrued retiring allowance, as the only sum which falls to be deducted is the lump sum he actually received in 2005. The Claimant relies upon the wording of Regulation 30(3)(b).

The Law

50. Neither party has produced any case law authorities.

51. These cases rarely come before the Employment Tribunals and where there is published case law concerning the Crombie Regulations, it has tended to concern the scope of the Regulations and whether or not the claimants in those cases had any entitlement to benefits under the regulations. There is no dispute as to whether or not the Claimant in this case is within scope of benefits under the Regulations.

52. The Crombie Regulations provide as follows:

> *2.—*
>
> *(1) In these Regulations, unless the context otherwise requires—*
>
> *"accrued retiring allowance", in relation to a pensionable officer who has suffered loss of office, means any lump sum payment to which he would have become entitled under the pension scheme to which he was last subject before suffering loss of office according to the method of calculation (modified where necessary for the purpose of giving effect to these Regulations) prescribed by that scheme if, at the date on which he ceased to be subject to that scheme, he had attained normal retiring age and complied with any requirement of that scheme as to a minimum period of qualifying service or contribution and completed any additional contributory payments or payments in respect of added years which he was in the course of making;*
>
> *…*
>
> ***Additional factors governing payment of retirement compensation***
>
> *17.—*
>
> *(1) Where retirement compensation is payable under any one of Regulations 18, 19 or 20, compensation shall not be payable under any other of those Regulations.*
>
> *(2) If a person has attained the age of 40 at the date on which he lost his office or suffered a diminution of his emoluments, the determining authority, in calculating the amount of the retirement compensation payable to him, shall credit him with an additional period of service on the following basis, namely—*
>
> *(a) 2 years, whether or not he has completed any years of service after attaining the age of 40,*

(b) 2 years for each of the first 4 years of his reckonable service between the date when he attained the age of 40 and the date of the loss or diminution, and

(c) one year for each year of that reckonable service after the fourth,

but the additional period so credited shall not exceed the shortest of the following periods, namely—

(i) the number of years that, when added to his pensionable service, would amount to the maximum period of service which would have been reckonable by him had he continued in his office until attaining normal retiring age,

(ii) the period of his reckonable service, or

(iii) 15 years;

and in calculating the amount of any retirement compensation payable to him any period so added shall be aggregated with any period entailing reduction of the relevant pension or retiring allowance because of a retirement pension payable under section 28 of the Social Security Act 1975 or which was paid under section 30 of the National Insurance Act 1965.

[…]

Retirement compensation for loss of emoluments payable to pensionable officer on attainment of normal retiring age

18.—

(1) Subject to the provisions of these Regulations, when a person to whom this Part of these Regulations applies reaches normal retiring age, the retirement compensation payable to him for the loss of emoluments shall be—

(a) an annual sum equal to the amount of his accrued pension, and

(b) a lump sum equal to the amount of his accrued retiring allowance (if any).

Reduction of compensation in certain cases

(3) Where compensation for loss of office is payable under these Regulations to or in respect of any person and that person […] is […] also entitled (whether immediately or on the person's attaining some greater age) to a superannuation benefit under his last relevant pension scheme in respect of any service of which account was taken in calculating the compensation—

[…]

(b) any of that compensation which is payable under Part IV or Part V of these Regulations and which is payable as a lump sum shall be reduced by the amount of any lump sum superannuation benefit,

and where part of the superannuation benefit is attributable to any additional period of service with which the person was credited under his last relevant pension scheme and—

(i) that period is equal to or less than any additional period credited to that person under Regulation 17(2) or under Regulation 13(3) deemed to be so credited, the amount of the compensation shall be reduced by that part of the superannuation benefit;

(ii) that period is greater than any additional period so credited, the amount of the compensation shall be reduced by an amount equal to the amount of the superannuation benefit attributable to a period equal in length to the additional period credited or deemed to be credited under Regulation 17(2).

Conclusions

53. I find the Respondent's position in this matter unsustainable.

54. If the issue between the parties is what amount should be deducted from the formula under Regulation 30(3)(b), and they tell me this is the only surviving issue, then there is no basis within that provision which would allow the Respondent to deduct anything other than the amount of lump sum that the Claimant had accrued under his pension.

55. That is the sum of £88,815.20 lump sum which the Claimant received when he retired early in 2005.

56. Regulation 30(3)(b) says that the lump sum payable under the regulations "*shall be reduced by the amount of any lump sum superannuation benefit*".

57. This means the lump sum to which the Claimant was entitled under the pension.

58. The Respondent says that this is a reference back to accrued retiring allowance.

59. I do not consider that to be the case. If it were the case, why do the Crombie Regulations say to deduct "*the amount of any lump sum that the Claimant had accrued under his pension*" rather than say deduct the "*accrued retiring allowance*"?

60. They are very different things, and I don't see any reason why one can be argued to mean the other.

61. I can only conclude that the reason that the words "*accrued retiring allowance*" were not used is because that is not what they intended to be deducted by the Respondent under this provision.

62. In my conclusion what falls to be deducted is what the Regulation plainly refers to, i.e. "*the amount of any lump sum that the Claimant had accrued under his pension*".

63. It is also evidence within the preceding wording to subsection (b) that what is in play here is lump sums paid under the pension scheme; "that person […] is […] also entitled (whether immediately or on the person's attaining some greater age) to a superannuation benefit", This cannot be read as referring in any way to the defined term "accrued retiring allowance".

64. We know the amount which had been accrued because it was calculated and paid in 2005.

65. The Respondent has also submitted to me the entitlement under Regulation 18 is to "*a lump sum equal to the amount of his accrued retiring allowance (if any)*".

66. The Respondent invites me to acknowledge that the accrued retiring allowance definition contains no deemed additional years' service to retirement age, they provide only for the assumption that the person had reached normal retirement age whatever age they actually retired at.

67. Whilst I acknowledge that this is correct, if I look at the term as defined alone under Regulation 2(1), it appears that the Respondent is ignoring the additional factors governing compensation payments which are set out in Regulation 17.

68. This is where the service credit of 15 years is found in the Claimant's case (Regulation 17(2)(ii)).

69. This seems the plain and simple way in which the Crombie Regulations have set out a formula for calculating retirement compensation in the form of lump sum for individuals in the Claimant's circumstances.

70. It is the manner which the parties clearly envisaged and recorded in 2004 when the compromise agreement was made and an estimate provided in the annex.

71. It would not have been difficult to write the Regulations which required the Respondent to do something else, including what they have done and are arguing should be done.

72. Regulation 17(2)(ii) could have been disapplied when working out the lump sum Retirement Compensation, but it isn't.

73. Regulation 30(3)(b) could have said it is the accrued retirement benefit which is deducted, and could have been specific about it being the period that is recalculated at the time of the calculation, but it does not say that.

74. The Respondent has, in their evidence, suggested that there is some element of discretion afforded to them here. Regrettably, although the Crombie regulations contain provision conferring discretion upon then, they are at that point reading the wrong Regulation.

75. There is in my conclusion no basis for the Respondent's stated methodology.

76. In my conclusion, the only figure that falls under the Crombie Regulations to be deducted from the agreed £226,769.93 in the formula calculating his lump sum is the £88,815.20 lump sum which had accrued when the Claimant retired early in 2005, that is "*the amount of any lump sum superannuation benefit*".

Preparation time order application

77. The Claimant is specifically requesting a preparation time order in relation to the time he spent preparing to defend an application made by the Respondent to strike out his claim which was due to be heard on 29 October 2024.

78. The application to strike out the claim was originally set out in the Respondent's response to the claim dated 20 August 2024.

79. The application was repeated by them in the cover letter accompanying the response. The application is essentially that it is difficult to ascertain what the basis of the claim is and that it has no reasonable prospects of success.

80. I am not entirely sure why the Respondent found it difficult to understand the legal basis for the claim, the Claimant had set out that he felt the Respondent had not followed the Crombie Regulations in calculating his Retirement Compensation and had been in correspondence with them for some time over the issues.

81. On 2 September 2024 the Claimant sent a response to the Respondent's grounds of resistance, where he provided further information about his case.

82. The Claimant is particularly frustrated by the Respondent's withdrawal of the application to strike out the claim which was made towards the close of business on 28 October 2024, i.e. on the day before it was due to be heard.

83. The Claimant has set out that he spent 40 hours preparing for the strike out hearing.

He is legally qualified as a barrister but his specialism is criminal law. He had to research the law and procedure in Tribunals and specifically concerning strike out applications. He had to prepare for the hearing, checking his case and reviewing the 254 bundle of documents produced by the Respondent.

84. Rule 74 of the Employment Tribunal Rules provides as follows:

> ***When a costs order or a preparation time order may or must be made***
>
> *74.—*
>
> *(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.*
>
> *(2) The Tribunal must consider making a costs order or a preparation time order where it considers that—*
>
> > *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings, or part of it, or the way that the proceedings, or part of it, have been conducted,*
> >
> > *(b) any claim, response or reply had no reasonable prospect of success, or*
> >
> > *(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins.*
>
> *(3) The Tribunal may also make a costs order or a preparation time order (as appropriate) on the application of a party where a party has been in breach of any order, rule or practice direction or where a hearing has been postponed or adjourned*

85. The Claimant's application is specifically made under Rule 74(2)(a); he considers that the Respondent's conduct was unreasonable or vexatious because they never had any grounds to make the application.

86. The Claimant refers to the order made by Employment Judge Moxon on 29 October 2024 when the hearing proceeded as a private preliminary hearing for case management.

87. By this point, the Respondent has conceded the claim concerning the calculation of his annual retirement compensation and resolved this issue with him directly.

88. The issues in relation to the lump sum Retirement Compensation were agreed but the Judge recorded that "*the Claimant has clearly set out his case in relation to those issues, but the Respondent had not done so and was unable to do so during the hearing, and has therefore been directed to do so within 14 days as outlined below*".

89. The Claimant's case concerning unreasonable / vexatious conduct is therefore how was he put through preparation time for a strike out hearing in circumstances where the annual compensation question was conceded by the Respondent and they were not able to explain any case against him at the preliminary hearing concerning the lump sum.

90. Costs do not "follow the event", meaning that if a Claimant succeeds in Tribunal with their claim that does not mean that they will automatically be able to recover their costs.

91. Costs are discretionary under Rule 74(2)(a).

92. Whether or not there has been unreasonable conduct is a matter of fact for the

Tribunal to deterimine.

93. In ***Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA*** Mummery LJ stated that "*the tribunal has a broad discretion and should avoid adopting an over-analytical approach. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*."

94. It is clear from the authorities that under either Rule 74(2)(a) the Tribunal must undertake a two stage approach. First, it must consider whether or not the wording of the relevant subsection is met. If it finds that the wording of the subsection is met, the Tribunal must go on to consider whether or not it will exercise its discretion to award costs in all of the circumstances of the case.

95. It was reiterated in the ***Yerrakalva*** case that "*In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion*".

96. Several cases have established factors which might be taken into account when assessing whether or not to exercise the discretion. These include noting that costs awards are compensatory not punitive and we must take care to consider what costs have reasonably been incurred and whether or not they arise from the conduct in question. The Tribunal should explain whether or not it took into account means to pay and if so how. The Tribunal may take into account whether or not a warning as to costs has been given, and whether or not a party has acted under legal advice, or was acting alone without experience of the matters in hand. A Tribunal will take into account the nature of the evidence and claims. But none of these factors are determinative in isolation and the decision on which factors are relevant in a particular application for costs and the degree to which they influence the exercise of the discretion is something for the Tribunal to determine.

97. In my conclusion, I conclude that it was unreasonable and vexatious, in ordinary sense of the words, for the Respondent to make a premature and weak application to strike out the Claimant's claim. In circumstances where the response is weak and inarticulate to make such an application seems in my view an attempt to cause the Claimant unnecessary worry about the process he had engaged in when essentially he had brought an perfectly arguable claim that the Respondent had failed to apply the Crombie Regulations in calculating his retirement benefits. In my conclusion the wording of Regulation 74(2)(a) is met.

98. I have taken into account the Respondent's submission that "*it can never be unreasonable for a party to assist the Tribunal in coming to a common sense appreciation of the position within proceedings and assisting the Tribunal by withdrawing an application where the underlying issues can be resolved in a more efficient and appropriate manner*". However, in my conclusion the Claimant has raised an appropriate issue concerning the making of the application at all. He is not suggesting that withdrawing the application was the unreasonable conduct alone.

99. The Respondent is resourced with in-house legal expertise.

100. There is no issue concerning their ability to meet the small amount of a preparation time order that the Claimant has claimed.

101. The Claimant's preparation time arises from the conduct in question, his time set out in his application is purely concerned with the application to strike out.

102. I find that the time claimed is reasonable and proportionate to the claim, the particular type of application being made, and the fact that the Claimant appears to have chosen to prepare with diligence despite it not being his area of legal expertise. It was not unreasonable for the Claimant to confer with a colleague in preparing for the application. It is not unreasonable to claim for a small amount of time spent having to locate and retrieve the bundle from sorting offices it having been incorrectly addressed.

103. The Respondent has suggested to me that there was no obligation upon them to supply the Claimant with the bundle of documents in advance of the preliminary hearing and it did so only as a gesture of goodwill. I find this submission concerning, and would invite the Respondent to consider the overriding objective set out in the Employment Tribunal Procedure Rules 2024 and consider whether sending a 254 page bundle which you intend to rely upon supporting your application to strike out a claim is a gesture of simple goodwill or a necessity to avoid unnecessary delay (which would be inevitable if the Claimant did not receive the documents before the hearing started), but moreover whether or not it is simply fair and just to send papers to your opposing party in advance of a hearing.

104. I do not accept the Respondent's argument that the time spent preparing for the strike out application will have saved time in preparing for this final hearing.

105. The reality is that where a person prepares diligently for different stages of Tribunal processes they end up needing to go over matters again and again. The Claimant has clearly gone over these issue ad infinitum through trying to resolve the issue with the Respondent directly then bringing his claim, preparing to respond to the strike out application then preparing for the final hearing itself.

106. I see no basis to conclude in the circumstances of this claim that the Claimant was saved time in preparing for the final hearing in being put through preparing for the strike out application.

107. I note that the Respondent's witness evidence served in relation to the final hearing was directed entirely at different reasons explaining the calculation (when compared to the Respondent's response), reliant upon the wrong provision in the repealed earlier Regulations. The reality is that the Claimant has in preparing for the final hearing been sent in a completely different direction, again withdrawn by the Respondent at the 11th hour.

108. In my assessment the Claimant's claim is a reasonable and proportionate amount of time for the party to have spent on preparatory work for the strike out application.

109. I exercise my discretion to award costs in the sum claimed, 40 hours multiplied by £44 makes £1,760.00.

Employment Judge T Knowles

11 February 2025

RESERVED JUDGMENT & RESERVED REASONS
SENT TO THE PARTIES ON

11/02/2025

FOR THE TRIBUNAL OFFICE