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THE EMPLOYMENT TRIBUNAL

SITTING AT:

LONDON SOUTH

BEFORE:

EMPLOYMENT JUDGE STACEY
(sitting alone)

BETWEEN:

Mrs K Duggan

Claimant

AND

The Mayor and Burgesses of the
London Borough of Hounslow

Respondent

ON: 27 July 2010

APPEARANCES:

For the Claimant:

Mr S Rahman (Counsel) Instructed by Owen Mitchell,
Solicitors

For the Respondent:

Miss J Baden-Daintree (Solicitor)
Instructed by Weightmans LLP

JUDGMENT on a PRE-HEARING REVIEW

1. The Claimant's complaint of unfair dismissal is dismissed;
2. The Claimant's claim for a statutory redundancy payment is dismissed;
3. The allegation of direct and indirect age discrimination on the basis that the Respondent imposed a requirement that employees approaching age 65, or who were over age 65, brings something "extra" to their role and that such requirement was a provision, criterion or practice based solely upon age which could not be justified, is dismissed since it is caught by the exclusion in regulation 30 Employment Equality (Age) Regulation 2006;

4. The Claimant's claim for voluntary redundancy may proceed to a full Hearing and the issues are as set out below in case management order;

CASE MANAGEMENT ORDER

The Issues

1. The issue in the case concerns the Claimant's application for voluntary redundancy and the matters to be determined by the Tribunal are as follows:
 1. Did the Respondent treat the Claimant less favourably than it treated or would have treated other persons on the grounds of the Claimant's age by failing to give any, or any proper consideration to, and by refusing her request for voluntary redundancy on 19 March 2008?
 2. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?
 3. Did the statutory grievance procedures apply and did the Claimant comply with them pursuant to s32 Employment Act 2002?
 4. Has the claim been brought in time? If not, is it just and equitable for the Employment Tribunal to extend time for the allegation to be heard?

Amended ET3

2. The Respondent shall have until **3 August 2010** to amend and serve its ET3 to include a defence of justification on both the Claimant and the Employment Tribunal.

Schedule of Loss and Remedy

3. The Claimant shall serve a schedule of loss on the Respondent by **31 August 2010** setting out all amounts claimed and remedies sought in the proceedings, giving calculations.

Discovery & inspection of documents

4. On **17 August 2010** both parties must prepare and exchange a list of all documents which each has relating to the matters in issue in these proceedings and which are to be relied on at the Hearing, together with copies of the documents themselves.

Bundle of Documents for Hearing

5. The Respondent shall prepare a consolidated bundle of documents for the Hearing to be served on the Claimant by **14 September 2010** and the Claimant

shall have until **21 September 2010** to agree or amend the bundle and inform the Respondent.

6. Each side shall bring two copies of the final agreed bundle to the Tribunal at the outset of the Hearing for the Tribunal's use.

Witness Statements

7. Witness statements shall be exchanged on **1 October 2010**, by each side providing to the other one copy of each of their witnesses' witness statements.
8. A witness whose statement has not been exchanged in accordance with this order may not give evidence at the Tribunal without permission from the Tribunal.
9. The witness statement shall set out all the evidence the witness intends to give to the Tribunal and be in short numbered paragraphs.
10. Each side shall bring four copies of their own side's witnesses' statements to the Tribunal at the outset at the Hearing, for the Tribunal's use.

Hearing Date

11. The Hearing date was fixed, by agreement, for a period of 1 day on **8 October 2010** commencing at 10.00am, to encompass both liability and remedy. Since the date has been agreed with the parties no postponement will be granted unless exceptional and unforeseeable circumstances arise.

NOTES

1. *This Order constitutes a notice of Hearing pursuant to rule 14(4) Employment Tribunals rules of procedure 2004. At the Hearing all parties will have the opportunity to submit written representations and to advance oral argument. If a party wishes to submit written representations for consideration to the Hearing s/he shall present them to the Employment Tribunal Office not less than 7 days before the Hearing and shall, at the same time send a copy to all other parties.*
2. *Failure to comply with an Order for DISCOVERY/INSPECTION may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.*
3. *The Tribunal may also make a further Order (an "Unless Order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or a Hearing.*

4. An Order may be varied or revoked upon application by a person affected by the Order or by an Employment Judge on his or her own initiative.
5. This Order confirms orders made/directions given at a hearing on 27 July 2010.

Mary Stacey
Employment Judge Stacey
Date:

28th July 2010

Judgment sent to the parties and entered in the Register on: 30th July 2010.

JOHN WATKIN for Secretary of the Tribunals

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Handwritten signature and initials: SSKD/32

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For the Claimant: Mr S Rahman (Counsel) Instructed by Owen Mitchell,
Solicitors

For the Respondent: Miss J Baden-Daintree (Solicitor)
Instructed by Weightmans LLP

**REASONS FOR THE JUDGMENT OF THE TRIBUNAL
ON THE PRE-HEARING REVIEW**

Sent to the parties on 28 July 2010 and provided at the Claimant's request.

1. The Claimant's claim is for age discrimination and it was lodged at the Tribunal on 5 December 2008. Following receipt of the ET3 the claim was stayed, awaiting the outcome of the proceedings of *R (on the application of) Age Concern England v Secretary of State for Business Enterprise and Regulation Reform* (referred to as the *Heyday* judgment). Following judgement in that case in the High Court, consideration arose as to whether all or part of the claim should be struck out in light of the *Heyday* judgment.

2. The Claimant's solicitors had helpfully set out their opposition to such a course of action as follows:

"The Claimant's claim is one of discrimination on the grounds of her age, but only partially relates to the Respondent's adoption of the default retirement age of 65.

"The Claimant's claim is also based upon the following:-

- 1) An allegation of indirect discrimination on the basis that the Respondent imposed a requirement to employees approaching age 65, or who were over age 65 to bring something "extra" to their role and that such requirement was a provision, criterion or practice based solely upon age which could not be justified.
 - 2) The Claimant's claim is also based upon her submission that the Respondent failed to give any or any proper consideration to her request for voluntary redundancy."
3. During the course of today's hearing it was accepted that the first allegation above was intended to include a complaint of direct age discrimination as well as indirect. It was also argued that a claim for a statutory redundancy payment should be permitted to proceed to a full Hearing as a distinct claim from the voluntary redundancy (VR) point.
4. The Respondent accepted that the Tribunal would have jurisdiction to consider the VR issue and that matter should proceed to a full Hearing. The Respondent however objected to the complaint being advanced as an unfair dismissal or age discriminatory dismissal, point 1 above which was referred during the hearing to the "something extra" point.

5. **The Law**

6. Employment Equality (Age) Regulations 2006 (Age Regulations 2006) prohibit direct and indirect discrimination in Regulation 3(1)(a) and (b).

7. Regulation 30 provides an exception to retirement as follows:

"(1) This regulation applies in relation to an employee within the meaning of section 230(1) of the Employment Rights Act 1996 ("ERA 1996") ...

(2) Nothing in Part 2 or 3 shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the dismissal is retirement.

(3) For the purposes of this regulation, whether or not the reason for a dismissal is retirement shall be determined in accordance with sections 98ZA to 98ZF of ERA 1996."

8. Employment Rights Act 1996 (ERA 1996) Section 98 ZA – 98 ZF sets out the law relating to unfair dismissal and retirement. It was common ground that the applicable subsection is 98 ZD which provides as follows:

“(1) This section applies to the dismissal of an employee if—

- (a) the employee has a normal retirement age,
- (b) the normal retirement age is 65 or higher,
- (c) the operative date of termination falls on or after the date when the employee reaches the normal retirement age..

(2) In a case where –

- (a) the employer has notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, and
- (b) the contract of employment terminates on the intended date of retirement,

retirement of the employee shall be taken to be the only reason for the dismissal by the employer and any other reason shall be disregarded.”

9. It was also common ground that the notification provisions in paragraph 2 of Schedule 6 of the Age Regulations 2006 had been complied with.

10. S135 ERA 1996 provides that

(1) An employer shall pay a redundancy payment to any employee of his if the employee—

- (a) is dismissed by the employer by reason of redundancy, or
- (b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.”

11. Mr Rahman helpfully produced for me a copy of the judgment of the Employment Appeal Tribunal (Underhill P) in **Mayor and Burgesses of the London Borough of Tower Hamlets v Wooster** [2009] IRLR 980 and the Employment Tribunal decision of **Woodcock v Cumbria Primary Care Trust**, Carlisle Employment Tribunal 12 August 2009 (2506917/08).

Discussion and Conclusions

Unfair Dismissal

12. The complaint of unfair dismissal cannot stand in light of the plain reading of

S98ZD. The Respondent fully complied with its duty to consider working beyond retirement and had issued the appropriate notices in compliance with Schedule 6 of the Age Regulations 2006. The Claimant's contract of employment then terminated on the intended date of retirement. It was common ground that the Claimant's employment ended on 7 September 2008, her 65th birthday. The fact that she may have reported to offer her resignation to coincide with her 65th birthday is neither here or there in light of the wording of S98ZD. Mrs Duggan was notified in accordance with paragraph 2 of Schedule 6 and the contract of employment terminated on the intended date of retirement. Therefore both necessary and sufficient conditions were satisfied for retirement of the employee to be taken as the only reason for the dismissal by the employer and I must disregard any other reason.

13. I therefore dismiss the complaint of unfair dismissal.

Statutory Redundancy Pay

14. Given that I have found that retirement shall be taken as the only reason for the dismissal by the employer of the employee, it follows that the Claimant cannot succeed in her claim for a statutory redundancy payment, since a statutory redundancy payment is only payable if the employer dismisses the employee by reason of redundancy. In this case because the effect of S98ZD is to deem the reason for dismissal retirement, and the reason cannot therefore be redundancy.

15. I therefore dismiss the claim for a statutory redundancy payment.

Voluntary Redundancy Request Refusal

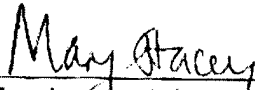
16. This allegation may proceed to a full hearing and is not caught by the exclusions of Regulation 30 Age Regulations 2006.

The "Something Extra" Allegation

17. This allegation is set out verbatim at paragraph 2(1) above. It is a distillation of the fully pleaded ET1 and refers to the Council's retirement process and in particular a meeting of 24 June 2008 convened to discuss the Claimant's request to continue working beyond her 65 birthday (see paragraph 8-16 ET1). It is alleged that in discussing the Claimant's request to continuing working it was stated "People have always retired at 65 and have always been replaced ... we need to know what extra benefits to Hounslow you plan?"
18. The allegation is then articulated in paragraph 31.2 as amounting to a provision, criterion or practice ("pcp") based solely on age to provide something "extra" to the role beyond 65. It was clarified at the pre-hearing review today that the Claimant alleged the discrimination was both direct – being based on her age that more was necessary to continue in employment beyond 65, that "something extra" should be brought to her role and, in the alternative as indirect discrimination.

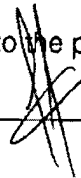
19. Mr Rahman relied on the *Wooster* and *Woodcock* cases that were referred to me as suggesting that matters other than dismissal could be treated as age discrimination in this way.
20. My difficulty is two fold: Firstly Mr Wooster and Mr Woodcock were 49 at the date of dismissal. S98ZD did not apply and nor in fact did any of the retirement provisions. They were too young to be caught by s98Z and there was no suggestion that either Mr Wooster or Mr Woodcock's employer had a normal retirement age of 49 or earlier. The cases are therefore not of assistance to me.
21. The second difficulty is that the allegation, as framed, is simply another way of challenging the Claimant's retirement dismissal. It appears from the ET1 that at the meeting to discuss her request to work beyond 65, the Respondent explained to the Claimant why her request to extend her working life did not find favour and what would be needed for a request to be successful. To that extent it was helpful to her and would have been of assistance at both that meeting and the appeal hearing. It would enable her to focus her mind on formulating and articulating the added value or extra that she could bring to the Council in support of her aim to continue working after 65.
22. My difficulty therefore is that the formulation of the allegation is an attempt to circumvent Regulation 30 when the allegation is of retirement dismissal in all but name.
23. One can think of examples of acts or omissions occurring during the retirement dismissal process which could possibly amount to free standing allegations of discrimination and/or harassment and not be caught by Regulation 30. For example if during the meeting to consider the employee's request an individual is abused or ridiculed on grounds of his or her age, or perhaps if very disparaging remarks are made about older people generally which reasonably upset the pre-retirement employee. In that situation the complaint would not be of unfair dismissal, but of the comments made.
24. The allegation in this case, however, is inextricably linked and essentially a component part of what would be a complaint of unfair dismissal, were it to be permitted to proceed. There is no suggestion that the comment was offensive on grounds of age. In fact it is questionable whether the matter complained of could amount to a detriment in any event, since it merely explained why her request was not being granted and provided assistance as to what was required for a request to be successful.
25. Accordingly the Tribunal has no jurisdiction to consider the "something extra" allegation and it is dismissed.
26. The other matter in dispute between the parties was whether the Respondent should be given leave to amend its ET3 to plead defence of justification in the voluntarily redundancy claim.
27. Bearing in mind the obligation to deal with cases justly and the fact that the

Claimant will not be prejudiced by the amendment at this stage in the proceedings, I consider it would be wrong to prevent the Respondent from relying on a justification defence because of their mistake in not mentioning it in the response form. It is clearly a part of their case and they should not be prevented from relying on it by a zealous over technical interpretation of the rules without having an eye on justice. Employment Tribunals are intended to be informal and whilst parties should do their best to include all matters they wish to rely on in the ET1 and ET3 form, in this case I give leave to the Respondent to amend its ET3.



Employment Judge Stacey
Date: 13th August 2010.

Reasons sent to the parties and entered in the Register on: 16 : 08 : 2010.



JOHN COTTER for Secretary of the Tribunals