Case Number 2508268/09

5780/44

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr R Ormerod	**AND**	Cummins Engine Company Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Newcastle upon Tyne

ON: 3 November 2009 & 2 February 2010
Deliberations on 8 March 2010

EMPLOYMENT JUDGE SPEKER OBE DL

MEMBERS: Mrs C Hunter
Mr L Brown

Appearances

For Claimant: Mr Andrew Sugarman, of Counsel

For Respondent: Mr A Parascandolo, Solicitor

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:-

1 The claimant has been treated less favourably by the respondent on the basis of his age, and accordingly this age discrimination claim succeeds.

2 The respondent shall pay to the claimant compensation for age discrimination in the sum of £22,736.

REASONS

1 This was a claim by Richard Ormerod against his former employer Cummins Limited seeking a declaration under the Employment Equality (Age) Regulations 2001 that he had been treated less favourably by the respondent on the basis of his age and claiming compensation.

2 The claim arose out of the decision of the respondent to reduce the enhanced non-statutory redundancy payment made to the claimant, a reduction which the claimant maintained amounted to age discrimination.

3 The case had originally been listed for half a day and then increased to one day. However, in the event the evidence took full two days and it was necessary for the decision to be reserved and for written submissions to be made by the representatives of both parties. These submissions were duly received and, in accordance with directions made at the end of the second day of hearing, each party was given the opportunity of making supplemental submissions having read those of the opponent, an option which was taken up by the claimant's representative.

4 The Tribunal heard oral evidence from the claimant and his witness Malcolm Ivison, formerly a senior shop steward for Unite the union. Evidence was given for the respondent by Jacquie Smith HR Manager of the Darlington plant of the respondent. The Tribunal was also provided with a detailed bundle of documents running to 132 pages.

5 The Tribunal found the following facts:

5.1 At the Darlington plant of the respondent company, diesel engines are manufactured for use in automotive construction vehicles and other industrial applications. The respondent's customers include Komatzu JCB and Leyland Trucks.

5.2 The claimant was employed as a production operator within the shop operations department at the Darlington site from 2 September 1974. He was made redundant on 21 November 2008. The claimant was born on 16 January 1945 and was 63 years old when dismissed. The normal retirement age at Cummins is 65.

5.3 In June 2008, the respondent experienced a significant downturn. Large numbers of orders were cancelled from July 2008 resulting in a considerable reduction in manufacturing at the plant. From about 350 engines a day utilising a three shift operation the numbers fell to 110 per day, working only one shift by April 2009.

5.4 Substantial redundancies took place. A total of 440 employers were redundant, in four sets of redundancies between October 2008 and April 2009, the figures being as follows:-

(a) October 2008 – 110 temporary workers were dismissed.

(b) November 2008 – 86 permanent employees were made redundant. Shift operation reduced from 3 to 2 shifts.

(c) In Summer 2008 – 25 redundancies of permanent employees.

(d) April 2009 – 191 permanent employees made redundant and shifts reduced to 1.

5.5 Before 2008, the respondent's redundancy payment terms were set out in two agreements dating back to the 1970s. The Labour agreement between the respondent and the AEU (which agreement was subsequently continued when AEU become part of Amicus and subsequently Unite), contained specific redundancy terms. For employees aged 51 to 64 years, a redundancy payment would be made of four weeks pay for each completed year of service. The maximum payment in respect of any one employee would equate to the maximum possible salary payable under the relevant salary grading structure. At the time of the agreement, the company operated a last in first out selection procedure. There were other provisions in the agreement with regard to voluntary redundancies. At the time of the termination of Mr Omerod's employment by way of redundancy, the maximum gross annual salary which would be payable under this enhanced redundancy payment scheme was capped at salary grade A, a figure of £38,733. Therefore if an employee's calculation of 4 weeks pay x the number of years service exceeded £38,733 then only that figure would be paid.

5.6 There were provisions in the agreements for redundancy pay to be reduced by one twelfth for each completed month by which the redundant employee's age exceeded 64. This was consistent with the statutory tapering arrangements which were set out in the Employment Rights Act 1996 but which ceased to be the law by virtue of changes introduced under the Employment Equality (Age) Regulations 2001, which repeated those tapering changes as being contrary to the law on age discrimination.

5.7 The company operated a loyal service payment scheme, the term of which was that if an employee left the company after attaining the age of 64, then the payment would be reduced by one quarter for each full quarter completed.

5.8 In a voluntary redundancy package scheme published in 1996, there was a provision to the effect that where redundancy calculations exceeded the amount that a person could earn in basic salary (calculated at current basic rate) by his or her normal retirement date, then the lesser amount would apply.

5.9 On 9 July 2008, a presentation was given by the company in relation to redundancy calculations. The Tribunal had the opportunity of seeing the slides which were shown at the presentation. This confirmed the enhanced redundancy terms as four week's pay per each year of service for employees aged between 51 and 64, this being capped at maximum salary payable under the salary grading structure. The presentation indicated the need to review the redundancy arrangements under the new age discrimination legislation and stated that the age ranges applied by the company for the different types of benefit were not in accordance with the statutory redundancy age ranges. It was stated that the aim was to find a redundancy calculation which complied with the law but did not disproportionately reduce the compensation to employees or increase the cost to the company. The presentation suggested a number of changes and indicated that there was to

be discussions with Unite the union on various issues including the redundancy selection criteria, although it was stated that the Union was not mandated by the membership to discuss anything other than LIFO. Neither the presentation nor the questions and answers which were issued at around the same time stated that there was to be a cap with regard to the compulsory redundancy payments for those approaching retirement. It was stated that the company's policy was to retire employees at their normal retirement age of 65. No reference was made to applications to extend the retirement date or work beyond the retirement age.

5.10 On 15 October 2008, the company issued a business update with regard to redundancies and the redundancy selection procedure, together with the questions and answers referred to. This was to acquaint the workforce with the position regarding redundancies generally.

5.11 During the redundancy round, dealt with by the respondent in October 2008 the claimant was assessed. Consultation took place between the respondent and the union representatives when redundancy was discussed and volunteers were sought. Mr Omerod indicated he was interested in voluntary redundancy in late October 2008. The respondent's position was that those who were close to retirement would not be made redundant but would continue to work to the normal retirement age. Therefore, Mr Omerod was not accepted for voluntary redundancy.

5.12 At a further consultation meeting on 5 November 2008, redundancies were further discussed. There were 17 volunteers for redundancy, one of whom, under the redundancy scheme, would qualify for very high payments. Mr Spackman on behalf of the company suggested that those close to retirement would have their redundancy payments capped at the pay they would have earned up to retirement. This was not agreed by any of the union representatives. A document headed "Redundancy Pay Agreement October 2008" was produced to the Tribunal in a number of forms. On one of these there was a signature on behalf of the company and on behalf of the unions. A revised version of that agreement contained an additional clause reading as follows:

> "As per custom and practice payments are also capped whereby employees cannot receive more in a redundancy payment than they would have earned in gross earnings up to their normal retirement date (NRD). In these cases the employee will receive gross pay up to their NRD."

The Tribunal finds that the agreement in that format with the additional clause was never agreed on behalf of the employees by the union and was never signed including that additional clause. The Tribunal finds that the additional clause was added to a further draft for discussion in January 2009 but was never signed.

5.13 On 19 November 2008 the five employees who were close to retirement were offered a redundancy payment capped at their pay up to the

normal retirement date, on the basis that if they accepted it, another person would be saved from redundancy. Four of those five people accepted the offer and one chose to stay. This number did not include the claimant who had been told on 10 November that he had been selected for redundancy. On 11 November the claimant filed a letter of grievance regarding his selection. On 12 November the claimant wrote a further grievance letter. The claimant had been sent an individual redundancy quotation to the effect that he would receive notice pay of £6,964 and a redundancy payment of £17,497. It was stated with regard to the redundancy payment as follows:-

> "Given the cost implications of the current business situation it is appropriate for your redundancy payment to be capped at the level of earnings you could have earned prior to your planned normal retirement date of 16 January 2010."

In Mr Omerod's case he had 61 weeks to work up to retirement and therefore the calculation was 61 x £401 (weekly wage) = £24,461. The notice payment was deducted from this indicating that the redundancy payment he was to receive was actually £17,497.

5.14 The claimant would have been entitled to the sum of £45,697 based upon the contractual redundancy pay which amounted to 114 week's pay and taking him 53 weeks beyond his retirement date.

5.15 On 24 November 2008 there was an informal grievance hearing in which Mr Omerod raised the issue of his claim to entitlement for four week's pay for each completed year. Mr Spackman indicated that the reason for not paying Mr Omerod in accordance with the contractual terms was based upon cost and that it would not make "any sense for us to pay more to you in a redundancy payment than the wages you would receive to your normal retirement date – 2865".

5.16 Mr Omerod appealed against the refusal alleging age discrimination.

5.17 On 3 December 2008, Jacquie Smith wrote to the claimant dealing his the grievance regarding to redundancy selection.

5.18 On 12 December 2008, the claimant attended his appeal with regards to the allegation of age discrimination with respect to the redundancy payment calculation. In the course of that meeting it was advanced on behalf of the claimant that there was a contractual issue and a pension issue and that the claimant had lost money on his pension. The claimant stated this to be £5000 on the lump sum and £1000 per annum on the pension.

5.19 On 12 January 2009, Tom Partridge, Chief Engineer of the respondent, wrote to the claimant as to his grievance and the letter stated that Cummins needed to reduce costs which was the reason for the redundancies. It was stated that to pay Mr Omerod more in redundancy than he could have earned had he remained in employment was "not in line with normal company practice". It was conceded that there was no record of the "cap" being

communicated during the redundancy process until Mr Omerod had received his first quote and it was conceded that there should have been better communication.

5.20 The claimant appealed further on 14 January 2009 stating that the company was relying upon the 1996 document as to voluntary redundancies in order to justify capping the claimant's redundancy payment. A further hearing took place on Monday 26 January 2009. The appeal was not successful and a letter was sent to the claimant by Dennis McMemamin, Assistant Line Manager, on 10 February 2009 setting out the reasons why the appeal was not upheld. In the course of that letter it was suggested that to make the payment claimed by Mr Omerod would give him a "windfall profit" and that to comply with what Mr Omerod required would produce bizarre results. It was denied that the failure to pay Mr Omerod in accordance with the scheme amounted to a breach of the scheme or amounted to age discrimination.

5.21 On 3 February 2009 Ian McMar, Unite convener, wrote to the company asking for a meeting regarding the redundancy pay agreement and bringing to the attention of the company that the clause about maximum payments had not been in the agreement signed by Mark Thorpe, one the union representatives. It was subsequently conceded that the clause had not in fact been in any agreement signed on behalf of the union. As at the date of the Tribunal, there had been no contractual change signed on behalf of the workforce.

The Law

6 Regulation 3 of the Employment Equality (Age) Regulations 2006 provides as follows:-

"(1) For the purposes of these regulations, a person ("A") discriminates against another person ("B") if –

(a) On grounds of B's age, A treats B less favourably than he treats or would treat other persons, or

(b) A applies to be a provision criterion or practice which he applies or would apply equally to persons not of the same age group as B, but –

(i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

(ii) which puts B at that disadvantage,

(iii) and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

(2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

7 The burden of proof lies upon the respondent to establish justification where a prima facia case of discrimination has been established.

Submissions

8 Both representatives submitted detailed and helpful written submissions supported by a number of authorities, the most significant of which are as follows:

Loxley v BAE Systems (Munitions and Ordnance) Limited 2008 [IRLR} 853

Bilka-Kaufhaus GMBH v Wever Von Hartz [1984] IRLR 317

MacCulloch v Imperial Chemical Industries plc [2008] IRLR 846

Rainey v Greater Glasgow Health Board

L Pulham and others v London Borough of Barking and Dagenham UK EAT/0516/08/RN.

Discrimination

9 The Tribunal considered the issues of both direct and indirect discrimination.

10 As to direct discrimination, the Tribunal found that the respondent had on grounds of the claimant's age treated him less favourably than others would have been treated. This related to the fact that the the full contractual entitlement to four week's pay for each completed year for those aged 57 to 64 was not being given to Mr Omerod (or he was not being given the maximum capped payment) because he was approaching retirement, in his case he was aged over 63 years. This meant that he was receiving less favourable treatment because of his age and accordingly this amounted to direct discrimination.

11 The Tribunal also found that it amounted to indirect discrimination in that the respondent had applied a provision criterion or practice, namely a provision (not yet but proposed to be in the written agreement) to cap the discretionary redundancy payments made to those approaching retirement and to pay only the maximum which the employee could have earned in basic pay between the date of redundancy and the normal retirement date. This was a provision criterion or practice which put persons of the same age group as the claimant at a particular disadvantage when compared with other persons. Accordingly it amounted to indirect discrimination on the grounds of age.

12 Having decided that the claimant had suffered discrimination on grounds of age it was necessary for the Tribunal to consider the defence put forward by the respondent namely that the treatment amounting to direct discrimination or the

provision criterion or practice adopted by the respondent amounted to a proportionate means of achieving a legitimate aim, the so called "justification defence", age discrimination being a type of discrimination which is justifiable on the specific grounds set out in regulation 3 of the Employment Equality (Age) Regulations 2001.

13 The Tribunal considered in detail the submissions made by both parties with regard to these issues.

Legitimate aim

14 Although the respondent's skeleton argument referred to five potentially legitimate aims identified by case-law, and then to four legitimate aims said to have been given in evidence by Ms Smith, the Tribunal did not find that the respondent had pleaded all four all four of those legitimate aims or that there was evidence supporting them.

15 The four potentially legitimate aims which the respondent claimed had been advanced in evidence by Ms Smith were as follows:-

(i) To prevent employees receiving a windfall.

(ii) Reducing the number of other redundancies that would be required had the capping not been in operation.

(iii) Operating a commercial viable business and reducing the cost of redundancy by discouraging higher payment employees from volunteering.

(iv) Cushioning younger workers that (fic) would not have the advantage of being cushioned by a pension scheme.

16 The claimant's submission was to the effect that it was only the windfall argument which had been pleaded by the respondent namely that it was not considered appropriate that the claimant should be disproportionately "better off" on a redundancy than if he had worked up to his normal retirement date. It was clear from the respondent's response that its pleaded defence was as follows:-

"To prevent employees receiving a windfall payment when close to retirement and therefore able to draw pension benefit".

17 It has not been part of the respondent's pleaded case that the reason for placing the relevant cap upon the claimant's redundancy payment related to other than the wish to prevent him having a windfall. The Tribunal finds that the other arguments advanced with regard to economic issues, concerned only the general need for the respondent company to make redundancies namely to reduce the workforce to that which was required and to reduce the expense to the company of the payroll. The Tribunal does not find that the specific aim of the respondent in capping the claimant's redundancy payment was other than to avoid him receiving what the respondent considered to be a windfall.

18 The case of Loxley makes clear that avoiding is windfall is a potential legitimate aim in a case such as this. However, the Tribunal did not find that the aim in the present case was legitimate. The Tribunal considered it significant that there was a specific agreement that employees such as Mr Omerod would receive four week's pay for each completed year subject to the cap of the pay band. This was a contractual entitlement rather than a discretionary scheme. Although the respondent advanced various other aspects in respect to which other caps were applied, such as the contractual cap applied in relation to voluntary redundancies and similar tapering which applied in relation to loyalty benefit, none of these changed the fact that the claimant had a clear contractual entitlement to his enhanced redundancy payment. That there was nothing in the documentation which expressly entitled the company to cap Mr Omerod's payment by limiting it to the earnings he would have received up to his normal retirement date. As advanced on behalf of the claimant, the respondent was seeking to rely upon alleged implied terms drawn from examples of other capping or tapering arrangements in other circumstances in order to imply such a term in the claimant's contract contrary to the express term of his specific entitlement.

19 The Tribunal finds that the aim to avoid a windfall in this case was not legitimate. This was partly because no attempt was made by the respondent to advance a clear case as to what the "windfall" was. The claimant gave evidence to the effect that his early redundancy and early taking of his pension would result in a £5000 reduction in his pension lump sum and £1000 per annum reduction in his pension, actuarially amounting to a loss of over £20,000. Furthermore, the redundancy and the early drawing of the pension deprived the claimant of various other benefits:

(i) Loss of the opportunity to work on and enhance his pension.

(ii) Loss of opportunity to work over time which was available in 2009 and 2010.

(iii) Loss of potential bonuses.

(iv) Loss of the opportunity to request continued working beyond the age of 65, a right available under the Age Regulations.

20 Without such evidence it could not be shown that the claimant would in fact have achieved a windfall, as the calculations of the losses might substantially or totally offset the alleged windfall. We find this was not a legitimate aim.

Proportionality

21 It was for the respondent to satisfy the Tribunal that any proposed legitimate aim would be achieved by proportionate means, namely placing the cap upon Mr Omerod's contractual enhanced redundancy payment. The Tribunal did not consider that this was a proportionate means because it effectively amounted to a breach of the claimant's contract of employment. As stated, the enhanced contractual redundancy payment was set out as an express term in the contract of employment to which the claimant was entitled. Even if the respondent felt that this amounted to a

windfall, it was not proportionate for the respondent to break a clear express term of the contract which is what was being done by withholding from the claimant that which was clearly set out in his contract.

22 Furthermore, as stated earlier, the respondent had not shown that its actions would in any event be proportionate bearing in mind that no effort had been made to actuarially or in any other way to calculate precisely how the claimant would have been better off in receiving the enhanced payment up to the cap rather than working to retirement age with the opportunity of achieving the additional benefits previously referred to. For the respondent to demonstrate to the Tribunal that its actions were proportionate would have involved providing to the Tribunal sufficient evidence to show how the claimant would in fact be better off. As laid by the EAT in Loxley, it is necessary for the Tribunal to consider whether the provision (namely the capping applied to Mr Omerod), achieved a legitimate aim and was proportionate to the disadvantage. This involved considering the financial position which Mr Omerod would have been in but for the application of the capping provision and indeed if he had not been made redundant. The Tribunal had not been provided by the respondent with any evidence as to the claimant's pension entitlement, how it related to or compared with his enhanced redundancy entitlement and the impact of the other financial provisions. It is not possible on the evidence for the Tribunal to reach a conclusion that the capping of the claimant's redundancy payment was proportionate in all of the circumstances. The onus is upon the respondent to persuade the Tribunal that it was indeed proportionate and the respondent has failed to do so.

23 In the circumstances the respondent has failed to justify the discrimination of the claimant on the grounds of age and accordingly the claim succeeds.

Remedies

24 The claim advanced is that the claimant should have been paid the income cap of £38,733. He received a redundancy payment of only £17,497 and accordingly the loss suffered is £21,236 and this is the sum the respondent must pay to the claimant.

25 As to injury to feelings it has been submitted on behalf of the claimant that this falls into the lower band of the guidelines laid down in the case Vento as amended by Da-Bell and it was submitted that a figure of £3000 would be appropriate. The Tribunal finds that this is too high. Certainly it is appropriate for an award to made but the Tribunal finds that in the circumstances having heard the evidence of Mr Omerod and considered all the documentation, a figure of £1500 is appropriate and adequate and this is sum that should be paid under that head. Accordingly, the total compensation to be paid by the respondent to the claimant is £22,736.

BN Speker OBE DL EMPLOYMENT JUDGE
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 17 March 2010
JUDGMENT SENT TO THE PARTIES ON 17 March 2010
AND ENTERED IN THE REGISTER
FOR SECRETARY OF THE TRIBUNALS