6453/18

Case Number 2505448/12

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A J Witham	**AND**	Capita Insurance Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Newcastle upon Tyne ON: 18, 19 & 20 February 2013

EMPLOYMENT JUDGE HUNTER MEMBERS: Ms M Purvis
Mrs WE Stacey

Appearances
For the Claimant: Mr A Blake of Counsel
For the Respondent: Mr M Brain, Consultant

JUDGMENT

The claims that the respondent discriminated against the claimant because of age and made unlawful deductions from his wages are well-founded.

ORDER

By no later than Thursday 28 March 2013 the parties shall report to the tribunal whether terms of settlement have been agreed failing which a telephone case management discussion shall be arranged (before any employment judge) (one hour allowed) to give further directions.

JOHN HUNTER EMPLOYMENT JUDGE
JUDGMENT SIGNED BY THE
EMPLOYMENT JUDGE ON
20 February 2013

JUDGMENT SENT TO THE PARTIES ON

20.2.13

AND ENTERED IN THE REGISTER

20.2.13

FOR SECRETARY OF THE TRIBUNALS

6453/18

Case Number 2505448/12

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A J Whitham	**AND**	Capita Insurance Services Limited

REASONS OF THE EMPLOYMENT TRIBUNAL

HELD AT: Newcastle upon Tyne ON: 18, 19 & 20 February 2013

EMPLOYMENT JUDGE HUNTER MEMBERS: Ms M Purvis
Mrs WE Stacey

Appearances
For the Claimant: Mr A Blake
For the Respondent: Mrs M Purvis

REASONS

1 Introduction

1.1 The claimant had been in receipt of benefits from the respondent under a Permanent Health Insurance (PHI) scheme arranged between the respondent and an insurance provider. The payments stopped when the claimant turned 55. The claimant alleged that in stopping the payments, the respondent had directly discriminated against him because of age.

1.2 The claimant had been denied the opportunity to join a more favourable PHI scheme arranged by the respondent in 2002 which would have entitled him to receive PHI payments until he turned 65. The insurance company were not prepared to indemnify the respondent in respect of PHI payments if the employee was not actively at work when applying to join. The claimant alleged that this was an indirectly discriminatory practice which put him (as a person in the age group 45 and above) at a particular disadvantage compared with the under 45s.

1.3 The claimant alleged that he had a contractual right to receive PHI payments until he turned 65 and the purported variation of this right by the respondent was of no effect because the respondent had no contractual right to vary the contract and to the extent that it did, such variation was discriminatory and unenforceable by virtue of section 142 Equality Act 2010 (EA).

2 The Issues

A list of issues had been agreed between the parties. The following is a summary as adopted by the tribunal.

Direct age discrimination

2.1 Is Employee F an appropriate comparator?

2.2 If so, did the respondent treat the claimant less favourably than Employee F because of his age (by stopping his PHI payments)?

2.3 If so can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Indirect age discrimination

2.4 Did the respondent apply a provision criterion or practice (PCP) to the claimant and others that it would not pay recipients of PHI under the McLaren's UNUM PHI scheme beyond the age of 55 or in other words that such recipients could not join the Capita PHI scheme due to an "actively at work" criterion applied by the insurers?

2.5 If so, did that PCP put (or would it put) persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it?

2.6 If so can the respondent show that the application of the PCP was a proportionate means of achieving a legitimate aim?

Unlawful Deductions from Wages

2.7 Does the claimant have a contractual right to receive PHI payments until he turns 65? In particular did the respondent effect a valid variation of his contract so that the claimant's right to PHI payments ceased at age 55 and if so was that variation discriminatory and unenforceable by reason of section 142 EA?

3 The Facts

3.1 The claimant was unable to attend the Hearing. Attached to these reasons as an appendix is a statement of facts agreed by the parties.

The tribunal makes the additional findings

3.2 The letter written to the claimant by Joanne Bacon dated 21 August 2006 (referred to in paragraph 31 of the Agreed Facts) begins:

> "In light of impending age legislation, which comes into force on 1st October this year, we have reviewed our retirement procedures."

3.3 Miss Bacon was not available to give evidence. We note that she was the Group HR Director. There is nothing in the letter that might indicate that Miss Bacon had misunderstood the impact of the impending age discrimination legislation or the arrangements that the respondent needed to make to comply with it.

3.4 The summary of the first grievance hearing (referred to in paragraph 35 of the Agreed Facts) contains the following:

> "Discussion then took place around Mr Whitham's projected pension calculations which had been sent to him and how much he received under the PHI policy.
> It was further noted that we cannot change the policy and any changes would only apply to new members and not existing ones. It was also noted that age legislation does not cover the PHI benefit, which is a non-contractual benefit.
>
> The communication sent to Mr Witham in 2006 contained an error with regards to the impending age legislation and confusion of this with the PHI cover and related policy. Following this, we had reviewed all the policies and attempted to bring them in line, but unfortunately had not been able to do that due to the restrictions on the policy. It was confirmed to Mr Whitham by Sara Roe's letter of 22nd June 2009, that it was hoped that there may have been an opportunity to extend the cover to 65 and unfortunately this has not proved possible."

3.5 There was no evidence of the attempts the respondent took to extend the policy benefits. There was no evidence that the respondent had considered the possibility of funding the PHI payments itself and given the comment that the legislation did not cover the PHI payments, it is highly unlikely that it did so.

3.6 Employee F was born on 16 March 1962 and thus 50 years of age. He had also been a McLarens' employee and his contract of employment gave him entitlement to the McLarens' UNUM PHI Scheme. He became ill and was first in receipt of PHI benefits on 3 August 2000 (when he was 38 years of age). He is still in receipt of benefits. The respondent says they will end when Employee F attains the age of 55.

3.7 McLarens produced a leaflet providing a brief outline of its Long Term Disability Scheme. Under the heading "Benefits" it provides:

> "What are the Benefits?
> a. There will be an income benefit of 50% of "Salary" after the waiting period. This income benefit will be subject to income tax and National Insurance contributions in the normal way. The income benefit will increase by 3% compound after each year of payment.
> b. Your pension benefits will be maintained in full."

Under the heading, "Can the Scheme Terminate"

> "The company reserves the right to terminate or amend the Scheme at any time. Any such termination or amendment will not affect benefits which are already being paid or which may be paid when the "Waiting Period" is completed."

4 The Law

Direct Age Discrimination

4.1 The Statutory Provisions (References are to the EA)

> 13 Direct discrimination
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> 23 Comparison by reference to circumstances
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
>
> 39 Employees and applicants
> (2) An employer (A) must not discriminate against an employee of A's (B)—
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.

4.2 In some cases the ground or the reason for the treatment complained of is inherent in the act itself. In such cases what is going on in the head of the putative discriminator – whether described as his intention, his motive his reason or his purpose – will be irrelevant. In other cases the act complained of is not in itself discriminatory, but may be rendered so by a discriminatory motivation. Amnesty International v Ahmed [2009] ICR 1450 at paragraph 33

4.3 If it is sought to justify direct age discrimination, the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature which is distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness. Seldon v Clarkson Wright & Jakes [2012] ICR 716 paragraph 50

Indirect Discrimination

4.4 Section 19 EA provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.
(3) The relevant protected characteristics are—
age;

Unlawful Deductions from Wages

4.5 Section 13 Employment rights Act 1996 provides:

Right not to suffer unauthorised deductions
(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

> (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
> (5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
> (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
> (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

5 Analysis

Direct age discrimination

Is employee F an appropriate comparator?

5.1 The claimant relies upon employee F. The respondent argues that the correct comparator would be a person of a different age group from JW who was a claimant under the McLarens UNUM Scheme who was permitted to move onto the Capita PHI scheme and/or continued to receive PHI payments beyond 55. The respondent's argument appears to be that since there was no such person there could be no discrimination.

5.2 We take the view that the respondent's argument is fundamentally flawed. The comparator will always be the statutory comparator. There may be an actual comparator who meets the criteria of the statutory comparator. If there is no such person, then a hypothetical comparator must be constructed. That no person matching the description of the hypothetical comparator exists is neither here nor there.

5.3 The tribunal takes very much on board the advice given to tribunals by Lord Hoffman in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 that,

> "Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as [he] was."

5.4 We, therefore, do not dwell at this stage on the identity of a comparator, save to note that Employee F was in all material respects in exactly the same position as the claimant and meets the criteria of the statutory comparator (section 23 EA) precisely.

Did the respondent treat the claimant less favourably because of his age (by stopping his PHI payments)?

5.5 The respondent argues that there has been no less favourable treatment because the same fate will apply to the statutory comparator when he reaches the age of 55. That is to misunderstand the concept of age discrimination. The focus must be on whether two people of different ages are being treated differently because of their age. It is irrelevant that in a few years the comparator will also suffer discrimination.

5.6 The respondent argues that if there is any less favourable treatment, the reason is not because of age but because the payments to the respondent under the Unum policy came to an end. This is to confuse the cause of the detrimental treatment with the respondent's reason for triggering it.

5.7 The issue can be decided by asking the following simple question. But for his age, would the claimant still be in receipt of PHI payments? The answer is clearly in the affirmative. There can, therefore, be no doubt that the less favourable treatment is because of the claimant's age. The respondent asked us to apply the test in Nagarajan v London Regional Transport [2000] 1 AC 501 which is to go on to examine the perpetrator's mental processes. Applying, Amnesty International v Ahmed, however, the age related payment is inherently discriminatory and there is, therefore, no need to examine the respondent's reasons for ceasing to make PHI payments.

5.8 The tribunal have applied two checks to this logic. The first is to ask why Unum are no longer indemnifying the respondent. It is because of the claimant's age. The second check is to ask why employee F, whose circumstances are the same as the claimant's, other than his age, is still receiving PHI payments. The answer is that Employee F is 50 and qualifies on the grounds of age. While the respondent's hypothetical comparator does not meet the requirements of the statutory comparator, we conclude that he would also be in receipt of a payment, because he would qualify on the grounds of age.

If so can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

5.9 The respondent says that its legitimate aim was to admit as many employees into its pension scheme and PHI scheme as possible within the constraints imposed by the PHI insurance and in particular the "actively at work" condition. There can be no doubt that an aim limited to admitting as many employees as possible to its pension and PHI schemes would be legitimate. We do not accept that the respondent did have this as an aim. It did not offer a PHI scheme to any employee directly recruited, but only to those employees who transferred under TUPE who were already on a final salary pension scheme. Moreover, we can detect no social policy objective to this aim.

5.10 We consider whether the stopping of the PHI payment was an appropriate and necessary means of achieving the aim. We cannot see how failing to make

payments to the claimant helped achieve the aim of admitting as many employees as possible to its pension scheme or its PHI scheme. In fact the reverse is true. By ceasing to pay the claimant, the respondent reduced the number of employees who were in the PHI scheme. If it had continued to make the payments to the claimant it would have kept the claimant in the scheme and thus promoted the objective.

5.11 Although the respondent denies it, it seems that there was only so much money the respondent was prepared to put into the relevant pension/PHI pot and the payments were stopped on grounds of cost once UNUM ceased to indemnify the respondent. That is a purely budgetary consideration. Lady Hale makes it clear that this cannot be regarded as proportionate. In O'Brien v Ministry of Justice [2013] UKSC 6 at paragraph 74 of her judgment she says:

> "But the fundamental principles of equal treatment cannot depend how much money happens to be available in the public coffers at any one particular time or upon how the State chooses to allocate the funds available between the various responsibilities it undertakes. That argument would not avail a private employer and it should not avail the State in its capacity as an employer."

5.12 The grievance hearing report makes it clear that the respondent was in denial that the PHI scheme was potentially discriminatory. That is the reason they did nothing to find other ways of funding the payments. For all of these reasons, the respondents have failed to show us that stopping the PHI payments was justified.

Indirect age discrimination

Did the respondent apply a provision criterion or practice (PCP) to the claimant and others that it would not pay recipients of PHI under the McLaren's UNUM PHI scheme beyond the age of 55 or in other words that such recipients could not join the Capita PHI scheme due to an "actively at work" criterion applied by the insurers?

5.13 The respondents acknowledge that they did adopt this practice. An employee could only move to the Capita scheme (which allowed for PHI payments up to age 65) if the employee was actively at work when they joined the scheme. Those, like the claimant, who were already in receipt of PHI payments, could not join the Capita PHI scheme when they joined the Capita pension scheme on 1 November 2002.

If so, did that PCP put (or would it put) persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it?

5.14 The PCP was applied to the claimant in 2002 and this is the date at which the effect has to be considered. However, age is a dynamic concept. The claimant was first disadvantaged in 2002, but he says that the PCP has been applied continuously since then and that the disadvantage has arisen over this time.

5.15 The disadvantage contended for is that those aged 45 or over are at a particular disadvantage compared with those under 45 because they were more likely to be in receipt of PHI payments than the under 45s.

5.16 The parties are in agreement that if the identification of a pool is necessary it should include all employees who are entitled to receive PHI payments until age 65.

5.17 In cases such as these it is common to have regard to statistical evidence. In this case, the claimant has produced statistical evidence of the impact of the policy on the disadvantaged group in 2002. The respondent's statistics concentrate on the effect of the policy on the advantaged group. The respondent's statistics, however, are based on the age of pool members at the date of claim. We are also mindful that whatever statistics are produced they have to be examined with great care, because as time progresses, some of those in the pool will move between the two age groups under comparison.

5.18 There are some situations where the disparate impact can be judged without the use of statistics. Judicial notice can sometimes be taken of the obvious and it is obvious that as people get older they become prone to debilitating ill health. The Office of National Statistics data relating to those with a disability and GP consultations support this.

5.19 Notwithstanding the inherent difficulties in using statistics that have not been compiled in a consistent way, the following analysis can be applied:

	Number of employees	Employees under 45	Employees 45 and over
Total pool	6704	3501 (52.2%)	3203 (47.8%)
Disadvantaged	12	1 (8.3%)	11 (91.7%)
Advantaged	6692	3500 (52.3%)	3192 (47.7%)

This shows that the disadvantaged group comprise a very small proportion of the total pool. In the 45 or over age group 11 out of 3202 cannot comply (0.0034). In the under 45 group 1 out of 45 cannot comply (0.00029).

5.20 A statistical analysis of the advantaged group would not support the claimant's case. However, the analysis of the disadvantaged group supports what the tribunal believes to be the obvious conclusion, namely that the PCP did put the 45 and over age group at a particular disadvantage.

<u>If so can the respondent show that the application of the PCP was a proportionate means of achieving a legitimate aim?</u>

5.21 The respondent relies on the same arguments for objective justification of the PCP as those it advanced in respect of the direct discrimination claim. There is no requirement in the case of indirect discrimination to show that the aim amounts to a social policy objective. Other than that, our comments concerning objective justification in respect of direct discrimination apply with equal force to this issue. The respondent has not satisfied us that the PCP achieved its stated aim, but rather that it was to save cost. We are not satisfied that the PCP was reasonably necessary and appropriate to achieve a legitimate aim.

<u>Unlawful Deductions from Wages</u>

Does the claimant have a contractual right to receive PHI payments until he turns 65? In particular did the respondent effect a valid variation of his contract so that the claimant's right to PHI payments ceased at age 55 and if so was that variation discriminatory and unenforceable by reason of section 142 EA?

5.22 The respondent concedes by virtue of the circumstances set out in paragraphs 31 to 33 of the Agreed Facts that in 2006 it varied the claimant's contract so that he was contractually entitled to receive PHI payments until age 65.

5.22 The issue, therefore, is whether the respondent effected a further valid variation of the contract in 2009 and whether that variation is unenforceable by reason of section 142 EA.

5.23 The respondent relies on the variation clause set out in the Branch Manager's contract referred to in paragraph 5 of the Agreed Facts, which it states is clear and unequivocal.

5.24 The claimant contends that the clause must be read in conjunction with the guidance leaflet.

5.25 Interpretation of a contractual document is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896

5.26 Applying this test we are satisfied that the meaning of the contract was that the respondent was at liberty to vary or withdraw the scheme at its discretion, but any such variation or termination would not adversely affect anyone in receipt of benefits. The respondent, therefore, could not rely on the variation clause to reinstate the provision that benefits would cease on the claimant's reaching 55 years of age. Moreover, if the respondent did have that contractual right, in the light of our findings, such variation was unenforceable by reason of section 142 EA.

JOHN HUNTER
EMPLOYMENT JUDGE

REASONS SIGNED BY THE EMPLOYMENT JUDGE ON
25 February 2013

REASONS SENT TO THE PARTIES ON
26/2/13

AND ENTERED IN THE REGISTER
G. Haswell

FOR SECRETARY OF THE TRIBUNALS