

IN THE MANCHESTER EMPLOYMENT TRIBUNAL

BETWEEN:

MR R WAGENER

Claimant

-v-

THE CABINET OFFICE

Respondent

CLAIMANT'S ARGUMENTS FOR PHR ON 9 OCTOBER 2012

1. INTRODUCTION

- 1.1. This is a full and detailed account of the claimant's arguments. It is delivered simultaneously to both the tribunal and the respondent, as a written deposition to support the verbal arguments adduced at the PHR.
- 1.2. Although this is a complete account of the claimant's arguments at this time, the claimant reserves the right to present further arguments and adduce additional supporting evidence at a full tribunal hearing or in the later court proceedings, should this become necessary.
- 1.3. Throughout, references to the 'Equality Act' are to be taken as references to the Equality Act 2010. References to 'the Disability Act' should be taken as references to the Disability Discrimination Act 1995.

2. THE CLAIM

- 2.1. The claimant makes two principal assertions, namely that -
 - (a) he has suffered unlawful discrimination under the Equality Act, and
 - (b) the Equality Act requires the respondent to make a reasonable adjustment.
- 2.2. As regards the first of these assertions, the claimant has provided evidence that his life expectancy is reduced by at least 8 years. This, the claimant argues, places him at a disadvantage compared with non-disabled persons, who, on average, will receive substantially more pension payments and enjoy a significantly longer retirement.

- 2.3. As regards the second assertion, the claimant has proposed that a reasonable adjustment should take the form of a reduction in the number of years he has to work before being entitled to his full pension entitlement. Specifically, the claimant has requested that he should be allowed to retire at 57 and from that date receive the pension and lump sum entitlements he would have been entitled to had he retired at the age of 65 on that date.
- 2.4. Although the claimant has proposed this as the most logical solution, the claimant acknowledges that other reasonable adjustments might be possible. One adjustment might, for example, involve an enhancement to his lump sum and/or pension entitlement to reflect the increased risk that the claimant will enjoy a significantly shorter retirement. Another possibility might involve the payment of the death in service lump sum now, instead of in the event of the claimant's death. This would allow the claimant to try to finance his early retirement independently at some stage.
- 2.5. The claimant does not make these comments as proposals; this is a matter for any negotiation that might take place between the parties. The claimant simply wishes to emphasise that he is not insisting that the reasonable adjustment has to take a particular form. The law only requires that an adjustment is 'reasonable'; it does not say it cannot take more than one form.

3. CLAIMANT'S ARGUMENTS

General

- 3.1. The factual basis for the claimant's request for a reasonable adjustment is set out in the claimant's letter to the respondent of 28 June 2011 and supporting documents at pages 55-59, 72, 75, 91 109-111, 113, 114 of the bundle of documents to be submitted at the PHR. The following focuses on the legal basis for that reasonable adjustment request.

Discrimination

- 3.2. The Equality Act identifies and proscribes various forms of 'prohibited conduct'. These include several types of disability discrimination, which include 'discrimination arising from a disability' (section 15) and 'indirect discrimination' (section 19). The claimant contends that he has been subject to both types of illegal discrimination.
- 3.3. Initially, the respondent would have been unaware of the claimant's disability and its effect on his life expectancy. However, section 19, unlike the predecessor legislation in the Disability Discrimination Act, does not require the respondent to be aware of a situation for discrimination to exist. Section 19 says:

(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;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation.

- 3.4 It should be noted here that discrimination will exist under section 19(2)(c) if the 'provision, criterion or practice' in question 'puts, or *would put*' the disabled person at a disadvantage. This clearly indicates that the disadvantage may exist now ('puts') or in the conditional future ('would put').
- 3.5. The claimant asserts that the Principal Civil Service Pension Scheme (PCSPS) rules 'would put' the claimant at a disadvantage for the purposes of section 19 above, as he would in all probability receive a much shorter retirement and far less in pension payments, if he were not afforded a reasonable adjustment.
- 3.6. As the respondent has now been made fully aware of the claimant's circumstances, however, the claimant contends that he has also been subject to discrimination arising from his disability for the purposes of section 15 of the Equality Act. This states that:
- (1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
- 3.7. The claimant argues that his likely premature death is something that '*arises in consequence of*' his disability as a type 1 diabetic. As the respondent has provided no evidence that this is 'a proportionate means of achieving a legitimate aim', this 'unfavourable' treatment constitutes illegal discrimination.
- 3.8. The requirement of sub-section 15(2) is met, as the respondent has been made fully aware of the claimant's disability and its implications in terms of his pension requirements.

- 3.9. It should be noted that, unlike the predecessor provisions in the Disability Discrimination Act, there is no requirement for any kind of comparator. The Disability Discrimination Act said at section 24(1)(a), for example -

For the purposes of section 22, a person ('A') discriminates against a disabled person if -

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply;

- 3.10. Section 15 of the Equality Act, however, has removed the words 'than he treats or would treat others to whom that reason does not or would not apply'. It is clear from both the Explanatory Note 71 to the Equality Act (document 8, page 29 of the bundle) and the Hansard discussions on 16 June 2009 (document 10, pages 32-37 of the bundle), that this was done quite deliberately to remove the comparator test derived from the case of *Lewisham v Malcolm* [2008] UKHL43.

Substantial Disadvantage

- 3.11. Where something is a 'relevant matter' the obligation to make a reasonable adjustment applies to any 'provision, criterion or practice' relating to that matter (section 6(3)). The pension scheme arrangements provided by an employer constitute a 'relevant matter', as they are required by section 61 to contain a non-discrimination rule. In particular, section 61(2) states (with emphasis added) that the responsible person (A) must not -

...discriminate against another person (B) in carrying out any of A's functions in relation to the scheme;

- 3.12. If discrimination does exist, then the responsible person is obliged to make a 'reasonable adjustment' (section 61(11)). This adjustment can also have effect for periods prior to the time of the reasonable adjustment (sections 62(3), (4)).

- 3.13. Where an obligation to make a reasonable adjustment exists, section 20(1) states that sections 20-22 apply, together with 'the applicable Schedule'. Section 20 then goes on to set out the obligations of the responsible person in general terms, and says at section 20(3):

The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

- 3.14. The claimant's principal argument here is that the wording of section 20(3) clearly indicates that the phrase 'puts...at a substantial disadvantage' is not limited to the instantaneous present, the 'here and now'. It is not necessary, therefore, for the claimant to show that he is already suffering the ill effects of the discrimination to which he claims he has been subjected. This is made clear if one reads the sentence as a whole, which says with emphasis added:

The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

- 3.15. The first part of this sentence refers to 'a substantial disadvantage' to which a disabled person is put. The second part then states that the responsible person (A) is required to avoid 'the disadvantage'. The use of the definite article in the second half of the sentence makes it clear that 'the disadvantage' in question is the 'substantial disadvantage' referred to in the first clause. Consequently, the responsible person is required to 'avoid' the substantial disadvantage in question, in other words, they must prevent it from occurring in the first place.
- 3.16. Something cannot be 'avoided' if it has already taken place. It follows from this that it is not necessary for one to have already been put at a disadvantage before any action is required by the Equality Act. The phrase 'puts...at a substantial', therefore, cannot mean 'puts...at a substantial disadvantage (now)', but merely 'puts...at a substantial disadvantage (at some stage)'.
- 3.17. The claimant contends, therefore, that section 20(3) is not a time-bound provision. This makes perfect sense of the legislation, which encourages responsible persons to avoid disadvantages by being proactive. It is not acceptable to simply wait for a disadvantage to occur, particularly when it is known (as in the claimant's case) that it would then be too late to make any kind of reasonable adjustment if one did that.

Substantial

- 3.18. The word 'substantial' is not defined in the legislation. According to the Solicitor General Hansard, however, it means 'a disadvantage that is more than minor or trivial' (bundle document 12 at page 40, column 295). This is in turn based on the definition that courts applied in relation to the Disability Discrimination Act. This appears to have been largely based on the dictum in *Goodwin v Patent Office* [1999] ICR 302, which was cited with approval in the House of Lords' case of *Lewisham v Malcolm* [2008] UKHL43.
- 3.19. The claimant argues that a reduction in life expectancy of more than 10% (8/78 must be 'substantial' for these purposes. The claimant would point out that it also represents a 44.44% (8/18) reduction in pension receipts and retirement years assuming retirement at 60, or a 61.54% (8/13) reduction in pension receipts and retirement years assuming retirement at 65.
- 3.20. The claimant also contends that he is presently placed at a substantial financial disadvantage by the arrangements. Pension rights are a form of insurance against unemployment in old age. And the present value of that bundle of rights to any person is directly related to their life expectancy.
- 3.21. The claimant argues, therefore, that the net present value of the pension rights he holds is worth substantially less than the rights held by a non-disabled person with an average life expectancy. This places the claimant at a substantial disadvantage now. I would therefore have to incur a substantial amount of further expenditure to provide the same level of financial support to my dependants as a non-disabled person in the same position.

- 3.22. If the claimant wished to have the same pension rights as someone with an average life expectancy, therefore, he would, to follow the insurance analogy, have to pay a significant additional premium. The reasonable adjustment that the claimant seeks calls on the respondent to effectively meet that premium, by making a reasonable adjustment that will restore him to the position he would have been in had he not been disabled.

Reasonable Adjustment

- 3.23 The phrase 'reasonable adjustment' is not defined in the legislation, and must therefore take its normal dictionary definition.
- 3.24 The claimant contends that for it *not* to be reasonable for the respondent to make an adjustment, the respondent would have to show that it would be impracticable or prohibitively expensive to make similar reasonable adjustments to others in broadly the same circumstances as the claimant. The respondent would also have to show that the retention of the inequalities in the net present values of these disabled persons' pension rights was 'a proportionate means of achieving a legitimate aim', as required by section 15(1)(b) and 19(2)(d) of the Equality Act.
- 3.25. The claimant has provided ample evidence in his letter and supporting documents of 28 June 2011 (bundle document pages 55-59, 72, 75, 91 109-111, 113, 114) to show that meeting claims of this kind would be neither impracticable nor prohibitively expensive for the respondent. These issues are, however, covered further in section 4. below in response to the respondent's claims to the contrary.

4. RESPONDENT'S DEFENCES

The Respondent is Exempt from Making a Reasonable Adjustment

- 4.1. The respondent has argued that Schedule 22(1)1 of the Equality Act exempts him from making reasonable adjustments in relation to this matter. The reason for this, it is claimed, is that this paragraph exempts the responsible person from making reasonable adjustments in respect of disability matters, if he 'does anything he must do pursuant to a requirement specified in the third column'. The latter refers to 'a requirement of an enactment' or 'a relevant requirement or condition imposed by virtue of an enactment'.
- 4.2. The respondent argues that the Civil Service Pension Scheme rules were made under the Superannuation Act 1972, and this does not permit adjustments of the kind requested by the claimant.
- 4.3. The claimant contends that this is factually incorrect. An adjustment could be made under the Principal Civil Service Pension Scheme (PCSPS) rules, (bundle document 7, pages 27 and 28) in two ways. Firstly, the reckonable service on which the claimant's pension benefits are based could be increased in accordance with rule 2.24 as follows:

The Minister has discretion to grant added years of reckonable service to a civil servant if there are special circumstances to justify this. The number of added years which may be granted will be subject to the limits set out in rule 2.3 (limit on length of reckonable service). Subject to those limits, the Minister may determine whether the added years are to be treated as accruing evenly over the period from the date of entry into the Civil Service until the pension age or over such other period as the Minister may specify.

- 4.4. Secondly, the respondent could make special contributions to directly increase the retirement benefits to which the claimant was entitled under rule 14.6, as follows:

The employer of a civil servant or a third party contributor in relation to a civil servant may, if the Minister approves, make one or more additional contributions to the 1972 Section to increase the benefits payable to or in respect of the civil servant under section 3 and section 4 (retirement and death benefits and widows' and dependants' benefits).

- 4.5. Consequently, the PCSPS rules that were created under the Superannuation Act 1972 do not prohibit reasonable adjustments of the kind being sought by the claimant. Schedule 22 is not therefore applicable.

There is No Discrimination, as Non-Disabled Persons are Treated Similarly

- 4.6. The respondent's argument here is based on the decision in *Lewisham v Malcolm* [2008] UKHL43. This case concerned a man with schizophrenia, who sublet his flat before acquiring it under a right-to-buy scheme. This automatically and irrevocably cancelled his tenancy, thereby preventing him from buying the flat. It was argued in his defence that the action of subletting was caused by his schizophrenia. Consequently, cancelling his tenancy in these circumstances would amount to discrimination under the Disability Discrimination Act.
- 4.7. In the House of Lords, however, it was held that a reasonable adjustment was not required for two reasons. Firstly, Mr. Malcolm's disability was not the 'reason' the landlord cancelled his tenancy, as the landlord was unaware of his disability at the time. Secondly, the Disability Discrimination Act required Mr. Malcolm to be compared with someone who was the same in all material respects as him, with the exception of his disability. As a non-disabled person who had sublet his flat would have been evicted, it was held that no discrimination arose under the Disability Discrimination Act.
- 4.8. The respondent argues that this decision requires the claimant to be compared with someone in the same circumstances apart from his disability. This, the respondent contends, would be a non-disabled person with the same reduction in their life expectancy as the claimant. As such a person would be afforded the same treatment as the claimant, the respondent argues that the claimant has not been subject to discrimination on the grounds of the claimant's disability.
- 4.9. The decision in the case of *Lewisham v Malcolm*, however, cannot be used as a direct authority here. To begin with, it was decided in relation to the Disability Discrimination Act, which has been rescinded and replaced by the Equality Act.

- 4.10. Furthermore, the decision in *Lewisham v Malcolm* elicited widespread consternation from both government and disabled groups alike. Indeed, it was clearly one of the things that prompted the introduction of the Equality Act.
- 4.11. As a result, the Equality Act introduced two new concepts for disabled people, which have no counterparts in the Disability Discrimination Act. These are discrimination arising from disability (section 15) and indirect discrimination (section 19). It is clear that both of these concepts were explicitly introduced to reverse the effects of the case of *Lewisham v Malcolm*. This is clearly evidenced by the Explanatory notes in bundle document 8, page 29.
- 4.12. In relation to section 15, paragraph 70 of the Explanatory Notes says:
70. This section is a new provision. The Disability Discrimination Act 1995 provided protection from disability-related discrimination but, following the judgment of the House of Lords in the case of *London Borough of Lewisham v Malcolm* [2008] UKHL43, those provisions no longer provided the degree of protection from disability-related discrimination that is intended for disabled people. This section is aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment.
- 4.13. And as regards section 19, paragraph 81 of the Explanatory Notes says:
- This section largely replaces similar provisions in previous legislation. It applies the EU definition of indirect discrimination, replacing pre-existing domestic definitions in the Sex Discrimination Act 1975 and the Race Relations Act 1976, to ensure uniformity of protection across all the protected characteristics in all areas where it applies. However, the extension of indirect discrimination to disability is new, coming after consultation following the judgment of the House of Lords in the case of *London Borough of Lewisham v Malcolm* [2008] UKHL 43, which concerned the interpretation of the provision on disability-related discrimination in the Disability Discrimination Act 1995.
- 4.14. As already explained, these twin changes removed the requirement for a responsible person to be aware of a disability, and, crucially in this case, the requirement for a comparator. This is made clear by the following Hansard extract from the Standing Committee debate on section 15 (clause 14) on 16 June 2009 (bundle document 10, page 36):
- The Solicitor-General:** Proposed new subsection (1B) relates to a situation in which a person subjects a disabled person to discrimination arising from disability, even if that person has subjected a non-disabled person to the same detriment, where the non-disabled person's circumstances are otherwise the same as those of the disabled person. The provision in clause 14, however, does not require a comparator for establishing the detriment because of somebody's disability. Instead, it applies where the treatment to which the disabled person is subjected is detrimental because of the disability. It is immaterial that somebody else, disabled or not, has been subjected to the same treatment.
- 4.15. The respondent may wish to argue that the intentions of Parliament as expressed in legislation cannot be construed by reference to Hansard, because of the rules relating to parliamentary privilege.

- 4.16. This point was addressed in the House of Lords in the case of *Pepper v Hart* (document bundle, item 9, page 31), which was also considered in *Lewisham v Malcolm*. In *Pepper v Hart*, it was held that Hansard could be consulted when the plain words of statute were 'ambiguous or obscure, or led to absurdity'.
- 4.17. The claimant's contention is that the words of section 15 clearly removed the need for a comparator. However, the word 'unfavourably' could, however, be taken to imply some kind of comparison. If this word can be read in two ways, however, the claimant would argue that it is ambiguous or obscure and one must therefore refer to Hansard. This then provides the clear and unequivocal answer that no comparator is required for the purposes of section 15. As the Solicitor-General put it –
- It is immaterial that somebody else, disabled or not, has been subjected to the same treatment.
- 4.18. This statement clearly reveals the respondent's argument to be spurious, anachronistic and irrelevant.

The Duty to Make a Reasonable Adjustment is not Anticipatory

- 4.19. In the Grounds of Resistance of 14 June 2012, the respondent's solicitor stated -
- comparison with another member of the Classic Scheme who is not disabled. Further, it is submitted that the duty to make reasonable adjustments is not anticipatory. The Claimant continues to work and has not retired. He has not therefore been placed at a disadvantage by the pension arrangements referred to above.**
- 4.20. The Respondent's argument here are that -
- (a) the reasonable adjustment provisions of section 20 of the Equality Act require the claimant to be placed at a substantial disadvantage now; and,
 - (b) the claimant is not placed a substantial disadvantage at the present time.

The claimant disputes both of these contentions.

- 4.21. The claimant argues that the wording of section 20(3) does not require that a substantial disadvantage is actually happening here and now. To begin with, the present tense in English is not limited to this usage, which is known as the 'instantaneous present' (bundle documents 13 and 14, pages 41 to 43). The statement that 'roses are red and violets are blue', for example, is not falsified because there are no red roses or blue violets around at the time. Furthermore, the present tense can also refer to future events. For example, the statement, 'my train leaves at four o'clock' does not mean, as the respondent might have it, that 'my train is leaving right now and it is now four 'o'clock'.

- 4.22. The correct understanding of a tense, of course, depends on the context. Here, the immediate context is section 19, which covers indirect discrimination (see 3.3). As well as being the immediate context, section 19 provides an interesting parallel to section 20. It states that a person 'discriminates' against another person if a 'provision, criterion or practice...puts, or would put' that person at a disadvantage (19(2)(c)). The phrase 'would put' shows that the present tense ('discriminates') is not limited to the here and now. Someone also 'discriminates' if a disabled person 'would' be put at a disadvantage in the future.
- 4.23. The legislation must be read in a purposive and consistent manner. And it would clearly make no sense for section 19 to require a responsible person to take account of future events, if those events had to then be completely disregarded when considering the reasonable adjustment requirements of section 20(3).
- 4.24. Moreover, as with section 19, the wording of section 20(3) clearly indicates that the phrase, 'puts...at a substantial disadvantage' is not limited to the 'here and now'. This becomes clear if it is read as a whole. It says (with emphasis added):
- The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- 4.25. The first part of this sentence refers to 'a substantial disadvantage' to which a disabled person is put. The second part then states that the responsible person (A) is required to avoid 'the disadvantage'. The use of the definite article in the second half of the sentence makes it clear that 'the disadvantage' in question is the 'substantial disadvantage' referred to in the first clause. Consequently, the responsible person is required to avoid this particular disadvantage. In other words, they must prevent it from occurring in the first place.
- 4.26. Something cannot be 'avoided' if it has already taken place. It is not necessary, therefore, for someone to have already been put at a disadvantage before any action is required by the Equality Act. The phrase 'puts...at a substantial', cannot therefore mean, 'puts...at a substantial disadvantage (now)'. Instead, like section 19, it must mean, 'puts...at a substantial disadvantage (at some stage)'. These sections are not time-bound provisions. Like the legislation as a whole, they are clearly proactive, not reactive in nature.
- 4.27. This proactive facet of the legislation is evident in numerous parts of the Equality Act. For example, Schedule 2, Paragraph 2(5), says in relation to services and public functions:
- (5) Being placed at a substantial disadvantage in relation to the exercise of a function means...
- (b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.
- 4.28. A similar point arises regarding Schedule 8. This applies to work related matters, which includes occupational pensioners by virtue of Paragraph 19 of that Schedule. The first relevant provision here is Paragraph 5(3)(b), which states (with emphasis added):

(b) the reference to being put at a substantial disadvantage is a reference to being likely to be put at a substantial disadvantage that is the same or similar in the case of each of the principals referred to in paragraph (a)

4.29. Although this applies to contract workers, it makes it clear that the phrase 'puts at a substantial disadvantage' is not limited to the 'here and now' as the respondent suggests. The disabled employee only has to show that he or she is likely to suffer a substantial disadvantage in the future, for the employer to be required to make a reasonable adjustment.

4.30. This principle also applies to occupational pensioners by virtue of Schedule 8, paragraph 20. This contains the following general caveat in respect of the requirements of Schedule 8 (again with emphasis added):

20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any other case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

4.31. The other cases 'in this Part' include 'an applicant for employment' and the reference to the first, second and third requirements here is a reference to sections 20(3), (4) and (5) of the Equality Act as explained by Paragraph 2 of Schedule 8.

4.32. It is clear, therefore, that if a person with type 1 diabetes applied for employment with the Civil Service and declared this disability, the respondent would be obliged to make a reasonable adjustment in relation to their occupational pension arrangements, as this would clearly be 'a provision, criterion or practice' of the remuneration package relating to that employment.

4.33. What is also notable about the wording of Schedule 2, Paragraph 2(5) and Schedule 8 Paragraph 5(3)(b), is that they do not say that the basic rule in section 20(3) has been expanded to mean, 'puts or may be/is likely to be put...to a substantial disadvantage'. It simply says that this is what 'puts...at a substantial disadvantage' means in those particular contexts.

4.34. This clearly indicates that the semantic range of the phrase, 'puts...at a substantial disadvantage' is not limited in the way argued by the respondent, as it can clearly encompass the future. All Schedule 2, Paragraph 2(5) and Schedule 8, Paragraph 5(3)(b) do, is to explain what level of probability is required to meet those provisions. Schedule 2 is concerned with possibility ('may') and Schedule 8 sets the higher bar of probability ('likely'). Both, however, are predicated on the assumption that the phrase, 'puts...at a substantial disadvantage' encompasses the future as well as the present.

- 4.35. Nevertheless, the claimant also contends that he is financially disadvantaged at the present time as a result of his disability and the respondent's refusal to make a reasonable adjustment.
- 4.36. The claimant argues that his pension rights are significantly reduced in monetary value, because of his reduced life expectancy. He is therefore substantially disadvantaged at the present time, as the net present value of his pension rights is significantly less than someone who is not disabled.
- 4.37. It is important to emphasise that this is not just a theoretical accountancy point. The claimant's substantially shorter life expectancy means that he would need incur a substantial amount of additional expenditure to provide for his dependant family in the same way as a non-disabled person.
- 4.38. If the claimant died 8 years prematurely after his retirement, as his calculations indicate, his family would not benefit from 8 years of his pension. The claimant's widow would only be entitled to 50% of that pension, which would mean that the equivalent of 4 years of income would be lost. Hence, although the family (two adults and two children) would be reduced by 25%, for 8 years a significant part of their income would be reduced by 50%.
- 4.39. To put himself in the same position as a non-disabled person, therefore, the claimant would have to undertake a substantial amount of additional outlay now, to ensure his family did not suffer adversely from his premature death. This significant additional financial burden exists at the present time and clearly places the claimant at a substantial financial disadvantage *now*.

Making Similar Reasonable Adjustments would be Prohibitively Expensive and Impracticable to Administer

- 4.40 In relation to the practicalities, the Respondent made these claims in their Grounds for Resistance of 14 June 2012:

11. Further, in order to ensure consistency of treatment towards all members of the PCSPS, the Respondent would be required to make similar adjustments in respect of all those members who suffer from disabilities which result in a shorter average life expectancy. It is submitted that the proposed adjustment would therefore be impractical. A blanket earlier pension age would not be effective in each case and therefore, in order to make an adjustment of this sort, the Respondent would be required to research and set adjustments specific to the disability in question and the particular prognosis of an individual. There are currently in the region of 574,000 active members of schemes within the PCSPS, consisting of 468,000 Civil Servants and 106,000 others. The Respondent does not have details of the number of active members with declared disabilities as this information is not collected centrally. However, official figures published in October 2011 state that 8% of Civil Servants have a declared disability and it is expected that the proportion of active members of the PCSPS with a declared disability would be broadly similar. It would be impractical for the Respondent to accurately adjust pension age in respect of all those members who suffer from a disability that may affect their life expectancy.

4.41. On the question of costs, the Respondent stated that in the same document that:

12. It is also submitted that the financial costs of the proposed adjustment would be so great as to make it impossible for the Respondent to continue to offer members of the PCSPS access to an occupational pension scheme on the terms currently offered.

4.42. As regards the logistical difficulties, Schedule 8 of the Equality Act places no requirement on the respondent to calculate the life expectancies of all disabled employees for which it is responsible. This data is not available to the respondent, as the employer's databases do not even identify the type of disabilities from which civil servants are suffering. Consequently, does not know that the life expectancy of any of those employees is substantially reduced.

4.43. It would therefore be up to individual employees to claim reasonable adjustments in the same way as the claimant. However, it is worth stressing, that they could only make valid claims under the Equality Act, if their life expectancies were substantially reduced by their disabilities.

4.44. As clearly demonstrated in the claimant's letter and attachments of 28 June 2011 (bundle documents pages 55-59, 72, 75, 91 109-111, 113, 114), the likelihood is that only 0.5% of individuals would be able to make claims of this kind. Using the above figures this would only amount to 2,870 individuals.

- 4.45. It is not tenable to argue that it would be impossible to handle this number of claims. As indicated at 3.109 of Lord Hutton's report (bundle document 30, page 115), 22,000 ill-health retirement cases were handled each year in the late 1990s. And although this figure may have been substantially reduced since then, Lord Hutton's report indicates that the figure is still several thousands per annum.
- 4.46. As regards the cost of meeting these claims, this would clearly be a very small percentage of the annual civil service pension costs, which according to Lord Hutton's report at 1.17 (document bundle 30, page 115) is presently around £33 billion per annum.
- 4.47. In working out the anticipated costs, the key figures are the –
- (a) mean reduction in life expectancy of 15 years (bundle document 111);
 - (b) average Civil Service pension of £7,800 (1.11. Lord Hutton's report)*;
 - (c) mean Civil Service Pay of £25,960 (bundle document 78); and
 - (d) average death-in-service lump sums of 2.5 times pay (bundle document 116).
- 4.48. The average death-in-service lump sum is hard to calculate without further data. However, a mean factor of 2.5 times final salary has been assumed here for illustrative purposes in the absence of actual statistics. Clearly, however, the figure must be somewhere between 2 and 3 times final salary, as these are the applicable factors for the main classic and premium schemes, which apply to the majority of pensions scheme members.
- 4.49. The factors in 4.47 produce the following calculation:

Details	Amount
Average pension (7,800) for an extra 15 years	117,000
Less death in service saved = average pay (£25,960) x 2.5 years	-64,900
Net additional cost per individual	52,100
Multiplied by 2,870 claimants	149,527,000
Divided by 15 years = cost per annum	9,968,467
Divided by annual costs of £33bn = potential cost increase	0.030%

- 4.50. It would clearly not be unreasonable, therefore, to require the respondent to make adjustments of the kind being sought by the claimant. The logistical problems are relatively small and the cost implications are tiny. The number of claim would probably be little more than 10% of the number of ill-health retirement claims already being handled each year. Furthermore, if some of those ill-health claims related to the disabled people included above, the time spent on those claims might be significantly reduced by offering them the reasonable adjustments clearly required by the EA.
- 4.51. As regards the potential cost implications, whilst the amount could be regarded as significant in absolute terms, it clearly represents a miniscule proportion of the annual PCSPS costs. This would therefore have no material impact on any government planning, amounting, as it does, to little more than a rounding adjustment in its calculations.

- 4.52. It is also notable that despite several requests from the claimant, the respondent has repeatedly failed to provide any evidence that the claimant's calculations are incorrect. Nor has the respondent provided any calculations or supporting evidence of their own.
- 4.53. The claimant is forced to conclude, therefore, that there is absolutely no evidence to support any of the respondent's arguments in relation to their contentions.

Robert Wagener

23 September 2012

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1.11 The Commission firmly rejected the claim that current public service pensions are 'gold plated.' The average pension paid to pensioner members is around £7,800 per year, while the median payment is around £5,600. It also rejected the idea of a 'race to the