



EMPLOYMENT TRIBUNALS

Claimant: Mr R Wagener

Respondent: The Cabinet Office

HELD AT: Liverpool

9 October 2012

ON:

BEFORE: Employment Judge Ryan

REPRESENTATION:

Claimant: In person

Respondent: Mr M Gullick, Counsel

PRE-HEARING REVIEW JUDGMENT

The judgment of the tribunal is that:

1. The claimant has little prospect of proving his contentions that:
 1. The respondent's retirement and pension provisions put him at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and/or
 2. That there is/are some reasonable adjustment(s) that could be made to avoid any such disadvantage.
2. The claimant will therefore be ordered to pay a deposit of £750.00 in order to continue with proceedings and a formal Deposit Order will be sent to him forthwith.

REASONS

1. The claimant's claim is one of a failure to make reasonable adjustments and the questions to be decided are whether or not he has a reasonable, little reasonable or no reasonable prospect of success and therefore whether I should permit him to continue with the claim with or without the payment of a deposit, or alternatively whether it should be struck out.

2. In such a case there must have been a provision, criterion or practice (PCP) that put, the claimant, as a disabled person, at a substantial disadvantage in respect of a relevant matter in comparison with a non-disabled person; in such circumstances a duty would arise for the respondent to take such steps as is reasonable to avoid that disadvantage.

3. I am not here finding facts determinative of the substantive claim and response; I have not heard evidence; I am just considering the legal principles and the claimant's prospects.

4. The claimant is currently aged 51 years of age and he has Type 1 Diabetes. He says that his life expectancy is reduced by some eight years as a consequence of this condition; that the average male life expectancy in the United Kingdom is 78; that his life expectancy is thus reduced to 70 years

5. The claimant says that there was an applicable provision, criterion or practice in relation to the operation of his Occupational Pension Scheme such that he would have to work to age 60 to get a full pension and 65 to get a maximum pension. He says that the substantial disadvantage of which he complains is that if he is required to work to age 65 to get maximum pension and benefits, and whilst he may be expected to reach that age, he would have a reduced period of retirement on the best pension terms, that is he would only benefit from years aged 65 to 70 and not age 65 to average UK life expectancy of 78. He contends that this is a substantial disadvantage giving rise to the duty on the respondent to make adjustments. The claimant says that just as added years may be granted and additional contributions allowed by a beneficiary so too the respondent could have exercised its discretion in some way to allow him to take maximum benefits from the scheme earlier than his 65th birthday, which he says would be a reasonable adjustment. He should, he says, be able to enjoy maximum benefit under the scheme from age 57 years such that by reference to life expectancies he could avail of his pension benefits for thirteen years as would any other beneficiary who did not have his condition.

6. A jurisdictional point is also being raised by the respondent which may be argued fully at the Hearing. Schedule 22 paragraph 1 to the Equality Act provides, in short, that there is no unlawful discrimination where an employer acts pursuant to a requirement of an enactment or a relevant requirement or condition imposed by an enactment; the respondent says that that the

Superannuation Act 1972 governs the pension scheme in question. The claimant says that this only applies when an enactment requires certain action, saying one must do a certain thing; that whilst there are some requirements there is also some leeway in "special" or other circumstances.

7. At the Hearing the tribunal may find that the claimant's situation is "special" or that this is not a consideration in this context. The claimant was not fully prepared to argue the point and produced at short notice part of a document from which he quoted and which he relied upon to suggest that the criteria to establish, or need for, "special" circumstances had altered. I was not satisfied that this jurisdictional point and the documentation relied upon by the claimant was properly prepared for by the claimant who appeared in person. I was not prepared to find that the tribunal has no jurisdiction today to consider the claim for the purposes of establishing whether the claimant has no, little or reasonable prospects at a full Hearing and this jurisdictional point remains in issue.

8. I consider that a tribunal may accept jurisdiction to hear claims under the scheme notwithstanding the respondent's contention that it is merely complying with its rules (as that is something to be ascertained). I consider however that the claimant has some, but little prospect of proving that the tribunal has jurisdiction to consider the exact point that he argues concerning a demand for an adjustment to allow him to take retirement on maximum pension benefit at age 57 rather than at age 65. This is however open to further argument at any subsequent merits Hearing.

9. The steps that the claimant is suggesting as adjustments may or may not remove or avoid a disadvantage and taking those steps may or may not be reasonable; the respondent may or may not be able by law to make the requested adjustment; I have not heard evidence on those points. I am prepared today to consider the agenda item of reasonable prospects of success without having to comment on the merits of the jurisdictional issue beyond that at this point.

10. So, accepting jurisdiction for the purposes of today's hearing only, I have to consider whether the claimant has reasonable, little or no prospect of succeeding to prove the essential elements of the claim (in addition to his eventually establishing that the tribunal has jurisdiction).

11. The first question as regards the merits of the claim is whether there is a PCP? There are rules regarding pension entitlement amounting to conditions and there are criteria for assessment.

12. Can the claimant identify people who do not have his disability, Type 1 Diabetes, who are subject to the same PCP? Clearly the claimant will be able to identify non-disabled comparators.

13. Has the claimant been put to a substantial disadvantage? The disadvantage he says is based on the current expectation of his reduced period of retirement with maximum pension; so he is not suffering a disadvantage in the workplace at present other than his understandable concern about this. His

disadvantage is anticipated; it is anticipated based on a current prognosis based on his current health situation and even then measured against an average life expectancy in the United Kingdom. Factors may change; the claimant's health may alter; his treatment may alter; the available treatments may alter; therefore his prognosis and life expectancy may alter as may the average life expectancy of males in the United Kingdom. To an extent some of the variables are within the claimant's control (lifestyle choices and acceptance or rejection of proposed treatments). He may not, in the long run, have a shortened period of retirement, shorter than to the average life expectancy, which is obviously to be hoped.

14. Is the suggested adjustment reasonable? In view of the above the adjustment may have to be monitored and varied; there is a lot of uncertainty; uncertainty as to others in the workforce, many of whom may be disabled or not disabled persons and may yet have reduced life expectancies for any number of reasons. Many may not live to age 78, even those who are not recognised as being disabled persons within the statutory definition, and they then too may also receive less than maximum pension benefit for a period of thirteen years. As I have said, I am not making findings of fact binding any full merits Hearing; I am considering the factors relevant to my consideration.

15. There are many assumptions and many variable factors to establish an actual disadvantage or to assist in identifying what adjustment would be reasonable. However, the rules appear to allow for some variations in their operation, such as added years and special contributions; I do not know, because I have not heard evidence on it, whether any other variations suggested are possible or practicable.

16. The very fact that this subject matter is complex and the scope of the pension scheme and its regulation is extensive and far-reaching does not prevent further consideration, and it does not mean that the claimant could not succeed with his claim, although I have had to conclude and do conclude that he has little prospect.

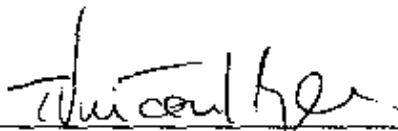
17. Under Rule 20 of the Rules where I find, as I find, that the claimant has little prospect of succeeding, I can order that he pay a deposit as a condition of being permitted to continue the proceedings subject to taking reasonable steps to ascertain his ability to make a payment. From the ET1 claim form I can see that the claimant has declared a net income of £34,997 per annum, which is a net monthly income of £2,916 and he has confirmed this income to me. He also confirmed that his wife is in paid employment working part-time hours and that they have two dependant children of primary school age. They own their house, subject to a mortgage, which has in excess of £20,000 equity in it; he has savings in excess of £2,000 available to him (which he described as "holiday money").

18. My judgment, based on both the jurisdictional and merits issues, is that the claimant has little prospect of succeeding in establishing his contentions that:

(1) the respondent's retirement and pension provisions put him at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and/or

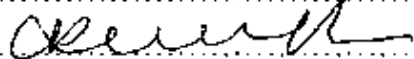
(2) that there is or are some reasonable adjustments that could be made to avoid any such disadvantage.

19. The claimant will pay a deposit of £750.00 as a condition of proceeding with his claim.


Employment Judge T.V. Ryan 23.10.12

JUDGMENT AND REASONS SENT TO THE PARTIES ON

30 October 2012



FOR THE SECRETARY OF THE TRIBUNALS

[TVR]



EMPLOYMENT TRIBUNALS

Claimant: Mr R Wagener

Respondent: The Cabinet Office

HELD AT: Liverpool

ON: 9 October 2012

BEFORE: Employment Judge Ryan

REPRESENTATION:

Claimant: In person

Respondent: Mr M Gullick, Counsel

DEPOSIT ORDER

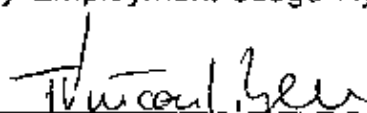
The Employment Judge considers that the claimant's contentions:

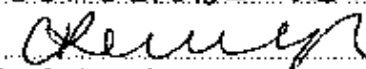
(1) the respondent's retirement and pension provisions put him at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and/or

(2) that there is or are some reasonable adjustments that could be made to avoid any such disadvantage
have little reasonable prospect of success. The claimant is ORDERED to pay a deposit of £750.00 not later than 21 days from the date this Order is sent as a condition of being permitted to continue to take part in the proceedings relating to that matter. The Judge has taken account of any information available as to the claimant's ability to comply with the Order in determining the amount of the deposit.

GROUND

The grounds for the above Order are set out in the written reasons for the Pre-Hearing Review Judgment of 9th October signed by Employment Judge Ryan on 23rd October 2012.


Employment Judge T.V. Ryan
ORDER SENT TO THE PARTIES ON

30 October 2012

FOR THE SECRETARY OF EMPLOYMENT

Caseflow

Form ID: Correspondence



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