Neutral Citation Number: [2023] EWCA Civ 1351

Case No: CA-2023-000905

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
Mr Justice Zacaroli
[2023] EWHC 928 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2023

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
SIR LAUNCELOT HENDERSON

- -

Between :

DUNCAN CAMPBELL	**Appellant**
- and -	
NHS BUSINESS SERVICES AUTHORITY	**Respondent**

- -
- -

David Schmitz (instructed by **The Associate Law Firm**) for the A**ppellant**
Naomi Ling (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 31 October 2023

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Approved Judgment

This judgment was handed down remotely at 12 noon on 16 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal is concerned with the proper construction of the regulations governing the National Health Service Pension Scheme, 1995 section (the "1995 Scheme") and, in particular, the construction and application of Regulation E2A of the National Health Service Pension Scheme Regulations 1995/300 (the "1995 Regulations").

2. The appeal arises out of a complaint made to the Pensions Ombudsman by the Appellant, Mr Campbell, in his capacity as the administrator of his wife's estate. The complaint was that both the Respondent to this appeal, NHS Business Services Authority, ("NHS BSA") and the South Tyneside NHS Foundation Trust (the "Trust") mishandled Mrs Denise Campbell's application for commuted tier 2 ill health retirement benefits.

3. By a determination dated 29 April 2022 and numbered CAS-43833-N8K7 (the "Determination"), the Pensions Ombudsman dismissed the complaint on the basis that taking into account her outstanding annual leave, Mrs Campbell had died in service because she was treated as being in pensionable employment with the NHS until 20 June 2018 which was after she had died. The Pensions Ombudsman did not go on, therefore, to consider Mr Campbell's other head of complaint which had been that NHS BSA had refused to authorise payment of commuted ill health benefits in relation to his wife on the basis that Regulation T1 had not been met because Form AW8 had not been received by NHS BSA prior to Mrs Campbell's death. The Pensions Ombudsman noted that as he did not consider that Mrs Campbell had become entitled to Tier 2 benefits before she died, any failure concerning the completion and/or submission of Form AW8 had not affected that entitlement.

4. Mr Campbell appealed the Pensions Ombudsman's Determination to the High Court. The appeal relating to the Trust was compromised during that hearing. As a result, Zacaroli J made no more mention of it and accordingly, the Trust has taken no part in the appeal before us.

5. By an order dated 4 May 2023, Zacaroli J dismissed the appeal against the Determination. At [59] of his careful judgment, he concluded that the Pensions Ombudsman was correct to decide that Mrs Campbell's pensionable employment was to be treated, for the purposes of Regulation E2A, as having continued until the expiry of an additional period in lieu of her untaken leave, so that she was to be treated as having died whilst still in pensionable employment within Regulation F1 as opposed to having retired from pensionable employment within Regulation E2A.

6. At [15] of his judgment, the judge explained that although both heads of complaint were raised before him (both (i) the proper construction of the 1995 Regulations in the circumstances and (ii) the way in which the relevant forms had been dealt with), since the hearing NHS BSA had withdrawn its objection based upon Regulation T1. He recorded their position as being that if the appeal on the matter of the construction of Regulation E2A was upheld, then a claim could be made by Mr Campbell on a different form and commuted ill-health benefits would then be paid to Mrs Campbell's estate. As a result, the judge did not address the Regulation T1/Form AW8 issue.

Background in more detail

7. The detailed background to this matter is set out at [3] – [15] of the judgment and reference should be made to those paragraphs. Suffice it to say for the purposes of this appeal that Mrs Campbell was employed by the Trust. Her employment by the NHS had commenced in May 1989 and she was a member of the 1995 Scheme. In early 2018, she was informed that she had limited life expectancy and as a result, on 26 May 2018, she submitted an application to commute ill health retirement benefits and sought a lump sum payment. On 30 May 2018, a Form AW33E (consideration of entitlement to ill health retirement benefits) was submitted on her behalf and the following day, Ms Atkinson, the Head of Employee Relations for the Trust, wrote to Mrs Campbell informing her as follows:

> "I have no alternative but to terminate your employment ... on the grounds of capability due to ill health with effect from 31 May 2018. You are entitled to receive 12 weeks pay in lieu of notice which will be paid as a lump sum at the end of June 2018. You will also be paid for any outstanding annual leave which equates to 5.5 days for 18/19 and 10 days from 17/18; this will be paid as part of your final salary at the end of June 2018."

8. On 3 June 2018, Ms Atkinson was informed that Mrs Campbell's application for ill-health retirement benefits had been approved at Tier 2 and that a Form AW8 should be forwarded and completed as soon as possible. Unfortunately, Mrs Campbell died on 6 June 2018 before Form AW8 was completed. She was 51.

9. Having initially given other reasons for being unable to authorise the payment of commuted ill health benefits, in June 2019, NHS BSA gave two reasons for refusing to do so. They were: (i) that the last day of Mrs Campbell's employment, taking into account her outstanding annual leave, was 20 June 2018 and that accordingly, she had died in service; and (ii) the requirements of Regulation T1 had not been met because Form AW8 had not been received before her death.

10. The judge's interpretation of the 1995 Regulations has a stark effect upon the benefits payable from the 1995 Scheme. In her skeleton argument on behalf of NHS BSA, Ms Ling contrasted what NHS BSA considers to be the difference between the death in service benefits payable to Mrs Campbell's estate and the commuted ill health benefits which she had requested:

> <u>Death in Service Benefits</u>
>
> Lump sum on death = £139,019.92
>
> Initial survivor pension payable for 6 months = £5,936.91 per month. Total payable £35,621.46
>
> Continuing survivor pension payable when initial pension stops at £14,660.92 per annum
>
> <u>Commuted Ill Health Benefits</u>
>
> Commuted lump sum = £274,887.72

> Initial survivor pension payable for 6 months = £2,443.48 per month. Total payable £14,660.92
>
> Continuing survivor pension payable when initial pension stops at £14,660.92 per annum.

Judge's reasoning in more detail

11. The judge rejected the distinction made by the Pensions Ombudsman between retirement from "employment" and from "pensionable employment" for the purposes of Regulation E2A. He considered that the only retirement which was contemplated by that regulation is a retirement from pensionable employment [35] – [37]. In particular, he stated that:

> "35. I do not think, however, there is any distinction being drawn in Regulation E2A between retirement from employment and retirement from pensionable employment. In my judgment, Regulation E2A is only concerned with retirement from "pensionable employment". It is only where a member retires from "pensionable employment" that (by para (1)) the Regulation applies at all and (by para (2)) an entitlement to a pension under the Regulation arises. The Regulation does not in fact refer to *retirement* from *employment* at all. The only reference to "employment" (as opposed to pensionable employment) is in para (2)(b), where two additional requirements are set out which entitle a member who has retired from pensionable employment to a pension. The first imposes a requirement as to the minimum length of qualifying service. The second imposes a requirement as to the reason for terminating the employment of the member, namely that it must have been terminated "<u>because of</u> physical or mental infirmity as a result of which the member is either permanently incapable of efficiently discharging the duties of that employment or of regular employment of like duration.
>
> 36. In other words, para (2)(b) is not imposing a requirement that the member's "employment" was terminated per se, but is imposing a requirement — in relation to a member who has retired from pensionable employment — that such retirement was as a result of their employment being terminated on grounds of physical or mental infirmity leading to one or other of the outcomes in (2)(b)(i) or (ii).

He went on to hold that it did not follow, however, that the Pensions Ombudsman was wrong to conclude that the extended definition of pensionable employment in Regulation C2(5) applies to Regulation E2A(1). He stated:

> "38. . . If, as I have concluded, the only concept of retirement used in that Regulation [E2A(1)] is retirement from "pensionable employment", the question still remains as to whether the extended meaning of that term in Regulation C2(5) applies to the question whether someone has retired from "pensionable employment" within Regulation E2A(1) and (2)."

12. The judge also noted the circumstances in which the deeming provision in relation to pensionable employment in Regulation C2(5) applies for other purposes in other parts of the 1995 Regulations ([47] –[49]) and stated at [50] that there was force in the point that the 1995 Regulations as a whole "create a mutually exclusive distinction between the period or periods when members are contributing to the 1995 Scheme and the period or periods when they are receiving benefits under it". He also stated at [52] that it is pertinent that Regulation C2(5)(a) does not refer merely to the amount paid in respect of untaken leave being "pensionable pay" for the purposes of calculating entitlements, or otherwise merely refers to entitlement to a payment in lieu. He explained that:

> "It does so, instead, by extending the period of pensionable employment. Moreover, it does this, not by treating pensionable employment as being extended in the abstract, but by treating it as "continuing" for a period equal to the number of days of untaken leave. In other words, it adds on a period after the date the member actually left employment, in which the member is to be treated as still in pensionable employment."

For those reasons, he rejected Mr Schmitz's submission that Regulation C2(5) only extends the total amount of pension service and does not purport to alter the date on which any event is deemed to have occurred. He added:

> "53. . . On the contrary, in my view, by "continuing" the member's pensionable employment for a further period, Regulation C2(5) necessarily alters the date on which that pensionable employment is treated as coming to an end."

13. The judge went on to state that he did not consider it counter-intuitive that if two people retire on the same day, one with untaken leave and the other without it, the payment of the pension of the first will be delayed whereas the second will received a pension immediately. The answer, he concluded, was that the 1995 Scheme operates on the basis of a definition of pensionable employment which continues beyond the date of actual retirement in the case of the first member, but not the second [55].

14. He agreed with the Pensions Ombudsman that there was something illogical about a member receiving both a salary for a particular period of time in respect of which contributions are payable to the 1995 Scheme and at the same time being entitled to receive a pension in respect of the same period based, in part, upon the contributions made during it [56]. He also drew a distinction between "leaving" pensionable employment and the concept of "retiring" from pensionable employment with which Regulation E2A is concerned and concluded that:

> "58. . . . I see nothing illogical in the Regulations treating retirement from pensionable employment as a term of art which is capable of occurring at a different time from the time at which, in fact, the member leaves pensionable employment, or even occurring after the time that the member has died."

15. As I have already mentioned, he concluded, therefore, that the Pensions Ombudsman was correct and that Mrs Campbell's pensionable employment is treated as having continued until the expiry of the additional period in lieu of untaken leave so that she is treated as having died whilst still in pensionable employment within Regulation F1 rather than as having retired from pensionable employment within Regulation E2A [59].

Grounds of Appeal

16. The grounds of appeal are in narrative form. In essence, they raise two issues. The first relates to the proper interpretation of Regulation E2A. The second arises if the first ground is successful and is that Mrs Campbell's entitlement to pension benefits accrued on her retirement, without the need for a form AW8 to have been submitted because upon a proper interpretation of Regulation T1, the entitlement to benefits is not contingent upon the submission of the form.

17. In relation to the first issue it is said that in holding that Mrs Campbell had not retired from pensionable employment at the date of her death, the judge erred in law because he should have held that in Regulation E2A(1) the words "[T]his regulation applies to a member who – retires from pensionable employment . . ." require no more than that the member should have retired in the ordinary sense of having ceased to work and that the member should have been in "pensionable employment" as defined in Regulation A2. He did so as a result of further errors of law in relation to the interpretation applied to the phrase "treated as continuing" in Regulation C2(5) and the proper interpretation of "retire" and "retirement" in Regulation E2A. He ought to have held that the effect of C2(5) was not to delay the date of retirement for the purposes of Regulation E2A, but instead, only to extend the total amount of the member's pensionable service and that "retire" and "retirement" should bear their ordinary and natural meaning of having stopped working.

18. It is also said that the judge should have found that there was nothing illogical in the payment of salary and of pension during a run-off period at the end of employment and that the judge further erred in law in relying upon Regulation S1 as an aid to construing Regulation E2A and in construing Regulation S1 as preventing the receipt of pension benefits and earning salary from taking place simultaneously.

Relevant 1995 Regulations

19. Regulation E2A is at the heart of this appeal. It is headed "Ill health pension on early retirement". Where relevant, Regulation E2A(1) provides that the regulation:

> "(1) . . . applies to a member who—
>
> (a) retires from pensionable employment on or after 1st April 2008;

> (b) did not submit Form AW33E (or such other form as the Secretary of State accepted) together with supporting medical evidence if not included in the form pursuant to regulation E2 which was received by the Secretary of State before 1 April 2008, and
>
> (c) is not in receipt of a pension under regulation E2."

Regulation E2A(2) then provides that:

> "(2) A member to whom this regulation applies who retires from pensionable employment before normal benefit age shall be entitled to a pension under this regulation if—
>
> (a) the member has at least 2 years qualifying service or qualifies for a pension under regulation El; and
>
> (b) the member's employment is terminated because of physical or mental infirmity as a result of which the member is—
>
> (i) permanently incapable of efficiently discharging the duties of that employment (the "tier 1 condition"); or
>
> (ii) permanently incapable of regular employment of like duration (the "tier 2 condition") in addition to meeting the tier 1 condition."

Regulation A2 is entitled "Interpretation". In particular, it is relevant to note that "pensionable employment" is defined as "NHS employment in respect of which the member contributes to the Scheme . . ." and that "pensionable pay" is stated to have the meaning given to it in Regulation C1.

20. Where relevant, Regulation C1(1) provides that in the 1995 Regulations, subject to the provisions of regulation C1 itself, "pensionable pay" means:

> "all salary, wages, fees and other regular payments made to a member in respect of pensionable employment as an officer, but does not include bonuses, pay awards and pay increases that are expressed by the Secretary of State to be non-consolidated, payments made to cover expenses or payments for overtime".

Regulation C2 is headed "Meaning of 'pensionable service':

> "(1) In these Regulations, "*pensionable service*" is service which counts both for the purpose of ascertaining entitlement to benefits under these Regulations and for the purpose of calculating them and means, subject to paragraph (2), the aggregate of the following –

> (a) any period of pensionable employment in respect of which the member contributes to this Section of the scheme under regulation D1 (contributions by members)..."

21. Regulation C2(5) provides as follows:

> "(5) If, when a member leaves pensionable employment or dies, a payment is made in respect of leave not taken—
>
> (a) the member's pensionable employment will be treated, subject to paragraph (3), as continuing for a period equal to the period of leave for which payment is made; and
>
> (b) the payment will be treated as the member's pensionable pay for that period."

In summary, regulation C2(3), which is referred to at Regulation C2(5)(a), states that benefits will be calculated by reference to a maximum of 45 years' pensionable service in the case of a member who is not a special class officer and if pensionable service exceeds the limits, the amount of the excess will be ignored.

22. Regulation D1(1) provides that each member in pensionable employment must contribute to the relevant section of the Scheme in accordance with rates set out in the following paragraphs of that regulation.

23. Regulation S1 is headed "Suspension of pension on return to NHS employment". It is concerned with the circumstances in which a member who is in receipt of a pension, within one month, re-enters NHS employment for more than 16 hours per week. In such circumstances the pension ceases to be payable (Regulation S1(3)) but may become payable once more if the member ceases to be in NHS employment or reduces their hours below 16 hours per week for a period of one month, or if sooner, from the date of the member's 70th birthday if the pension is payable before 31 March 2008, or their 75th birthday if the pension becomes payable after that date (Regulation S1(4)(a) and (b)).

Our decision and reasons

24. At the end of the hearing, we informed counsel that we would dismiss the appeal and provide written reasons for having done so. These are those reasons.

25. It is necessary to interpret Regulation E2A and Regulation C2(5) in the context of the 1995 Regulations as a whole. Once viewed in that light, it seems to us that the proper interpretation and application of Regulations E2A(2) and C2(5) in Mrs Campbell's circumstances are clear.

26. As the judge pointed out, Regulation E2A(1) applies where a member "retires from pensionable employment" on or after 1 April 2008 (Regulation E2A(1)(a)) in circumstances in which Regulation E2A(1)(b) and (c) are also satisfied.

27. Mr Schmitz, who appeared on behalf of Mr Campbell, pointed out that "retires" and "retirement" are not defined terms for the purposes of the 1995 Regulations and emphasised what he described as the "potency" of the natural and ordinary meaning of

the word "retires" in Regulation E2A. He says that Mrs Campbell quite clearly retired in the ordinary sense of the word before she died and that her employment had been terminated.

28. He referred us to *R (PACCAR Inc & Ors) v Competition Appeal Tribunal & Ors* [2023] UKSC 28, [2023] 1 WLR 2594 at [48] and [49] in this regard. In that case, the Supreme Court was concerned with the meaning of "claims management services" within the meaning of section 58AA(3) of the Courts and Legal Services Act 1990 and the definition in section 4 of the Compensation Act 2006. Lord Sales JSC, with whom Lord Reed PSC, Lord Leggatt and Lord Stephens JJSC agreed, held amongst other things that the phrase "claims management services" had no established legal meaning nor any clear or generally accepted meaning in ordinary parlance which was capable of exerting any significant potency in terms of qualifying the ordinary words used by Parliament in section 4(2) and 4(3) of the 2006 Act. He stated at [48] that:

> "In an appropriate case "the potency of the term defined" may provide some guidance as to the meaning for that term as set out in a statutory definition. . . . Lord Hoffmann explained in *MacDonald v Dextra Accessories Ltd [2005] 4 All ER 107, para 18*, " a definition may give the words a meaning different from their ordinary meaning. But that does not meant that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean". I agree with Henderson LJ . . . that this principle is not confined to cases where there is an ambiguity in the terms of the definition, but means that when the definition is read as a whole the ordinary meaning of the word or phrase being defined forms part of the material which might potentially be used to throw light on the meaning of the definition. Whether and to what extent it does so depends on the circumstances and in particular on the terms of the legislation and the nature of the concept referred to by the word or phrase being defined."

29. This is not a case in which either "retires" or "retirement" is a defined term for the purposes of the 1995 Regulations and we are not concerned with whether such a definition should be given an extended or different meaning as a result of the word or words chosen by Parliament. The principle of the "potency of the term defined" is of little assistance, therefore. We are concerned with the ordinary and natural meaning of the word used in the context in which it arises.

30. It seems to us that Mr Schmitz seeks to divorce the use of "retires" from "pensionable employment" in Regulation E2A and from the structure and regime of the 1995 Scheme. Like the judge, we consider the phrase must be read and understood as a whole. The Regulation only applies to a member if they <u>retire from pensionable employment</u> (emphasis added). The relevant retirement is not retirement per se. It is retirement from <u>pensionable</u> employment. It is only in such a circumstance and where the further requirements of Regulation E2A(2) are satisfied, that the member becomes entitled to a pension under that Regulation.

31. Like the judge, we also consider that it is significant that "pensionable employment" is defined as NHS employment in respect of which the member contributes to the 1995 Scheme and that Regulation D1 states that each member in pensionable employment must contribute to the 1995 Scheme in accordance with rates set out in that regulation. This dovetails with Regulation C2(1) which defines "pensionable service" for the purposes of the Regulations as a whole, by reference to an aggregate of a number of things including "(a) any period of pensionable employment in respect of which the member contributes to [this Section of] the scheme under regulation D1 . . ." It is also significant that Regulation C2(1) provides that pensionable service is service which counts both for ascertaining entitlement to benefits and for calculating them, and not, as Mr Schmitz submitted, merely for the purposes of calculation.

32. The way in which untaken leave is dealt with fits into this framework. Regulation C2(5) provides that where a member "leaves pensionable employment or dies" pensionable employment is "treated" as continuing for the period of the leave for which payment is made and the payment will be treated as pensionable pay for that period (Regulation C2(5)(a) and (b)). As one might expect, the definition of "pensionable pay" in Regulation C1(1) includes "all salary, wages, fees and other regular payments made to a member in respect of pensionable employment . . ." (emphasis added) and (as already mentioned) Regulation D1 makes clear that each member in pensionable employment must contribute to the 1995 Scheme.

33. Mr Schmitz submitted that "treated . . . as" in Regulation C2(5) is weaker than if the drafter had used the word "deemed" and that as a result, Regulation C2(5) does not apply in all circumstances. It seems to us that to "treat" something as continuing is the same as to "deem" it to do so: *Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed* at para 17.8. This is also consistent with the approach taken in the Supreme Court in *Fowler v Revenue and Customs Commissioners* [2020] 1 WLR 2227 to which Mr Schmitz referred us.

34. In that case the Supreme Court considered the application of section 15 of the Income Tax (Trading and Other Income) Act 2005 in the context of a double taxation convention. Section 15(2) provides that divers working in the UK continental shelf sector of the North Sea are to be "treated for income tax purposes" as self-employed. Lord Briggs, with whom Lord Hodge DPSC, Lady Black, Lady Arden and Lord Hamblen JJSC agreed, described section 15(2) as a statutory deeming provision ([25]). He went on at [27] to consider what he described as useful but not conclusive dicta in reported authorities about the way in which, in general, such provisions should be interpreted and applied. He noted that the authorities include the following guidance:

> "(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
>
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real . . . "

We note that the Supreme Court was in no doubt that a statutory provision using the phrase "treated" for particular purposes should be approached as a deeming provision and we bear the guidance which Lord Briggs distilled from the authorities, firmly in mind.

35. It seems to us that the natural meaning of the words used in Regulation C2(5)(a), when read in context, is that pensionable employment is treated as "continuing" until the end of the period of untaken leave for which payment is made. As the judge pointed out, Regulation C2(5) does not merely increase "pensionable pay" by the amount paid in lieu of untaken leave. It extends the period of pensionable employment by treating it as "continuing". It states that it does so not only where the member leaves pensionable employment but even where the member dies. There can be no doubt, therefore, that the extent of the fiction created is broad. Furthermore, there is no limitation on the wording which might indicate that it is not intended to apply in the circumstances of early retirement on grounds of ill health as much as in any other situation contemplated in the 1995 Scheme.

36. The amount paid in lieu of untaken leave is treated as pensionable pay for the period by which the pensionable employment is treated as having been continued (Regulation C2(5)(b) and (a)) and as already noted, "pensionable pay" is defined as a variety of payments to the member "in respect of pensionable employment" in relation to which contributions are due.

37. We agree with the judge that, but for the limited circumstances which are catered for in Regulation S1, there is a natural dichotomy between the receipt of benefits and the payment of contributions to the 1995 Scheme. It seems odd that one should be in receipt of benefits whilst deemed to be in pensionable employment in relation to which contributions to the scheme are payable and by reference to which the benefits themselves are calculated. Regulation S1 does not alter that position. It relates to the circumstances in which within a month of a normal retirement pension, an early retirement pension with employer's consent or an early retirement pension with actuarial reduction or a preserved pension in certain circumstances becoming payable, the member returns to NHS employment for more than 16 hours a week. In those circumstances, as one might expect, the pension ceases to be payable (Regulation S1(3)). The pension becomes payable once more, however, if the member ceases to be in NHS employment or reduces the hours worked below 16 or attains the age of 70 or 75 depending upon whether the pension became payable before or after 1 April 2008. The circumstances in which a pensioner can receive an NHS pension and contribute to

the 1995 Scheme are very limited, therefore. In most circumstances, the pension attributable to previous pensionable employment and pensionable service will cease.

38. We also agree with the judge that there is nothing anomalous or unjust in a situation in which a person who retires early as a result of ill health, to whom Regulation C2(5) does not apply, will become entitled to pension benefits on retirement whereas a member to whom the regulation applies will not be deemed to have left pensionable employment and will be treated as continuing to be in receipt of pensionable pay until the period of untaken leave has expired.

39. We take full account of the fact that the effect of this interpretation and application of the 1995 Regulations produces a result which may appear harsh in Mrs Campbell's case. It is accepted, however, that there are circumstances in which these Regulations work to the member's advantage.

40. For all these reasons, we consider that the judge did not err in law in deciding that in the circumstances of this case, as a result of the effect of Regulation C2(5), Mrs Campbell's pensionable employment was treated as continuing until 20 June 2018 and therefore, despite her employment having terminated as a result of ill health, she had not retired from pensionable employment at the date of her death. She died whilst in pensionable employment. That is the ordinary and natural meaning of the clear words in the deeming provision in Regulation C2(5) which must be applied.

2nd Issue

41. Mr Schmitz submitted that it was important both for the purposes of the date from which interest would run and from a tax point of view to determine when the pension entitlement arose under Regulation E2A in this case. As we have decided that there was no such entitlement, this issue does not arise. In any event, neither the judge nor the Pensions Ombudsman decided the issue and accordingly, we are not in a position to do so.

Costs point

42. Lastly, Mr Schmitz sought to persuade us to vary the terms of the costs order made by Newey LJ when he gave permission to appeal. Newey LJ stated that in circumstances in which (a) it was agreed below that there should be no order as to costs; (b) the appeal raises an important point of principle; and (c) the appellant is of limited means, he considered it appropriate to make an order under CPR 52.19 limiting the appellant's costs exposure to £25,000. He went on: "Given, however, that (a) the appellant has an obvious personal interest in the litigation and (b) the point of principle has already been the subject of one appeal and a cogent decision from a High Court Judge, I do not consider it appropriate to limit the respondent's recoverable costs to zero, as the appellant asks."

43. Mr Schmitz pointed to a further deterioration in Mr Campbell's health since Newey LJ made his decision and his precarious financial position. He also emphasised that it was important to consider the meaning of the 1995 Regulations in circumstances of this kind and the Pensions Ombudsman had stated expressly that they were in need of review. Ms Ling did not resist the application strongly. It seems to us, nevertheless, that matters have not changed sufficiently to warrant a variation of Newey LJ's order.

44. The appeal is dismissed for the reasons set out above.

Sir Launcelot Henderson:

45. I agree.

Lord Justice Lewison:

46. I also agree.