EMPLOYMENT TRIBUNALS

Claimant: Mr A Brunt

Respondents: Pochin Construction Limited

HELD AT: Manchester **ON:** 6 Feb 2017
7 Feb 2017
8 Feb 2017
(In Chambers)

BEFORE: Employment Judge Howard
Mrs B Radcliffe
Dr H Vahramian

REPRESENTATION:

Claimant: Mr K McNerney, Counsel
Respondent: Mr J Milford, Counsel

JUDGMENT

The claimant's claims of disability discrimination pursuant to Sections 15, 19, 20, 21, and 39 of the Equality Act and of age discrimination pursuant to Sections 13, 19 and 39 of the Equality Act 2010 and for unlawful deduction from wages pursuant to the Provisions of Part II of the Employment Rights Act 1996 are not well founded and are dismissed.

REASONS

1. The Tribunal heard evidence from the claimant and in support of the respondent's case from James Nicholson, Chief Executive, and Roger Berry, formerly Insurance and Pensions Manager. With the consent of both parties, the Tribunal admitted a witness statement from Nigel Rawlings, Finance Director, the contents of which was not challenged by the claimant.

2. During the course of the hearing the Tribunal was referred to documents contained within an agreed bundle.

3. At the outset of the hearing the Tribunal confirmed with the parties that the issues to be determined were as referred to at the Preliminary Hearing on 25th August 2016 as laid out in the agreed list of 24th August, save that the respondent has now conceded that the claimant was a disabled person at the relevant time for the purposes of his claim of disability discrimination.

4. In summary, the claimant's claims were as follows:

4.1 S15 Discrimination arising from disability:

(1) The unfavourably treatment relied upon by the claimant was; (i) not being allowed to join the UNUM PHI scheme from November 2006 or (ii) not being provided with alternative cover that would have paid both salary and pension contributions until his NRA of 65
(2) In the event that the claimant had been treated unfavourably arising from his disability, the respondent relied upon the legitimate aim of ensuring employees were afforded financial protection against the consequences of long-term absence form work, within a reasonable costs envelope.

4.2 S20 Failure to make Reasonable Adjustments:

(1) The PCPs relied upon by the claimant were; (i) that the claimant must not already be in receipt of PHI benefits to be eligible for entry to the new PHI scheme and/or (ii) the claimant must be in work and not absent in order to be eligible for entry to the new PHI scheme
(2) The adjustments contended for were; (i) seeking an amendment to the existing PHI scheme to provide cover to a normal retirement age of 65; and/or (ii) making pension contributions so that the claimant could retire at 60 on an unreduced pension; and/or (iiii) obtaining cover of PHI benefits from age 60 – 65.

4.3 S19 Indirect Discrimination – disability and/or age

(1) The PCPs relied upon by the claimant in placing him and other disabled persons/persons aged over 50 at a disadvantage were those laid out above
(2) The legitimate aim relied upon by the respondent was that laid out above

4.4 S13 Direct age discrimination

(1) The claimant asserted that he had been treated less favourably because of his age by the following; (i) stopping PHI payments; (ii) not replacing PHI payments with payments directly from the respondent; (iii) not allowing the claimant to join the new PHI scheme; (iv) not making alternative arrangements to cover the loss of PHI benefits.

4.5 Unlawful deduction from wages

The claimant asserted that he had a contractual right to receive PHI benefits until his normal retirement age of 65 years. He contended that such a right

arose from (i) under his original contract of employment, or (ii) as a result of a variation to that contract effective by a conversation and correspondence between him and Mr Berry of the respondent

4.6 Jurisdiction

Were the claimant's claims brought within the relevant statutory time limits?

5. The Employment Judge explored with the claimant whether he might require any adjustments during the course of the hearing to accommodate his disability. Save that he might require further time and breaks whilst giving his evidence, the claimant indicated that no adjustments were required.

The findings of fact relevant to the issues.

6. There was little in the way of factual dispute in this case; the background to the claimant's claims are as follows:

7. The claimant commenced employment with the respondent on 16th October 1978, becoming a Director on 1st August 1994 and has been continuously employed by the respondent ever since. The claimant has suffered from ME/CFS and consequent depression for many years. His condition was such that by February 1997 he was unable to work and he commenced a period of absence which, with the exception of a couple of occasions when he attempted a return to work, has extended to the present day. The claimant's health difficulties have been further exacerbated by a diagnosis of kidney cancer in recent years.

8. It was evident and was endorsed by the respondent's witnesses that the claimant has had a long struggle with prolonged illness and has taken a wide range of steps to return to work but his ill health has precluded him from doing so successfully thus far. The claimant accepts that the respondent has been very supportive to him during the course of his illness and it was apparent that the parties had worked together over the years to try and improve his prospects of a successful return.

9. In 1996 the respondent took out a group permanent health insurance (PHI) policy with Sun Life Assurance of Canada which provided health insurance to all the respondent's employees, including the claimant, in accordance with the terms of that policy.

10. The respondent also provided a contributory pension scheme; *'the Pochin's and Associated Companies' Retirement Benefits Plan'* (the Plan). The claimant was a member of the *'Senior Staff'* category of the Plan; the entitlements under the *'senior staff'* category were generally more generous than those of the *'Ordinary Members'* category.

11. Under the terms of the Plan, the normal retirement age for directors of the respondent – the retirement age at which directors were entitled to receive a full pension - was 60. This was in contrast to all other employees of the respondent whose normal retirement age under the terms of the Plan was 65.

12. To reflect that earlier normal retirement age of 60, the PHI scheme provided for the payment of benefits for director members to cease at age 60; as follows;

> *"cessation age means*
>
> *(i) in respect of director members and in the case of female members those who joined the scheme prior to the 1st November 1990, age 60, and*
>
> *(ii) in respect of all other members age 65".*

13. Under the terms of the PHI scheme, directors who qualified for benefits received payments equal to 75% of *"assurable earnings"* as opposed to 50% for other employees. *"Incapacity"* was defined as *"a condition whereby that member is totally unable by reason of illness or injury to follow the members occupational and is not following any other and incapacitated shall be construed accordingly".* A guaranteed increase of 5% per annum upon *'assurable earnings'* applied to benefit payments.

14. As a consequence of his inability to work through his ill health, the claimant was granted PHI benefits under the terms of the Sun Life scheme from 7th August 1997. With the exception of a short period when his claim was disputed by the scheme administrators, (the circumstances of which are not relevant to these proceedings), the claimant received PHI benefit of 75% of his income, increased annually by 5% for the following 17 years, up until his 60th birthday on 22nd June 2015 when those payments ceased, by which time he was receiving PHI benefit payments of £87,095.00, per annum.

15. On the 28th May 1999, the claimant resigned as a director of the respondent; as a pre-existing beneficiary under the scheme he continued to receive PHI payments on the same terms.

16. In 2003 the Sun Life Scheme was taken over by new administrators UNUM; the terms of the scheme remained unaffected.

17. As Mr Nicholson explained in evidence, in response to the introduction of age discrimination legislation in 2006, the respondent took steps to harmonise employees normal retirement ages and made changes to the Pension Plan and group policies which differentiated between employees on the basis of age. As a result, the respondent raised the normal retirement age for directors to 65 and whilst directors were still able to take their pension from 60, that would be reflected in a reduced pension amount to reflect the distance from the increased normal retirement age.

18. At the same time the respondent entered into a new group PHI scheme with UNUM which specified a universal *"cessation age"* of 65 for all employees, including directors. Under the terms of the Sun Life Scheme the conditions of the policy at the date of the commencement of the claimant's incapacity (i.e. August 1997) continued to determine his benefit.

19. In order to be eligible for the new UNUM scheme; at clause 4.1, the scheme provides the following;

"an employee becomes a member on the effective date upon which all the following conditions are met as well as those set out in the eligibility category within the schedule

(a) he is actively at work;

(b) he is ordinarily employed in the United Kingdom;

20. *'Actively at work'* under the terms of the scheme is defined as *"an individual who is actively following his insured occupational working a normal number of hours required in his insured occupational at his normal place of business …".*

21. It was common ground that the claimant has not been *'actively working'* since the commencement of that policy in October 2006, to date and hence is not currently eligible for membership. However as Mr Berry confirmed in evidence, were the claimant, at any point up to his 65th birthday, able to satisfy the eligibility criteria by returning to work so as to be *'actively at work'*, he would thereafter be entitled to membership of the scheme, and to claim benefit, in the same way as all other eligible employees of the respondent, providing he met any other requirements of the scheme.

22. On 27th July 2006, the respondent wrote to all employees and members of the pension Plan laying out proposed changes and seeking signed consent. In response to a rising pension deficit of £4½ million and difficult trading conditions, the accrual rate for the directors' pension was to be increased from 1/45 to 1/60.

23. A query form was provided for scheme members to raise any issues. The claimant submitted a query as follows *"my (and other current directors') health insurance stops at 60. In my case where the cover is active how will the period between 60 and 65 be covered?"*. Mr Berry took advice on the claimant's query and drafted a reply as follows *"this situation is unique to you and as a consequence the company trustees will need to investigate the options and take detailed advice in order to arrive at an equitable solution that will be discussed with you further".* That response was not, in fact, sent to the claimant but a telephone conversation took place between Mr Berry and the claimant about the issue. The claimant's recollection was that Mr Berry assured him that his PHI cover would extend to age 65.

24. The claimant signed and returned a consent form to the pension Plan changes on the 28th September 2006, noting on the form *"at the time of signing I have not received a written reply to my question (1) on the query form (Appendix 1) which asked how will the period between 60 and 65 be covered for health insurance as current policy stops at 60. However I telephoned Roger Berry on 26th September 2006 who advised me that it was going to be extended from 60 to 65 for those affected".*

25. Mr Berry's recollection was that he did not and would not have given such an explicit assurance, as this would have been inconsistent with his understanding of the position at the time, which was that as someone not *'actively in work'* the claimant was not entitled to claim benefits under the new PHI scheme at that time, but would continue to receive benefits as a pre-existing beneficiary in accordance with the terms of the old scheme. Further, Mr Berry explained that his role was to administer the mechanics of the PHI scheme but that he had no authority to dictate or amend its terms; that would be a matter for UNUM and the respondent's directors. Mr Berry pointed out that, as a former director himself, the claimant would be fully aware of the limitations of Mr Berry's role.

26. The claimant continued to raise the issue of his PHI cover if he continued to be unable to work after age 60, periodically over the following years. In August 2007 the claimant wrote to Mr Berry asking *"has anything happened about my illness cover between 60 and 65*?" raising the matter again in December 2007 and February 2008. In April 2009 he raised the issue again with the Business Strategy Director of Pochins Group, Mr Pochin, explaining that *"the cover has been extended for those affected but only for me if I return fit and well before 60 and then go off again"* and asking for clarification of his situation.

27. By letter of 20th May 2009 Mr Pochin responded that;

> *"I have therefore looked into this matter on your behalf and have been in contact with the insurance company who have stated the following; 'as Mr Brunt was not actively in work when the termination age of the policy was increased to 65 his benefit will cease on his 60th birthday which were the terms under the policy once he became an income protection claimant'.*
>
> *The cover provided under the policy is governed by the rules of the scheme at the time you went off sick in February 1997 and I can confirm that you have been a claimant under the policy since August 1997. I am sorry therefore that there is nothing further we can do in view of the rules of the scheme as highlighted by the insurance company".*

28. In December 2009, following a further period of consultation, the respondent ceased the 'final salary' pension plan and allowed members, including the claimant, to transfer to a 'money purchase' plan from 1st January 2010. It was not in dispute that this was done in response to an ongoing and increasingly substantial deficit in the pension plan.

29. On 11th February 2011 the claimant brought a grievance against the respondent and lodged a DDA Questionnaire. The claimant complained that *"prior to the change in NRA* [normal retirement age] *in October 2006, the cessation age for the PHI policy had been 60, the same as the NRA in the pension scheme, in October 2006 the NRA for the pension scheme was raised from 60 to 65 as a consequence of funding difficulties. At the same time it would appear that the cessation age of the PHI policy for those members of staff in work and who were not receiving benefits under the PHI policy, was also raised to 65. I believe that because I was receiving PHI benefits because I was disabled I have been treated less favourably than those colleagues who are in work and not currently receiving benefits under the PHI policy.*

I believe this amounts to direct discrimination, less favourable treatment for a disability related reason and/or a failure to carry out a reasonable adjustment so as to remove a substantial disadvantage to me".

30. Mr Berry made further enquiries about extending cover to the claimant and received a reply by email of the 14th February 2011 in which UNUM explained the position as follows *"as Mr Brunt has already been in claim which is due to cease when he turns 60 due to rules of that particular policy he is on, I am sorry to say it is not possible to set him up a new policy. The way income protection insurance works would not allow for a new claim to be made on a new policy covering time between the change in retirement age between 60 and 65 as his first day of absence was before the new policy came in to effect. For example, I have crashed my car can I insure it now, you wouldn't be able to take out a new car insurance policy and then make a claim on it after you have totalled your car. I have a few IP schemes where the companies changed the insurer over the year but if the employee's first day of absence occurs before the new policy starts then the claim would be set up against the old policy and not the new one".*

31. In the light of this advice from UNUM, the respondent replied to the Questionnaire, explaining that, since August 1997, the claimant had received PHI benefits in accordance with the terms of the scheme which had applied at the time that his claim was accepted and that; *"at the time of the change, enquiries were made as to the position of existing claimants under the scheme of which there were four claimants including yourself. The company was informed that existing claimants already in receipt of benefit under the scheme would remain under the policy as this was operative at the time the claimant was accepted. This advice has been confirmed subsequently on a number of occasions. You have also been informed of the position. In terms of introducing existing claimants in receipt of benefit into the new scheme, the company was informed that it was not possible to insure a person who would immediately become a claimant under the new scheme, such persons were uninsurable as, in effect, the cost of insurance would have to equate to the cost of benefit which the insurance company would be required to pay as benefit. Unfortunately you fell into this category of persons who are uninsurable because you were an existing claimant. The other existing claimants under the scheme remained entitled to the benefit under the scheme but not the new scheme". In respect of the other three existing claimants, as they were employees rather than directors, their cessation date had always been 65 and hence they did not face the same issue as the claimant.*

32. By letter of 20th July 2011, UNUM wrote to the claimant laying out the position as follows; *'I can confirm members are insured for the terms of the policy that are in force on the date the member becomes absent. At the time Mr Brunt became absent from work and subsequently a claimant, the terms of the policy had a terminal age of 60 therefore these are the terms that are applicable to Mr Brunt's claim. Any subsequent changes to the policy terms are not applicable to members who are already claimants at the time the changes take effect. Since Mr Brunt became a claimant there have been no new or amended policy terms commercially available to insure him. To benefit from any changes to the terms of the existing policy or be included in the new policy the member has to meet the eligibility criteria and*

conditions of membership. Mr Brunt does not qualify for either as he is a claimant and subsequently not actively at work".

33. The claimant raised the matter with the Trustees of the pension Plan in July 2012 and received a reply by letter of 9th August 2012 that; *"there is no record of any such conversation in Mr Berry's file nor does Mr Berry have any recollection of the alleged conversation. Given that this was a matter which could only be addressed and determined by the insurers and further, given that the response when it was received from the insurers was that such continued provision of benefit was not possible, the company believes that it is extremely unlikely that Mr Berry would make such a statement, which in any event cannot be binding on the company'.* The trustees pointed that PHI benefit was an employee benefit offered to members of the pension plan but separate to the pension plan and so was not a matter for the trustees in any event.

34. The Employment Tribunal found, having heard evidence from the claimant and from Mr Berry and having taken account of the subsequent correspondence, that Mr Berry gave, at most, a vague assurance that the claimant's position would be considered. In any event, even if the account of their conversation recorded by the claimant on the consent form was an entirely accurate reflection of what was said, it amounted to nothing more than an expression of a general intention that cessation age for the category of employees affected by the increase in pension age; i.e. directors, would be increased to 65 under the PHI scheme. It did not equate to a clear undertaking that continued payment of PHI benefit would be provided by the respondent for the claimant beyond the age of 60 up to the age of 65.

35. The fact that no such clear undertaking had been made to or agreed with the claimant is reflected in the fact that the claimant continued to press for precisely such a clear assurance over the subsequent years. Further the Tribunal accepted Mr Berry's contention that the claimant was aware of the limitations of his role, in particular that he would not have authority to give any such assurance or undertaking on the part of the respondent. It was clear to the Tribunal that the reference to *'extending cover from 60 to 65 of those affected'* simply referred to the extension of cover for the directors to coincide with the increase in their retirement age.

36. In accordance with the terms of the PHI scheme under which the claimant's was eligible, his benefit ceased on 22nd June 2015. The claimant had been provided with a pension valuation by the pension Plan administrators, JLT, on 25th March 2015 to the effect that if he were to take his pension immediately, at age 60; it would amount to £39,951 per annum, rising to £58,734 per annum if he were to take it at age 65.

37. On 30th June 2015, JLT wrote to the claimant informing him that under the terms of the pension plan, if the NRA for Directors had not changed from 60 to 65 on 1st November 2006, he would be entitled to a pension at aged 60 of £40,790, thereby creating a shortfall between the early retirement pension of £39,951and that to which he would have been entitled of £840 per annum.

38. The claimant lodged a further grievance by letter of 8th September 2015 alleging that he had been subjected to disability discrimination upon the cessation of PHI payments from the age of 60. Mr Nicholson attempted to resolve the claimant's grievance by offering to put the claimant in the position he would have been in, prior to the increase to the NRA of the pension Plan, by paying the shortfall of £840 per annum if the claimant began to take his pension aged 60. The claimant could then take his pension whilst remaining an employee. The claimant rejected this proposal and did not accept that £840 was an accurate reflection of his loss.

39. The Tribunal heard detailed evidence from Mr Nicholson, which was not disputed and which the Tribunal accepted, as to the burden that the claimant's demands would place on the respondent, in the context of a pension Plan in substantial deficit and the severe trading conditions facing the respondent at the time. As at 30th June 2016 the funding shortfall for the Plan was £7.65 million; a recovery plan had been agreed which incurred additional payments of £15,000 per month from the respondent.

40. The claimant was proposing that if PHI cover could not be obtained for him post 60, the respondent should pay him the amount of his ceased PHI benefit. As Mr Nicholson explained, this would place a disproportionate burden on the company and be unfair to the workforce, particularly given the difficult trading conditions caused by the recession and its impact on the company. As Mr Nicholson explained the respondent currently has 99 employees; almost half the number employed in 2006, following redundancies in 2008, 2009, 2010, 2011 and 2013 and further reductions in employee numbers through restructuring and not replacing those who had left. The cost to the respondent of providing the claimant with alternative cover; 'self funded'; between the ages of 60 and 65 would be over £400,000.00.

41. Mr Nicholson's explained that given that it was simply not possible to extend or obtain PHI cover for the claimant, in the circumstances; the significant financial burden that the claimant's alternative proposals would impose on the respondent, and in the light of the claimant's refusal of the offer to make up the annual pension shortfall, he rejected the claimant's grievance.

42. The claimant appealed against the grievance outcome which was considered by Mr Rawlings and upheld on the same grounds.

The Law

42. The relevant provisions of the Equality Act 2010, to which the Tribunal was referred by the parties were sections 13; Direct Discrimination; 15; Discrimination arising from disability; 19; Indirect Discrimination; 20 and 21; Duty to make adjustments; Failure to comply with duty and Employment Rights Act 1996, Part II; Unlawful Deduction from Wages.

43. The Tribunal reminded itself of the burden of proof provision found at S136 Equality Act; (2) *'if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision.'*

44. Both parties submitted detailed closing written submissions summarising the relevant case law and applying those principles to the issues and which were expanded upon in oral submissions. Respondent's counsel produced a comprehensive bundle of relevant authorities to complement his submission. It is not necessary to list all the authorities relied upon by both parties in this judgment. Of particular note was *Trustees of Swansea University Pension and Assurance Scheme v Williams* 2015 ICR 1197, which concerned the terms of an ill-health pension scheme. In that case, Langstaff J held that *'anyone who is permanently incapacitated so that they cannot work in the foreseeable future is disabled'* and that *'by comparison with any non disabled employee a former employee having taken ill-health retirement would be treated favourably as it was obviously the intention of the scheme to favour the disabled'*. Further, that treatment which is advantageous cannot be said to be *'unfavourable'* merely because it might be even more advantageous, or because it was insufficiently advantageous. The EAT's judgment in *O'Hanlon v HMRC* 2006 ICR 1579 provided helpful guidance on the purpose of making adjustments and the circumstances in which it arises; *'to assist the disabled to obtain employment and to integrate them into the workforce.'*

The Tribunal's conclusions

45 By reference to the agreed list of issues the Tribunal found as follows.

Disability Discrimination

Section 15 Discrimination arising from Disability

46 The claimant's claim was not submitted beyond the relevant time limit. The unfavourable treatment alleged arose when the claimant reached 60 and the benefit under the pre-existing scheme ceased. The respondent accepts that if that is the date from which time runs, the claim is not jurisdictionally barred.

47 The claimant was not treated unfavourably by the respondent by not being allowed to join the PHI scheme from November 2006 or not being provided with alternative PHI cover. The claimant, alongside all group employees, is entitled to membership of the scheme if he meets the eligibility requirements in accordance with the terms of the scheme, which currently he does not; even now the claimant can join the PHI scheme if he meets those requirements. It is the Trustees and managers of the scheme who determine applications for benefit under the scheme, not the respondent.

48 Indeed, the benefits that the claimant has received under the old scheme have been more valuable than that which he would have received under the new scheme or will receive if he becomes eligible. The claimant has received benefit at 75% of salary with an annual fixed increase of 5% per annum as compared to 50% of salary with an annual increase at RPI, capped at 5%, under the new scheme.

49 By virtue of his disability, the claimant received payment under the Sun Life scheme of 18 years' worth of benefit. The terms of both Sun Life and Unum require the individual to meet a definition of 'incapacity' which would effectively preclude any person who was not disabled from claiming benefit for such an extended period and

hence there is no actual or hypothetical non disabled comparator to whom the claimant can point who would have been treated more favourably than the claimant; such a person would not be eligible for benefit for an extended period, in the first place, under the terms of either scheme. The claimant now seeks further 'bespoke' PHI provision which would place him in a more favourable position than other beneficiaries of either group scheme and of any non-disabled employee who would not be eligible for PHI in the first place.

50 Further, and in any event, the respondent has put alternative provision in place by allowing the claimant to take full pension, without reduction for early retirement, at age 60, as had been envisaged under the terms of the Sun Life PHI policy, thereby ensuring that the claimant is not financially disadvantaged to any extent. The claimant is able to take his full pension and remain employed by the respondent.

51 The claimant was not treated unfavourably by not being allowed to join the UNUM scheme or not being provided with alternative PHI cover. Even if that did amount to unfavourable treatment, which the Tribunal found it did not, the Tribunal was satisfied that such treatment amounted to a proportional means of achieving a legitimate aim.

52 The Tribunal accepted the respondent's evidence that it aimed to ensure that employees who fell ill during their employment could be supported against long-term absence, within a reasonable costs budget. The means by which it secured that aim was entry into PHI arrangements in the terms of the Sun Life, then UNUM PHI schemes. The Tribunal was satisfied that the respondent's aim was a 'social policy objective' concerning the welfare of its workforce and was thus legitimate. Given the financial restraints on the respondent in difficult trading conditions and its commitment to ensuring fair provision of pension and other benefits to all its employees, the offer of allowing the claimant to take full pension, without reduction, was a proportionate means of achieving that legitimate aim. The claimant's assertion he should be provided with alternative cover would have placed a ruinous, unrealistic and disproportionate financial burden on the respondent of over £400,000.00.

53 There are no facts found by the Tribunal from which it could decide, in the absence of an alternative explanation, that the claimant has been subjected to unfavourable treatment. Even if such facts had been found, the Tribunal accepted the respondent's explanation for its actions as being entirely unconnected to the claimant's disability.

S21 Failure to make adjustments

54 The Tribunal was satisfied, following *O'Hanlon* that the duty to make adjustments does not arise in the circumstances of this claim. The claimant seeks a continuation of long term ill-health benefit or a financial equivalent. He is not seeking any accommodations or adjustments to assist him in returning to the workplace; indeed the contrary; he seeks financial support for his ongoing absence.

55. However, even if the duty arises, the PCPs identified by the claimant as placing him at a substantial disadvantage; that the claimant must not already be in receipt of PHI benefits to be eligible for entry to the new PHI scheme and/or the claimant must be in work and not absent in order to be eligible for entry to the new PHI scheme; were not, in fact, applied by the respondent. They are simply a reflection of the terms and eligibility requirements of the UNUM scheme and not the actions of the respondent. Further, for the reasons explained above, the claimant was not placed at a substantial disadvantaged by the application of the scheme terms to him by comparison with someone not disabled.

43. There are no facts found by the Tribunal from which it could decide, in the absence of an alternative explanation, that the claimant has been subjected to substantial disadvantage by a PCP applied by the respondent.

44. Even if there were facts from which the Tribunal could decide that the respondent had applied the PCPs alleged, to the claimant's substantial disadvantage; which the Tribunal found it had not; the adjustments contented for by the claimant were not reasonable.

45. The adjustments contended for were; (i) seeking an amendment to the existing PHI scheme to provide cover to a normal retirement age of 65; and/or (ii) making pension contributions so that the claimant could retire at 60 on an unreduced pension; and/or (ii) obtaining cover of PHI benefits from age 60 – 65. As the Tribunal accepted the respondent had explored all these options; options (i) and (iii) were simply not possible. Option (ii) had been offered by the respondent in allowing the claimant to take his pension from age 60 with no reduction.

S19 Indirect Disability Discrimination

46. As the Tribunal has found, the respondent did not apply the PCPs identified by the claimant and, in any event, the claimant was not placed at a particular disadvantage when compared to non- disabled employees of the respondent. Even had the claimant been put at such disadvantage, the Tribunal found that the respondent had showed that its treatment of the claimant was a proportionate means of achieving a legitimate aim for the reasons laid out above.

47 There are no facts found by the Tribunal from which it could decide, in the absence of an alternative explanation, that the claimant has been placed at a particular disadvantage by a PCP applied by the respondent.

Age Discrimination

S13 – Direct Age discrimination

46. For the purposes of his claims of age discrimination, the claimant identified his age group as 'employees over the age of 50' and compared himself to 'employees under the age of 50'.

47. The claimant asserted that he had been treated less favourably in that; his PHI payments were stopped; those payments were not replaced with payments

directly from the respondent; he was not allowed to join the UNUM scheme and no alternative arrangements were made to cover the loss of PHI benefits.

48. The respondent did not stop the claimant's PHI payments; those payments ceased when the claimant reached 60 in accordance with the terms of the scheme. That does not amount to unfavourable treatment.

49. The claimant was not refused access to the UNUM scheme by the respondent; he simply does not meet the eligibility criteria. Those criteria do not relate to age but whether the individual is actively in work. For the reasons explained by the respondent, the age threshold of the UNUM scheme was increased from 60 to 65 for all directors irrespective of their age.

50. The respondent's explanation for why putting alternative arrangements in place to continue the PHI payments after the claimant's 60th birthday was not feasible or economically viable was accepted by the Tribunal as being completely unrelated to the claimant's age. In any event, providing the claimant with those payments would have put the claimant in a significantly more favourable financial position than any of his fellow directors of whatever age, whose PHI benefits are determined by the terms of the PHI scheme.

51. There were no facts found by the Tribunal from which it could decide that the claimant had been treated less favourably because of his age. Even if such facts were found, the Tribunal accepted the respondent's explanations for its actions as entirely unconnected to the claimant's age.

S19 Indirect Age Discrimination

51. As the Tribunal has found, the respondent did not apply the PCPs identified by the claimant and, in any event, the claimant was not placed at a particular disadvantage when compared to younger employees of the respondent.

52. Save for pointing out that the other directors were all younger than him, the claimant produced no statistical or other evidence to support his contention that the PCPs relied upon placed those over 50, and him in particular at a particular disadvantage. Even had the claimant been put at such disadvantage, the Tribunal found that the respondent had showed that its treatment of the claimant was a proportionate means of achieving a legitimate aim for the reasons laid out above.

53. There are no facts found by the Tribunal from which it could decide, in the absence of an alternative explanation, that the claimant has been placed at a particular disadvantage by a PCP applied by the respondent.

Unlawful deduction from wages

54. There was no contractual entitlement for the claimant to receive PHI benefits until his NRA of 65. The claimant's contractual entitlement to PHI cover was pursuant to the terms of the Scheme of which he was a member and so his PHI payments ceased at age 60.

55. As the Tribunal found, Mr Berry did not enter into an agreement with the claimant to vary his contractual entitlement so as to extend benefit payments to age 65; nor, as the claimant was aware, did he have had the ostensible authority to bind the respondent into such an agreement.

56. Accordingly the claimant's claims of disability discrimination, age discrimination and unlawful deduction from wages are not well founded and are dismissed in their entirety.

Employment Judge Howard

15th March 2017

Judgment sent to the parties on

17 March 2017

FOR THE SECRETARY OF THE TRIBUNALS