



EMPLOYMENT TRIBUNALS

Claimant: Mr G Phillips

Respondent: Woodcote High School

Heard at: London South **On:** 3 and 4 January 2023

Before: Employment Judge Khalil (sitting with panel members)
Ms Y Batchelor
Ms C Chaudhuri

Appearances

For the claimant: in person

For the respondent: Mr Savla, Chair of Governors

JUDGMENT WITH REASONS

Unanimous Decision:

The claim for Age Discrimination under the Equality Act 2010 is not well founded and is dismissed.

Reasons

Claims, appearances and documents

1. This was a claim for Direct Age Discrimination under S.13/S.61 of the Equality Act 2010 ('EqA').
2. The claimant was in person, the respondent was represented by Mr Savla, Chair of the Governors.
3. The Tribunal had received an E-Bundle in 13 parts. Mr Savla had prepared a Witness Statement. The Claimant had not produced a Witness Statement and was Ordered to produce a Witness Statement by 10.00am on day 2 of the Hearing.

4. Owing to some confusion over the start time, the Hearing had not commenced until 1.00pm on day 1. The Tribunal spent considerable time to understand the claim before the Tribunal and the documents it had, or ought to have. For the avoidance of doubt, the claimant confirmed he had no claim for Equal Pay before the Tribunal or any other claim for Age Discrimination other than a direct discrimination claim based on the cessation of active membership of the scheme after his 75th birthday. He said his reference to harassment in his second claim was not pursued as he had already resolved this. No other claim for monies owed was also advanced by the claimant.
5. There had been a Case Management Hearing on 14 June 2022 which set down Orders in advance of this Hearing. The Case Management summary also recorded the Tribunal's understanding of the claim being pursued. The Summary was at electronic page 17, part 4 of the Bundle.
6. The claimant and Mr Savla were given an opportunity to question the evidence of each other by reference to the witness statements and the documents in the bundle. They also provided oral submissions to the Tribunal during the Hearing.

Relevant Findings of fact

7. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.
8. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant to an issue in the case.
9. The respondent is an Academy school funded by the Local Authority.
10. The claimant works as a cleaner for the respondent. He is still employed. On 29 July 2020, the claimant turned 75.
11. Upon turning 75, the claimant ceased to be a member of the respondent's Occupational Pension Scheme. This was pursuant to S. 4 (1) (b) of the Local Government Pension Scheme Regulations 2013 ('LGPS') which provides a maximum age of admission.

12. The claimant raised a grievance about the exclusion which was investigated by the respondent. The investigation was conducted by Mr Pratik Patel, Assistant Headteacher. The investigation report was at electronic page 19 in part 12.
13. Following a grievance Hearing on 16 December 2020, the grievance was rejected.
14. The claimant appealed against the outcome which was also rejected. The outcome letter dated 19 April 2021, from Clifford Taylor, Governor and Chair of the Appeal Panel, was at electronic page 27 in part 12.
15. The claimant's specific claim, as recorded in the appeal outcome, was that the school should continue to pay pension contributions for the claimant following his 75th birthday, equivalent to 19% of his base salary; that the school should either make payments into an alternative scheme to the LGPS or pay the equivalent amount directly to him as part of salary.
16. This proposition was based on the claimant's belief that pension contributions were part of pay. He relied on his highlighted text at electronic page 9 in part 7 wherein he referred to Local Government Employers Association and ACAS guidance on Equal Pay law whereby Equal Pay law extends beyond pay and includes pension, which the respondent did not dispute.

Applicable Law

17. S.61 EqA Non-discrimination rule:

- (1) An occupational pension scheme must be taken to include a non-discrimination rule.
- (2) A non-discrimination rule is a provision by virtue of which a responsible person (A)—
 - (a) must not discriminate against another person (B) in carrying out any of A's functions in relation to the scheme;
 - (b) must not, in relation to the scheme, harass B;
 - (c) must not, in relation to the scheme, victimise B

18. Under S.61 (8), it is not a breach of a non-discrimination rule for the employer or the trustees or managers of a scheme to maintain or use in relation to the scheme rules, practices, actions or decisions relating to age which are of a description specified by order by a Minister of the Crown.

19. The Equality Act (Age Exceptions for Pension Schemes) Order 2010 Schedule 1 (Occupational Pension Schemes: Excepted Rules, Practices, Actions and Decisions) says:

Admission to schemes

1. In relation to admission to a scheme:
 - (a) a minimum or maximum age for admission, including different ages for admission for different groups or categories of worker.
20. Under the LGPS Regulations 2013 there is a restriction on eligibility for active membership.
21. S. 4 (1) says the following are not entitled to be active members in an employment:
 - (a) a person entitled to membership of another public service pension scheme in relation to that employment;
 - (b) a person aged 75 or over; or
 - (c) an employee of an admission body who is a member of another occupational pension scheme in relation to that employment.

Conclusions and Analysis

22. It appeared to the Tribunal that at the heart of this dispute was a misunderstanding and/or conflation of Equal Pay legislation and Age Discrimination protection. In addition, the claimant had overlooked entirely, the Equality Act (Age exception for Pension schemes) Order 2010 which provides an exception to the non-discrimination principle in relation to Age and Occupational pension Schemes.
23. Under Schedule 1 (Occupational Pension Schemes: Excepted Rules, Practices, Actions and Decisions), section 1 states that in relation to admission to a scheme, a minimum or maximum age for admission can be set.
24. These Regulations were passed pursuant to S.61 (8) of the EqA and the LGPS Regulations (which applied to the parties in this case, which the claimant agreed) set a maximum age of active membership of 75.
25. The claimant's reliance on the EAT's decision in ***University of Sunderland v Drossou UKEAT/0341/16/RN*** was misplaced. In that case the EAT decided that in calculating compensation for Unfair Dismissal, the award should include pension contributions payable by the employer. That is a completely different point.
26. The Tribunal concluded unanimously that there was no basis to suggest that pay and pension contributions should or could be conflated such that the exception in the 2010 Age exceptions for Pensions Schemes Order should not apply. Neither did the claimant purport to raise any argument around the

compatibility of the 2010 Order with any EU Directive or general principles of EU (Discrimination) Law, to the extent that this might have been possible to argue, or, whether having regard to the age cap in this case and S. 6 (2) of the Framework Directive, that any such argument had reasonable prospects of success.

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Employment Judge Khalil

26 January 2023