Basing an ill health early retirement pension on part-time salary was not disability discrimination

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Basing an ill health early retirement pension on part-time salary was not disability discrimination

The Claimant, Mr Williams, who worked at Swansea University for 13 years, took ill health retirement at age 38 due to disability and became entitled to his accrued pension as well as an enhanced pension. Yet, both pensions were based on the final salary he received while working part-time for last three years in the period leading up to his retirement, after his employer had reduced his hours as an adjustment to accommodate his disability. The crux of the argument was that the pension should have been calculated on the basis of the

full-time salary Mr Williams had received for ten years prior to changing to part-time hours.

The Supreme Court identified the relevant treatment as the award of an “enhanced pension”, which was advantageous treatment arising from a disability and not available to someone without one. Therefore, the complaint of unfavourable treatment could not stand even if the employee wanted a greater advantage.

Williams v The Trustees of Swansea University Pension & Assurance Scheme and another [2018] UKSC 65

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Employee could not be released from a non-compete clause in shareholders agreement by settlement agreement on termination of employment

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Employee could not be released from a non-compete clause in shareholders’ agreement by settlement agreement on termination of employment

The Commercial Court held that a settlement agreement between an employer and employee had not discharged the employee from a non-compete clause in a shareholders’ agreement to which he was a party.

The Claimant, Mr Herbert, was a senior employee and member of the executive management team for Ideal Standard International BVBA, the main operating company in the Ideal Standard Group. His employment contract contained confidentiality obligations, but no restrictive covenants. Mr Herbert entered into a shareholders’ agreement with the five group companies that owned the Group’s operating companies, and was allocated a substantial number of shares.

A non-compete clause in the shareholders’ agreement stated that for 18 months after termination of employment, Mr Herbert must not “carry on or be engaged in or concerned or interested in any business within the Group’s jurisdictions where it would be in competition with the business activities of the Group or any Group company”. The agreement provided that a waiver of any term or breach of the agreement had to be in writing and signed by or on behalf of the party granting it.

Mr Herbert was subsequently dismissed and entered into a settlement agreement with his employer, which stated that the parties would have no further obligation to each other, save for what was provided in the settlement agreement itself. A clause provided for a waiver from Mr Herbert of his rights and stated that the employer "ensures that the waiver also applies to other companies and entities of the Group". Mr Herbert thereafter started working for a competitor, but two companies within the Group sought an injunction.

The injunction was granted to restrain breach of the non-compete clause. The court found that the settlement agreement had been signed by the employer, which was the main operating company within the group, but did not constitute a valid waiver of rights under the shareholders' agreement by any of the other parties to it, even though a statement in the settlement agreement made clear it was intended to settle outstanding differences with the employer and/or any other company in the group. The settlement agreement had been expressly signed by an executive "for and on behalf of" the employing company, not any other company in the group.

Mr Herbert was a senior executive and his shareholding was substantial. He was also integral to the business's relationships with clients, privy to confidential information and had years of working with other employees. Hence, it was held that a serious issue was to be tried as to whether the covenant was reasonable in scope.

Ideal Standard International SA and another v Herbert [2018] EWHC 3326

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Court of appeal holds that Uber drivers have worker status

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Court of appeal holds that Uber drivers have worker status

The Court of Appeal upheld previous decisions confirming that Uber drivers are workers entitled to the national minimum wage and paid holiday.

Despite written documentation to the contrary, the Court of Appeal held that it could not regard Uber as working “for” the drivers as an intermediary. The reality of the relationship between the parties was the opposite. Uber runs a transportation business and drivers provide the skilled labour that enables the business to deliver its services and earn profit. It was found that Uber drivers were to be regarded as working during any period when they were (1) within the

territory in which they were authorised to drive, (2) the Uber ‘app’ was switched on, and (3) they were willing and ready to accept trips. It was acknowledged that drivers were not workers solely when they were engaged in transporting a passenger as an important feature of the business was to maintain a pool of drivers that Uber could call upon as and when a demand for driving services arose. Hence, drivers were considered to be workers during waiting periods for bookings as long as the latter two criteria also applied.

The Court of Appeal has given Uber permission to appeal to the Supreme Court.

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Employment tribunal statistics

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Employment tribunal statistics

From April to June 2018 there was a 165% increase in single claims compared with the same quarter in 2017.

Tribunals have hired 50 more judges and should clear the backlog of claims in due course.

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Government announces extensive employment law reform following Taylor review Copy

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GOVERNMENT ANNOUNCES EXTENSIVE EMPLOYMENT LAW REFORM FOLLOWING

TAYLOR REVIEW

The Government has published the Good Work Plan in its response to the recommendations made by the Taylor Review in 2017. The amendments to current Regulation are due to come into force on 6 April 2020 as follows:

- All workers (not just employees) will have a right to a written statement of terms either before or from day one of employment (rather than within two months of starting employment).
- The reference period for determining an average week's pay (to calculate holiday pay) will increase from 12 weeks to 52 weeks, or the number of complete weeks for which the worker has been employed.
- The threshold required for a request to set up information and for a consultation will drop from 10% to 2% of employees, subject to the existing minimum of 15 employees.
- Better protection for agency workers, zero hours workers and others with atypical working arrangements – Repealing the exception in the Agency Workers Regulations, which currently excludes agency workers from the right to equal pay with comparable direct employees if they have an employment contract that guarantees pay between assignments i.e. when they are "on the bench".
- Publishing on gov.uk on a quarterly basis the names of employers who fail to pay tribunal awards within a reasonable time

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A robust approach can be taken to requests for adjournment on medical grounds

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A ROBUST APPROACH CAN BE TAKEN TO REQUESTS FOR ADJOURNMENT ON MEDICAL GROUNDS

The General Medical Council (“the GMC”) brought disciplinary proceedings against the Claimant, Dr Hayat, for amongst other things, feigning a heart attack and related insurance fraud. There had already been three unsuccessful adjournment applications when Dr Hayat was admitted to hospital complaining of chest pains, but the GMC applied to continue the hearing in his absence. They relied on emails from two treating doctors who considered him fit to attend the hearing.

However, Dr Hayat submitted a sick note to the tribunal stating that he was unfit for work. As it was concluded that he was voluntarily absent from the hearing, the tribunal proceeded and found against him.

The case went to the Court of Appeal which directed that:

- The original judge had mistakenly found that the sick note trumped the other medical evidence as it post-dated it. The relevance of the note depended on its contents, not date.
- The sick note had stated that Dr Hayat could not work, not that he could not participate in the hearing. The sick note did not consider whether or how the tribunal might have accommodated Dr Hayat.
- The sick note itself was completely insufficient for an adjournment as it did not identify the author, the medical condition and prognosis, an independent opinion following a full medical examination, or how it prevented attendance.

It was held that the tribunal was entitled to weigh the sick note against other medical evidence and facts, including the three unsuccessful adjournment applications and proceed with the hearing.

General Medical Council v Hayat [2018] EWCA Civ 2796

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Emails about whether to settle litigation had to be disclosed

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EMAILS ABOUT WHETHER TO SETTLE LITIGATION HAD TO BE DISCLOSED

Six emails had been sent between members of a Company’s Board, and between the Board and Shareholders. It was claimed that the emails were composed with the dominant purpose of discussing a commercial proposal for settling the parties’ dispute at a time when litigation was in reasonable prospect.

On appeal, the court held that:

- Litigation privilege was engaged when adversarial litigation was in reasonable contemplation;
- Once engaged, it covered communications between the parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of litigation, provided it was for the sole or dominant purpose of conducting litigation. This

included deciding whether to litigate and whether to settle the dispute giving rise to the litigation.

- However, there was no justification or authority for extending the scope of litigation privilege to purely commercial discussions. Documents created with the dominant purpose of discussing a commercial settlement did not fall within the scope of the privilege.

This surprising decision highlights that employers should take great care when recording internal discussions relating to litigation.

WH Holding Ltd and another v E20 Stadium LLP [2018] EWCA Civ 2652

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Employee who admitted to shoplifting held to have a tendency to steal and was prevented from bringing a disability discrimination claim

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EMPLOYEE WHO ADMITTED TO SHOPLIFTING HELD TO HAVE A TENDENCY TO STEAL AND WAS PREVENTED FROM BRINGING A DISABILITY DISCRIMINATION CLAIM

The EAT held that an employment judge had been justified to find that a Claimant who suffered from severe depression, post-traumatic stress disorder (“PTSD”) and associated amnesia, and who had left a shop without paying for his items had a tendency to steal, which is an excluded condition under the Equality Act (Disability) Regulations (“the Disability Regulations”). Given that the excluded condition had been the cause of the Claimant’s dismissal, the Claimant was prevented from bringing a disability discrimination claim.

The Disability Regulations outline several conditions that are expressly stated not to be impairments (and hence are not disabilities) for the purposes of the Equality Act, one of which is the ‘tendency to steal’.

The Claimant, Mr Wood, formerly a police officer with 16 years service, worked as an anti-social behaviour officer for the Council. The Council’s code of conduct required its employees to act with honesty and integrity and provided that breaches of the code (both work and non-work related) were serious and

could result in disciplinary action leading to dismissal. The Claimant had left a branch of Boots without paying for several items. When caught, he concealed his Council ID and stated that he worked in security. He also signed an admission that he did not intend to pay for the items and was given a fixed penalty notice for disorder. Mr Wood was obligated to inform both the Council and police about this incident, but failed to do so.

During a vetting and clearance process two months later, Mr Wood's application was refused due to the penalty notice and he was refused entry into any police premises, which meant that he could not do his job. He also denied, when questioned, knowing about anything outside of work about which the Council should have been aware. When the theft incident was raised, Mr Wood recalled the incident, but denied any fault. He was subsequently suspended and thereafter dismissed.

Mr Wood issued a claim for unfair dismissal and disability discrimination. Joint expert evidence found that he suffered from severe depression, PTSD and associative amnesia.

The EAT dismissed the Claimant's appeal in which he argued that the employment judge had mistakenly found that he had a 'tendency' to steal as the incident was a one-off episode. The EAT held that Mr Wood had, in fact, always put forward his case on the basis that he had a tendency to do 'whatever the correct description is for what happened in Boots…' His case had been that this was not a one-off matter or isolated event, but part of his condition and a manifestation of his PTSD which recurs. Mr Wood's second argument that it was a mistake to find the incident to be stealing rather than forgetfulness without intent or dishonesty was not upheld. The EAT could clearly see why the judge had reached the conclusion that Mr Wood was dishonest, especially as he had signed a statement admitting to the theft of the items, his behaviour in the following days and his self-serving selective memory when discussing the incident with his line manager.

Wood v Durham County Council UKEAT/0099/18

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Employee's dismissal whilst entitled to long-term disability benefits found to breach implied contractual term

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Employee’s dismissal whilst

entitled to long-term disability benefits found to breach implied contractual term.

The EAT held that an employer was not entitled to dismiss an employee on grounds of ‘capability’ given that the employee was contractually entitled to long-term disability benefits (namely, a Permanent Health Insurance Scheme (“PHI”)) and would, therefore, be deprived of the benefits to which they would otherwise be entitled pursuant to the Scheme.

The Claimant, Mr Awan, was employed as a security agent for American Airlines. His employment contract generously provided that he was entitled to full sick pay for six months and if his sickness absence exceeded this period, he benefited from a long-term disability benefit plan, which would pay two-thirds of his annual base salary until either he returned to work, retired or died. The contract also contained a clause entitling his employer to dismiss on notice.

Mr Awan was subsequently signed off sick with depression. During this time, his employment was transferred to ICTS due to outsourcing of his department. However, the new employers used a different insurance company for long-term disability benefits and the new insurer refused to cover employees who had pre-existing sickness absence when the new policy commenced. The original insurer only agreed to cover the Claimant for a specified amount of time following the TUPE transfer as a gesture of goodwill.

Mr Awan’s employment was subsequently terminated by ICTS as he had been on sickness absence for over two years and they believed that there was no prospect of him returning to work.

Mr Awan brought employment tribunal proceedings claiming that his dismissal while he was entitled to long-term disability benefits was unfair and amounted to discrimination arising

from disability.

The EAT held that ICTS should not have dismissed Mr Awan for incapability while he was in receipt of long-term disability benefits. Mr Awan had a contractual entitlement to be paid two-thirds of his salary after six months of sick leave. The EAT highlighted that his contract did not refer to an insurance policy or state that his entitlement to disability benefits was dependent on the rules of an insurance policy or the rules of a particular insurance provider. There was also no evidence to show that the original insurance policy was ever provided to employees. It was, therefore, concluded that ICTS's obligation to pay benefits under the disability plan was regardless of whether the insurer paid out under the policy or not.

It was further determined that the whole purpose of PHI and/or other disability benefit schemes would be defeated if an employer could simply end entitlement under the schemes by dismissing employees when they become unfit for work. However, whether or not an employer had a contractual right to do so would be decided on a case by case basis. The express clause to enable termination in Mr Awan's contract was drafted in general terms and it did not expressly deal with incapacity or reserve the right to dismiss without cause. Mr Awan also had the benefit of an express clause entitling him to disability benefits (as outlined above). This clause did not allow for dismissal upon incapacity.

There had been a fundamental contradiction between an employer's right to terminate a contract on notice and the employee's contractual right to disability benefits. A term was, therefore, implied into the contract of employment that the employer could not terminate due to incapacity reasons whilst the employee was entitled to payment of disability income due under the long-term disability plan.

Awan v ICTS UK Ltd UKEAT/0087/18

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