



Neutral Citation Number: [2020] EWHC 2789 (Ch)

Appeal Ref: CH-2020-000043

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 03/07/2020

Before:

THE HONOURABLE MR JUSTICE FANOURT

Between:

F [REDACTED] G [REDACTED]

Intended Appellant (the “Appellant”)

and

LANCASHIRE COMBINED FIRE AUTHORITY

Intended Respondent (the “Respondent”)

The Applicant appeared In Person
No appearance was made by or on behalf of **the Respondent**









Hearing date: 3 July 2020

Approved Judgment

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MR JUSTICE FANCOURT:

1. This is a renewed application by Mr G for permission to appeal against a decision of the Pensions Ombudsman, which was given on 10 September 2019. The original application for permission to appeal on a question of law was considered by Falk J on the papers, and on 2 April 2020 she refused permission to appeal, essentially on the basis that the legal issue raised was unarguable. Mr G, as he is entitled to do, renewed his application for permission to appeal.
2. Mr G is a retired firefighter and he has a pension under the Fireman's Pension Scheme.
3. He was forced to retire, as a fireman, through ill-health as a result of an accident at the age of 54. He would otherwise have been entitled to continue to work until the age of 60.
4. Mr G made a complaint to the Pensions Ombudsman on 10 October 2017 and the complaint, at that stage, was that he was wrongly being paid a Rule B1 ordinary pension, rather than a Rule B3 ill-health pension.
5. The complaint was considered first by a senior adjudicator at the Pensions Ombudsman's office, who wrote an opinion on 13 March 2019 saying that the complaint should not be upheld. Mr G, as he was entitled to do, did not agree with that opinion and accordingly his complaint was further considered by the Pensions Ombudsman, in fact the Deputy Pensions Ombudsman, who gave her decision for not upholding the complaint on 10 September 2019.
6. Mr G sought to appeal to the High Court and after one or two false starts, via the Court of Appeal in Northern Ireland and then the Court of Appeal in this Country, the appeal was finally properly issued in the High Court on 4 February 2020. It was therefore significantly out of time but Falk J considered that there were sufficient reasons to justify an extension of time and she made that order for an extension of time on 2 April but then refused permission to appeal by the same order.
7. She gave detailed reasons why she considered that, on the true interpretation of the relevant parts of Schedule 2 to the Fireman's Pension Scheme Order 1992, the Ombudsman had clearly been right and therefore Mr G's appeal had no reasonable prospect of success.
8. After the application for permission to appeal was renewed, Falk J made a further order on 6 May 2020, adjourning the hearing that was due to take place to enable various matters to be done in the interim so as to give Mr G the best possible chance of advancing his argument on the basis of the relevant facts of the case. The relevant facts, in accordance with Falk J's direction, were set out in a document that the employer Fire Authority prepared, dated 6 May 2020, and Mr G then responded directly, and very helpfully, by adding in his points of disagreement, such as they are, in the same document, which I have before me.
9. The relevant facts are that, as I have already said, Mr G was forced to retire early, aged 54, as a result of a road traffic accident when he was on duty. That was a compulsory

- retirement for the purposes of the pension scheme. Given his rank at the time of Assistant Divisional Officer, he was entitled to retire at 60 and so he was effectively forced to retire more than five years early. 
10. The total pay, to which he was entitled with flexible duty allowance at the date of his retirement, was £32,904.00. 
11. The issue between Mr G and the Pension Scheme is that, he says, the rules of the scheme require to be taken into account the chance of the firefighter obtaining further promotion before what would otherwise have been his normal retirement age, and Mr G's case, set out in his amendment to the facts document, is that there was a good chance, as he saw it, of promotion to the rank of Divisional Officer 2 by the age of 60. He says that, in effect, he was doing that work and had that responsibility in any event, and that therefore he considered he had a good chance of promotion. 
12. With that promotion the pay, as at the date of his actual retirement, would have been £36,547.72. At one stage, it appeared that part of Mr G's argument was that, not only any promotion should be taken into account, but also any increase in the pay for the relevant rank by the normal retirement age should also be taken into account.  But Mr G now accepts that the second point is not a good point. Nevertheless he maintains his case that the prospect of promotion by the normal retirement age of 60 should have been taken into account.
13. The issue is, and is accepted to be, purely a question of the true interpretation of the Pension Scheme comprised in the relevant statutory instrument. 
14. Falk J encapsulated the issue in her order of 6 May 2020 in the following terms, and I quote:
- “Whether as a matter of statutory construction of paragraph 5 of part 3 of Schedule 2 contained in Schedule 2 to the Fireman’s Pension Scheme Order, SI 1992 No. 129, the requirement to calculate the notional retirement pension “by reference to” actual average pensionable pay means either:*
- (a) *as the respondent contends, that the calculation must be done using actual pay in the year to the date of retirement, or,* 
- (b) *as the appellant contends, that the calculation must be done by reference to the pay scales in place at the date of retirement, but assuming that the individual would have continued to progress through those pay scales and achieve available promotions until the date he or she could have been required to retire, absent ill-health or injury”.*
15. The relevant provisions of the scheme are, first, in appendix one, where Part B differentiates between an ordinary pension, at paragraph B1, and an ill-health award, at paragraph B3. It is common ground that Mr G is entitled to an ill-health award and not an ordinary pension. 
16. In schedule two to that appendix, there are then detailed provisions for the calculation of an ill-health pension.  virtue of his long years of service, Mr G falls within paragraph 4

of that schedule. However, it is the terms of paragraph 5 that are directly in issue and they provide as follows:

“(1) Where:

(a) if the person had continued to serve until he could be required to retire on account of age, he would have become entitled to an ordinary or short service pension, “the Notional Retirement Pension” and

(b) the amount calculated in accordance with paragraph 3 or 4 exceeds the amount of the Notional Retirement Pension, the amount of the ill-health pension is that of the Notional Retirement Pension.

2. The Notional Retirement Pension is to be calculated by reference to the person’s actual average pensionable pay”.

17. Paragraph 5(1) therefore requires a cap be imposed on the amount of the ill-health pension that would otherwise be calculated under paragraphs 3 or 4 of Schedule 2 by reference to the amount of the Notional Retirement Pension that the retired firefighter would have achieved had he continued to work until the age of retirement.
18. However, paragraph 5(2) says that that Notional Retirement Pension is to be calculated by reference to the person’s actual average pensionable pay. Average pensionable pay, for the purposes of the scheme, is defined in rule G1 as the average pensionable pay of a regular firefighter and is, subject to paragraphs five to seven, the aggregate of his pensionable pay during the year ending with the relevant date, and the relevant date is the last day of the firefighter’s service as a regular firefighter.
19. It is therefore clear that a normal pension, under Section B and the Notional Retirement Pension are to be calculated using the average pensionable pay during the last year of actual service. However, Mr G’s argument is that the significance of the words ‘by reference to’ in paragraph 5(2) of the order is that they require the prospects of promotion during the remaining years of what would otherwise have been normal service to be taken into account. He argues that the words ‘by reference to’ signifies something different from what the word “is” would have signified, as for example it is used in an earlier part of the appendix: “the pension is the person’s actual average pensionable pay”.
20. He supports his argument by reference to guidance in the form of a commentary that was issued by the Home Office at the time when the pension scheme came into effect. The relevant part of that guidance says as follows:

“How much is the pension? The sums are set out in examples one and four to seven, the basis of the calculations is explained here. A firefighter’s basic ill-health pension is never less than 1/60th of average pensionable pay, APP, and never more than 40/60th, two-thirds of APP or what could have been earned by compulsory retirement age”.
21. Mr G fastens on the last words in that quotation and say that requires the scheme to consider what the firefighter could have earned had he continued to work until compulsory retirement on grounds of age.
22. The commentary and guidance is provided to give practical guidance to those considering

- their pension entitlement on the way that the detailed provisions of the pension scheme operate. The detailed provisions are highly complex and, with respect, not easy for someone who is not very technically minded to understand.
23. The guidance has no statutory force; however; it is the scheme itself that has to be construed. The significance of the guidance was addressed by the Ombudsman in his decision. He referred to the paragraph to which I have referred, and he said, as follows: ‘I find that the commentary does not support Mr N’s interpretation’ (I interpolate Mr N, in the decision, was Mr G), and then he referred to a further argument in relation to the scheme.
24. He said Mr G suggests that the figure of average pensionable pay should be determined by the Chief Fire Officer, based on what they think the likely salary could have been at the point of compulsory retirement; however, that interpretation implies a level of guesswork and forecasting that simply is not reflected in the methodology prescribed by the order or illustrated in the commentary. Read in the context in which they are used in the commentary, the two instances of what could have been earned by compulsory retirement age are references to the number of years of service that could be achieved, not the average pensionable pay. In both cases, the calculation described is based on a maximum of 40 years’ service or the length of service that could have been earned by compulsory retirement age.
25. In my judgment, there is no scope at all for construing paragraph 5(2) of Schedule 2 to the order so as to incorporate a requirement to take account of what promotion may or may not have been achieved by a firefighter between the date of early retirement and the normal retirement age.
26. There is no machinery in the scheme enabling the scheme administrators to assess or predict, or guess, what that promotion might in any given case have been. There is nothing in the wording which suggests that that kind of exercise is required to be undertaken.
27. In my judgement, the words ‘by reference to’ are simply being used as a synonym for ‘using’ as if the paragraph had said “the Notional Retirement Pension is to be calculated using the person’s actual average pensionable pay”. There is no warrant for interpreting that as referring to any theoretical pensionable pay that might have been achieved by a later date.
28. I am sympathetic to Mr G in the sense that the commentary and guidance uses a phrase which is ambiguous, namely “or what could have been earned by compulsory retirement age”; however, in context, and by reference to the examples given in the guidance, one of which, example seven, is inconsistent with Mr G’s case, it is reasonably clear that that phrase is intended to connote the number of years of service that would have been achieved by compulsory retirement and has nothing to do with any promotion.
29. It follows, accordingly, that I consider that there is no realistic prospect of the argument on the issue of law succeeding in Mr G’s favour. I consider that Falk J was right for the reasons that she gave. I therefore refuse permission to appeal.

End of Judgment

Transcript from a recording by Ubiquis
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