CH-2020-000043

In the High Court of Justice
Business and Property Courts of England and Wales
Chancery Appeals (ChD)
On appeal from a decision of the Deputy Pensions Ombudsman on 10 September 2019 (ref: PO-19150)
Appeal ref: CH-2020-000043

BETWEEN

[redacted]

Appellant

and

LANCASHIRE COMBINED FIRE AUTHORITY

Respondent

ORDER

Before **the Honourable Mrs Justice Falk** sitting at the Rolls Building, 7 Rolls Building, Fetter Lane, London, EC4A 1NL on the 2nd day of April 2020

UPON considering the applications for an extension of time to file the Appellant's notice and for permission to appeal

AND UPON reading the appeal bundle

AND UPON reading a letter from Counsel to the Pensions Ombudsman dated 20 February 2020 in connection with the extension of time application

IT IS ORDERED THAT

1. Permission is granted to the Appellant to bring this appeal out of time, and time is extended to 4pm on 4 February 2020.

2. The Appellant's application for permission to appeal on the merits is refused.

3. The Appellant may, within seven days of receipt of this order, apply for a hearing at which he may renew his application for permission to appeal. Such application may be made by to the High Court Appeal Centre Rolls Building, 7 Rolls Building, Fetter Lane, London, EC4A 1NL, or by email to ChanceryJudgesListing@justice.gov.uk, in each case quoting the above appeals reference number. Any such application must also be served on the Respondent and the Pensions Ombudsman.

4. This order has been made by the court under paragraph 7.1 of Practice Direction 52B, as the court has disposed of an application

without hearing the Respondent. Under para 7.3 of that Practice Direction, any party may apply to have the extension of time under paragraph 1 of this order set aside or varied within 7 days of the date of service upon that party, and must serve a copy of the application on the other party and the Pensions Ombudsman at the same time.

5. Any application made under paragraph 3 or 4 must confirm the correct identity of the Respondent to this appeal.

6. Any hearing of an application made under paragraph 3 or 4 may be on a remote basis, using Skype for Business (if possible) or otherwise a conference call, and will be a public hearing. The judge will consider written submissions on the communication method that should be used.

REASONS:

Extension of time:
The Appellant had a right to appeal the decision of the Deputy Pensions Ombudsman (the "Decision") on a point of law within 28 days, under s 151(4) of the Pension Schemes Act 1993 and pursuant to a general direction for England and Wales that has been made by the Pensions Ombudsman that appeals should be made within 28 days. Given that both the Appellant and Respondent are based in England, the appeal should have been filed in the High Court in England and Wales. However, an appeal was instead filed in the High Court in Northern Ireland on 23 September 2019, 13 days after the date of the Decision. The reason for this appears to have been related to the fact that the Appellant has been assisted by an ex-colleague, a Mr Burns, who is resident in Northern Ireland.

On 6 November 2019 Maguire J struck the appeal out for want of jurisdiction. It appears from the Appellant's notice that the appeal was then relodged in London on 3 December 2019, but with the Court of Appeal rather than the High Court. It was returned on 13 January when the Appellant was advised to resubmit the appeal to the Chancery Division.

I accept that the Appellant acted promptly after the Decision was issued. I also accept that the information issued with the Decision about appeals does not explain precisely when an appeal may be brought in Northern Ireland or elsewhere. Against that there is no indication that the Appellant took any steps to identify the correct route of appeal, and it is possible that his decision to appeal in Northern Ireland may have been affected by the fact that no permission is required in that jurisdiction.

It is also the case that there were delays between 6 November and 3 December, and again between 13 January and lodging the appeal in the Chancery Division, which according to the court's filing system was first attempted on 31 January. There is no obvious good reason for these delays. However, each delay is of a relatively moderate length.

Time limits are important, and they apply to litigants in person in the same way that they apply to litigants who benefit from professional advice. However, although the overall delay between the expiry of the 28 day time limit and the appeal being filed in the Chancery Division is significant, I think it is outweighed by the fact that there are some reasons for the delay, that there is no indication that the Respondent has been prejudiced by the delay, and by the fact that, in the interests of justice, I consider it preferable to address the substantive merits of the appeal.

I have therefore concluded that in all the circumstances it is appropriate to extend time and deal with the permission to appeal application on its merits.

Permission to appeal:
The appeal bundle contains a significant amount of material, including details of complaints and allegations of a serious nature that are not relevant to this appeal. I confine my comments to the points identified in the grounds of appeal as alleged errors of law by the Deputy Pensions Ombudsman, which I can summarise as follows:

(a) incorrectly interpreting the legislation and therefore failing to identify that the Appellant was wrongly being paid a B1 ordinary pension rather than the enhanced B3 ill-health award to which he was entitled;
(b) wrongly using an example in a Home Office commentary on the legislation to support that result;
(c) failing to recognise that firefighters had had common law entitlements removed, and that the statute should be interpreted in a way that did not deprive the B3 ill-health provision of meaning; and
(d) failing to recognise that rule K3 provides for an ill-health award to be reduced in certain circumstances, which was inconsistent with concluding that the pension due to the Appellant was the irreducible B1 pension.

In my view this appeal has no real prospect of success, and there is no other compelling reason for it to be heard.

The legislation at issue is Schedule 2 to The Firemen's Pension Scheme Order 1992/129 (the "1992 order"). I have proceeded on the basis that the correct version to consider is that in force at the date of the Appellant's retirement, which was 22 July 1998. On that basis the legislation originally enacted, available on the legislation.gov.uk website, appears to be the correct version since although certain changes had been made to the 1992 order by that date, the provisions at issue in this appeal appear not to have been amended.

Part B deals with personal awards, the relevant provisions being B1 and B3. Relevant extracts are as follows:

"Ordinary pension

B1.—(1) Subject to paragraph (2), this rule applies to a regular firefighter who retires if he then—
(a) has attained the age of 50, and
(b) is entitled to reckon at least 25 years' pensionable service, and
(c) does not become entitled to an ill-health award under rule B3.
…
Ill-health award
B3.—(1) This rule applies, unless immediately before his retirement an election under rule G3 not to pay pension contributions had effect, to a regular firefighter who is required to retire under rule A15 (compulsory retirement on grounds of disablement).
(2) A person to whom this rule applies becomes entitled on retiring—
(a) if he is entitled to reckon at least 2 years' pensionable service or the infirmity was occasioned by a qualifying injury, to an ill-health pension calculated in accordance with Part III of Schedule 2, and
(b) in any other case, to an ill-health gratuity calculated in accordance with Part IV of Schedule 2.
Schedule 2 Part III: Ill-health pension
1.—(1) Paragraphs 2 to 5 have effect subject to Parts VII and VIII of this Schedule, and paragraphs 3 and 4 have effect subject to paragraph 5.
(2) In paragraphs 2 to 4, A is the person's average pensionable pay.
2. Where the person has less than 5 years' pensionable service, the amount of the ill-health pension is—

$$\frac{A \times B}{60}$$

where B is the greater of one year and the period in years of his pensionable service.
3. Where the person has at least 5 but not more than 10 years' pensionable service, the amount of the ill-health pension is—

$$\frac{2 \times A \times C}{60}$$

where C is the period in years of his pensionable service.
4. Where the person has more than 10 years' pensionable service, the amount of the ill-health pension is the greater of—

$$\frac{20 \times A}{60}$$

and

$$\frac{7 \times A}{60} + \frac{A \times D}{60} + \frac{2 \times A \times E}{60}$$

where D is the period in years of his pensionable service up to 20 years, and E is the period in years by which his pensionable service exceeds 20 years.
5.—(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."

Pensionable pay is determined under paragraph G1. That provides that average pensionable pay is, subject to some exceptions, the aggregate of the individual's pensionable pay during the year ending with the "relevant date", which is essentially when the individual retired.

The Appellant retired on 22 July 1998, a few months short of his 55th birthday. By the date of his 50th birthday on 17 December 1993 he had already achieved 31 years of pensionable service, and by that stage was already able to choose to retire with a maximum ordinary pension under B1 (see the letter dated 19 February 2016 from LFRS included at tab 3 of the appeal bundle). As I understand it, absent ill-health he could have been required to retire at the age of 55, on 17 December 1998.

In fact the Appellant retired on grounds of ill-health at a time when he had over 35 years of service. There is no dispute that because he retired on grounds of ill-health he is entitled to an ill-health award under B3(1). It is clear that that means that he may not receive a pension under B1: see B1(1)(c).

The real dispute relates to paragraph 5 of Part III of Schedule 2 (confusingly, not Schedule 2 to the 1992 order but instead a Schedule included within Schedule 2 to the 1992 order). The Deputy Ombudsman upheld the Respondent's decision that the Appellant's pension was "capped" at the amount of an ordinary pension under B1, calculated using average pensionable pay determined at the date of retirement. That ordinary pension amount, calculated (given the length of service) on a 40/60 basis under Part I of Schedule 2, was obviously less than the amount that would have been payable under paragraph 4 of Part III (set out above).

I can detect no possible error of law in this conclusion. The key question is to determine the "notional retirement pension" under paragraph 5. If the amount calculated under paragraph 4 is higher than that amount then the amount of the pension payable under B3 is equal to that "notional retirement pension". It is worth emphasising that the pension is still payable under B3, not B1, but the calculation is determined by reference to the ordinary pension.

The Appellant argues that there is significance in the words "by reference to" in paragraph 5(2), in contrast to the word "is" when used to refer to average pensionable pay in paragraph 1(2) of Part III. What it is said that the rules contemplate is that the Respondent should have determined the pay level that the individual could have achieved if he had actually worked up to his normal retirement date, using pay scales available at the time and assuming pay increases and promotions, rather than using actual pay in the year to retirement. (It is not made clear what, if any, difference this would actually make on the facts of this case.)

There is no basis for reading the legislation in this way. What is referred to in paragraph 5(2) is actual average pensionable pay. As already mentioned that is defined under paragraph G1 by reference to the year to retirement. The reason that paragraph 5(2) uses the words "by reference to" is that the word

"is" would not make sense. What it is saying is that the notional retirement pension has to be calculated *using* actual average pensionable pay.

The Appellant also relies on a commentary published by the Home Office. The text relied on, set out at Appendix 2 to the Decision, refers to capping in terms that the pension can never be more than "could have been earned" or that the person "could have earned" by compulsory retirement age. This text has no force of law and cannot affect the clear wording of the legislation. In any event, the text can be read as referring to the pension available by reference to length of service (so if, for example, there would only have been 20 years' service at normal retirement, the pension would be lower than the 40/60ths maximum referred to). In addition, as indicated by the Decision, Example 7 in the commentary appears not to assist the Appellant's case.

I do not agree with the submission that this interpretation deprives B3 of meaning or effect, or that there are no circumstances when paragraph K3 could apply. There will be many situations where either paragraph 3 or paragraph 4 of Part III will produce a result which is lower than the notional retirement pension, and therefore where the pension payable would be determined by those paragraphs. This would be likely to be the case if retirement on grounds of ill health occurred earlier in a firefighter's career, rather than close to retirement. For example, assume retirement on grounds of ill-health after 20 years of service at age 40, and that the individual could otherwise have been required to retire at 55. The calculation under paragraph 4 would produce a pension of 27/60ths of average pensionable pay. If the individual had continued to work until retirement he would have had 35 years' service and a 40/60ths pension. On those facts paragraph 5 would have no application because the amount calculated under paragraph 4 would not exceed the notional retirement pension.

Identity of the Respondent

The Appellant has named the respondent to the appeal as Lancashire Combined Fire Authority. The respondent named in the Decision is Lancashire Fire and Rescue Service, and I would have expected that entity to be the respondent to the appeal.

SERVICE OF THIS ORDER: The court has provided a copy of this Order to:
Mr FM [redacted]
Mr D Howell (solicitor) Lancashire Fire & Rescue Service
dominichowell@lancsfirerescue.org.uk
The Pensions Ombudsman (ref PO-19150), enquries@pensions-ombudsman.org.uk and david.craddock@pensions-ombudsman.org.uk