Neutral Citation Number: [2017] EWCA 1008 (Civ)

Case No: A2/2015/2625/EATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE LANGSTAFF, PRESIDENT
UKEAT/0415/14/DM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2017

Before :

LADY JUSTICE ARDEN
LORD JUSTICE BRIGGS
and
LORD JUSTICE BEAN

- -

Between :

ANDREW WILLIAMS	**Appellant**
- and -	
(1) THE TRUSTEES OF SWANSEA UNIVERSITY PENSION & ASSURANCE SCHEME	**Respondent**
(2) SWANSEA UNIVERSITY	

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Catherine Casserley (instructed by **Didlaw Limited**) for the **Appellant**
Keith Bryant QC and Saul Margo (instructed by **Blake Morgan LLP**) for the **Respondent**

Hearing date: 13 June 2017

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Approved Judgment

Lord Justice Bean :

1. The Appellant Andrew Williams suffers from a disability which caused him first to reduce his working hours to part time working and then to take ill health retirement at the age of 38. The benefits to which he is entitled under his employers' pension scheme are far more advantageous to him than anything which would be available to a non-disabled colleague; but, because an element of them is calculated by reference to final salary, they are less advantageous than those which would be payable to a colleague with a disability of a different kind (such as from a non-fatal heart attack or stroke) which had struck him down so suddenly that there was no period of part time working. The question raised by this appeal is whether he has a valid claim for disability-related discrimination under s 15 of the Equality Act 2010.

2. The First Respondents are the trustees of the Swansea University Pension Scheme ("the Scheme"). The University, the Second Respondent, is the principal employer of the Scheme. Mr Williams was employed by the University from 12 June 2000 until his retirement on the grounds of ill health with effect from 30 June 2013. His date of birth was 6 October 1974; he was thus 38 at the time of his retirement. He was an active member of the Scheme throughout his employment with the University.

3. Mr Williams' complaint, which was heard by an employment tribunal sitting at Cardiff (Employment Judge Cadney and two lay members), concerned the way in which an enhancement to his pension benefits was calculated following his ill health retirement with effect from 30 June 2013. Under the Rules of the Scheme, he was allowed to take his accrued pension benefits immediately, and without any actuarial reduction for early receipt, rather than having to wait until his Normal Pension Date ("NPD") of 6 October 2041; and his benefits were significantly enhanced, in that he was treated as though he had accrued further pensionable service for the period (in excess of 28 years) from his actual retirement date to his NPD. He argued that, by using his actual part time salary rather than a full time equivalent, the calculation of the enhancement to his benefits for the period after June 2013 amounted to unlawful discrimination arising from disability under ss 15 and 61 of the Equality Act 2010. There was no complaint concerning the fact that he was only paid a part time salary (when working and when off sick) prior to his retirement, nor concerning the calculation of benefits accrued prior to his ill health retirement, which was also based on his actual part time salary.

The Facts

4. There was little, if any, factual dispute between the parties before the employment tribunal. The Appellant suffers from Tourette's syndrome, obsessive compulsive disorder and depression. It is common ground that he is disabled within the meaning of the 2010 Act.

5. In late 2010 Mr Williams requested, and the University agreed, a reduction in his working hours. He had previously worked full time (35 hours per week) and thereafter worked part time; the number of part time hours per week was varied on a number of occasions, on each occasion at his request. By the time of his retirement his agreed working hours were 17½ per week and had been so for nearly two years.

6. In late 2012 Mr Williams underwent specialist surgical treatment. In February 2013 the University's Occupational Health ("OH") department advised that the treatment was likely, on balance, to enable him to return to work and that it could not be said at that time that he was likely to be permanently incapacitated.

7. On 15 April 2013 OH advised that there had been sufficient improvement to allow a phased return to work starting on 29 April 2013. A phased return was then agreed. Mr Williams returned to work but on 9 May 2013 OH reported a deterioration in his condition such that he was unlikely to be able to sustain a return to work in the foreseeable future.

8. He then applied for ill health retirement. By letter dated 13 May 2013 OH advised that he was likely to be permanently incapable of efficiently discharging the duties of his post within Swansea University or in relation to any reasonably comparable post. The same opinion was expressed by the Appellant's GP and by a second OH physician.

9. The application for ill health retirement was successful and Mr Williams was provided with a benefit quotation and option form.

The University's 2008 pension scheme

10. The Scheme is a defined benefit occupational pension scheme. It is governed by a Definitive Trust Deed and Rules dated 22 April 2008 which have since been amended a number of times.

11. The rules of the Scheme provided for accrual of benefits on a final salary basis at an accrual rate of $1/80^{th}$ for each year of pensionable service.

12. The rules also included express provision for an adjustment to the calculation of benefits for members who had worked part time during any period of pensionable service. The adjustment was that accrued benefits would be calculated on the basis of full time equivalent salary with a corresponding reduction in the period of pensionable service; this avoided possible unfairness to employees who had worked full time for a period and then retired when working part time.

13. The Scheme was then amended with effect from 1 August 2009 so that accrual of benefits in respect of pensionable service on and after that date was on the basis of Career Average Revalued Earnings ("CARE"). Rather than using final salary, the CARE basis calculates benefits separately for each year of pensionable service using the salary in that year; it therefore automatically takes account of fluctuations in salary from year to year. Having been calculated for each year, CARE benefits are then index-linked up to the actual retirement date.

14. The Rules of the Scheme provide for retirement and receipt of benefits before NPD in a number of circumstances. One of these is early retirement from age 55 in which case a member will be entitled to an immediate pension but subject to actuarial reduction for early receipt. Another is ill health retirement at any age in circumstances where a member is permanently incapable of carrying on his or her occupation. A member who is eligible for, and is granted, ill health retirement becomes entitled to immediate payment of benefits as follows:

Benefits *accrued* as a result of actual pensionable service up to the date of ill health retirement are paid without any actuarial reduction for early receipt;

Benefits are then *enhanced* on the basis of salary at actual retirement date but also in respect of a further period of deemed pensionable service from actual retirement date to NPD, again with no actuarial reduction for early receipt.

15. The key provision of the Scheme Rules for these purposes is Rule 15.5 which provides as follows:

> "Subject to sub-rules 15.3 and 15.6 and the GMP Model Rules, a Member who has completed at least two years' Pensionable Service who retires from Service at any time before his Normal Pension Date as a result of Incapacity, may be provided with an immediate annual pension if the Trustees and the Principal Employer so determine. The pension will be equal to the Member's Scale Pension which would have been payable to him had the date of his actual retirement been his Normal Pension Date, calculated on his Final Pensionable Salary at the date of his actual retirement and his Pensionable Service up to his Normal Pension Date."

16. The calculation of figures for the Appellant's ill health retirement benefits was as follows:

	Accrued benefit	Enhancement	Total
Annual pension:	£5,094.73	+ £4,921.19	= £10,015.92
Lump sum:	£6,306.28	+ £14,763.57	= £21,069.85

The annual pension will be index-linked for life.

17. On receipt of the quotation Mr Williams wrote to the University querying the calculation of his benefits. He said, quoting an example given in the Equality and Human Rights Commission ("EHRC") 2011 Code of Practice on Employment, that his benefit quotation had been based on his part time salary, but he believed that his benefits should be calculated on the basis of full time equivalent salary and a corresponding reduction in the period of pensionable service.

18. The claim as originally presented to the employment tribunal argued that it would have been a reasonable adjustment to calculate Mr Williams' pension benefits on the basis of full time equivalent salary but with a reduction in pensionable service to take account of the period of part time working. However, calculating benefits on the basis of full time equivalent salary with a corresponding reduction in the period of pensionable service would have made no difference to the result, given the way in which CARE benefits are calculated. The reasonable adjustments claim was then withdrawn and a claim of unfavourable treatment under s 15 of the 2010 Act was substituted, arguing that the enhancement to Mr Williams' pension should have been calculated using full time equivalent salary with no corresponding reduction in pensionable service.

Section 15(1) of the Equality Act 2010

19. Section 15 (1) of the Equality Act 2010 provides that –

> "A person (A) discriminates against a disabled person (B) if-
>
> a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

20. The parties were agreed that the statutory test required the tribunal to answer three questions:-

i) Had the claimant been treated unfavourably?

ii) If so was that because of something arising in consequence of his disability?

iii) If so could the Respondents show that the treatment was a proportionate means of achieving a legitimate aim?

It was not in dispute that if the answer to the first question is that the claimant had been treated unfavourably then that was necessarily because of something arising in consequence of his disability. Only the first and third questions were live issues.

The decision of the employment tribunal

21. In its reserved judgment on liability dated 29 July 2014 the tribunal upheld the claim under s 15. They found that Mr Williams had been treated unfavourably and that although the Respondents had established a legitimate aim they had not established proportionate means. There has as yet been no hearing on remedy.

22. On the issue of unfavourable treatment the tribunal said:

> "22. The first point of dispute between the parties is whether the claimant has or has not been treated unfavourably within the meaning of Section 15. The parties are agreed that in broad terms Section 15 of the Equality Act 2010 was enacted to reverse and meet the difficulties caused by the well known decision in London Borough of Lewisham v Malcolm [2008] IRLR 700. The mechanism by which Parliament elected to deal with the perceived problem was in part to remove the requirement for there to be a comparator; thus the section requires "unfavourable" treatment and not less favourable treatment. The question is therefore, what does "unfavourable" mean in this context; and how can it be judged if someone has been treated unfavourably unless a comparison with some other individual or other factual circumstance, whether hypothetical or actual is made? If some form of comparison is required, what is it, given that the section has apparently removed the need for any comparative basis for assessment? Fundamentally

is a comparison to establish unfavourable treatment permissible even if it is not required? The parties are agreed that there is no authority to assist us and that the point is as far as the best researches of both parties have been able to elicit, a novel one.

23. The claimant submits that the analysis of this problem is simplicity itself:-

> "There is no statutory definition, however there is considerable case law establishing that unfavourable treatment/"detriment" has a very broad meaning, including merely "putting at a disadvantage" and would obviously include any financial or economic disadvantage."
>
> A simple reasonable and logical analysis of the pension rules leads to the inevitable realisation that a person who retires suddenly following a heart attack or stroke would receive their deemed years of service at their full time salary, whilst a disabled employee who before retiring is forced to work part-time due an increasing disability only receives their deemed years of service at their part-time salary. The disabled employee is consequently at a substantial financial disadvantage.

24. The claimant in essence submits that one only has to look at the scheme rules to discover in the disadvantage suffered by the claimant and therefore the unfavourable treatment. Because of his disability he was working part time for the final years of his employment. When that position was no longer sustainable and he retired due to ill health, he received less enhanced benefit under the scheme than he would have received had he been working full time immediately prior to taking ill health retirement. He has therefore been treated unfavourably in that he has received less enhanced benefit that he would otherwise have received and that has arisen as a consequence of his disability.

25. The respondent does not accept this analysis. Mr Bryant QC submits that whilst there is no longer a requirement for a comparator, that it is a useful exercise to consider what would have been the position in the predecessor legislation of the pre Malcolm understanding of the nature of the appropriate comparator as was set out in the well known case of Clark v Novacold Ltd (1999) IRLR 318. He submits that under that formulation the comparator to determine whether the claimant had been treated less favourably would have been a non disabled employee who remained at work and had not retired through ill health. He submits that self evidently the claimant would not have been treated less favourably than that hypothetical employee. He had not been deprived of pay or

some other employment benefit which he had previously been receiving; rather he had been given immediate access to enhanced pension benefits to which other non-disabled employees do not have access.

[Mr Bryant submitted that] the key points include the following:-

a) C has been granted ill health retirement benefits which entitle him to receive pension benefits nearly 30 years before his NPD.

b) His entitlement includes benefits accrued up to retirement date without any reduction for early receipt. The lack of actuarial reduction adds significantly to the value of the benefits.

c) His entitlement also includes an enhancement to his benefits for the period of deemed service from actual retirement date to NPD; that involves nearly 30 years deemed Pensionable Service and again the immediate receipt of benefits without any reduction for early receipt.

d) The effect of the enhancement is more or else to double C's annual pension and more than triple his lump sum.

e) In overall financial terms, the enhancement to C's benefits is valued at some £335,000 over and above the value of the benefits already accrued by C.

26. Accordingly Mr Bryant submits that there has been no unfavourable treatment in that upon ill health retirement the claimant has received very substantial benefit which would not be available to a non disabled employee. Whilst the section does not require a comparator the exercise carried out above demonstrates that there can be no unfavourable treatment.

…

32. Our conclusion is that the claimant is correct and that he has of necessity been treated unfavourably in that his disability has caused him to have a lower pension that he would have done had his disability not caused him to be working full time. In essence we accept the claimant’s submission set out above that the disadvantage is apparent from the scheme itself. The contention that there is no unfavourable treatment in our judgment rests essentially on the submission that the scheme is a particularly generous one. However fact that the scheme is particularly generous and that the claimant is in absolute terms much better off than he might have been in a differently constructed scheme, does not alter the fact in our judgment that

> he has been treated unfavourably in that he has been placed at a disadvantage in the application of the rules of this particular scheme.
>
> 33. As set out above it is accepted that if we find, as we do, that there has been unfavourable treatment it arises in consequence of the claimant's disability."

23. Before considering the correctness or otherwise of this analysis of the central issue in the case I should set out briefly the other principal points in the tribunal's judgment.

Other possible heads of claim

24. In paragraphs 29 and 30 the tribunal considered whether the facts might have given rise to a successful claim that the Respondents had failed to make reasonable adjustments, or that the enhanced benefit provisions of the pension scheme were indirectly discriminatory on disability grounds. They considered that the facts could "readily" have supported either of these findings.

25. The tribunal found that:-

> "29. In addition to the exercise carried out by Mr Bryant another way of analysing this is to compare it to other forms of discrimination which are claims which the claimant perhaps could have but has not. He has not by way of example brought a claim under Sections 20 and 61 (7) that there should have been an adjustment to the terms of the pension scheme so as to enhance his benefits to avoid the disadvantage caused by his working part time. If he had done so on the face of it he would have been able to identify a PCP, that is to say the scheme rule which determines payment of enhanced benefit on the basis of final salary, and on the face of it he would have been able to establish that this placed him at a substantial disadvantage in comparison with a non disabled employee, if he was able to persuade the tribunal to construct as a hypothetical comparator someone who retired on ill health arounds immediately following working full time and being in receipt of full salary but who was in fact not disabled. We have not heard any argument about this and it may or may not be difficult to construct such a comparator. Equally such an argument might be open to precisely the same objection that Mr Bryant advances in relation to the comparator in relation to the section 15 claim.
>
> 30. Similarly there is no indirect discrimination claim brought under Section 19. Again on our analysis the PCP would have been readily identifiable. In evidence before us Mr David Williams accepted that disabled employees were more likely to work part time and in addition that disabled employees were more likely to work part time immediately prior to ill health retirement. Accordingly on the face of it on the basis of the

> evidence before us, the claimant would have established both a PCP and group disadvantage and clearly would have established individual disadvantage on the same basis as the group. This would not appear to be susceptible to the same objection as outlined above given the evidence of Mr Williams as to group disadvantage. On that basis whilst we have to be cautious given that no such claim was brought and we have no means of knowing what evidence would have been given, it appears to us to be permissible speculation to say that it appears likely that the claimant would have satisfied those elements of an indirect discrimination claim and that what would have been left would be the question of justification. If that is right it would seem a curious result if the respondent is correct and the claimant cannot establish in this case that he has been treated unfavourably simply because he has chosen to bring his claim under section 15, which on the face of it is less onerous than either sections 19 or 20."

26. Having expressed that view they added:

> "We have been cautious in considering the points set out in the paragraphs above in respect of other hypothetical claims, as they are of necessity speculative and the parties have not addressed us as to them. They have not formed a *fundamental* part of our reasoning but they do appear to us to be permissible speculations." [emphasis added]

27. As Langstaff J observed in the EAT, the inference to be drawn from the last sentence is that the tribunal's view about the hypothetical claims did form *some* part of their reasoning. It was unwise, with respect, for the tribunal to have taken such speculation into account in respect of claims which had not been brought or not been pursued (indeed the reasonable adjustments claim had been withdrawn) and on which they had not invited the parties' advocates to address them.

Justification

28. Having found that Mr Williams had been "unfavourably treated" the employment tribunal went on to consider whether the Respondents had established a defence under section 15(1)(b) of the 2010 Act by showing that the treatment was a proportionate means of achieving a legitimate aim. They accepted the Respondents' contention that the treatment did have a legitimate aim, namely:-

> "… the provision or operation of a viable defined benefit occupational pension scheme for employees of the second respondent which provides benefits at an appropriate and affordable level to all eligible members of the scheme whether disabled or otherwise without placing an undue financial burden on the scheme including but not limited to the availability of appropriate immediate enhanced ill health pensions for those unable through illness to continue in their scheme."

However, they were not satisfied that the treatment was a proportionate means of achieving that legitimate aim. Their reasons for so holding included that:-

a) At the time of formulating the Scheme rules in 2008 the trustees had not appreciated the effect of rule 15.5 and "self-evidently did not consider any alternative methods of achieving the same overall result without the discriminatory effect";

b) The Respondents' argument related solely to cost and was therefore indistinguishable from the proposition rejected by the Supreme Court in the context of judicial pensions in *O'Brien v Ministry of Justice* [2013] IRLR 315;

c) "Whether a [pension] scheme is discriminatory and whether that discrimination can be justified cannot be dependent on the financial condition of the scheme at the time the question comes to be answered."

The tribunal's order

29. The tribunal's conclusion was that "the claimant's claim of discrimination against both the first and second respondent contrary to sections 15 and 61 of the Equality Act 2010 is well founded". (Section 61 provides that an occupational pension scheme must be taken to include a non-discrimination rule binding on the trustees of the Scheme and the employer of the Scheme's members. It was not otherwise mentioned in the tribunal's judgment, nor in the skeleton arguments of either side. It is common ground that the claims against the two Respondents stand or fall together.)

The appeal to the Employment Appeal Tribunal

30. The Respondents appealed against the tribunal's findings on unfavourable treatment and proportionate means. Mr Williams cross-appealed against the finding on legitimate aim.

31. In a reserved judgment handed down on 21 July 2015 the Employment Appeal Tribunal (the President, Langstaff J, sitting alone) allowed the appeal on both the unfavourable treatment and justification issues and dismissed Mr Williams' cross-appeal on the legitimate aim point. With the permission of Elias LJ Mr Williams now appeals to this court against Langstaff J's judgment; the Respondents cross-appeal against his decision to remit the case for re-hearing by a fresh tribunal, contending that the claim should instead have been dismissed.

32. On unfavourable treatment Langstaff J said:-

> "27. … The meaning of the word "unfavourably" cannot, in my view, be equated with the concept of 'detriment' used elsewhere in the Equality Act 2010. The word "unfavourably" is deliberately chosen. So, too, the choice not to use the word "detriment" must be assumed to be deliberate: the draftsman would have been well aware of the use of the word "detriment" elsewhere within the Equality Act, and avoided it. Nor, as the parties were agreed, does the word "unfavourably" require a comparison with an identifiable comparator, whether actual or

hypothetical, as would the description "less favourable". "Less" invites evidence to be provided in proof of "less than whom?"; "un.." is by contrast to be measured against an objective sense of that which is adverse as compared with that which is beneficial.

28. Section 15 as such was introduced into the Equality Act 2010 for the first time. The word "unfavourably" is used elsewhere in the Act in respect of provisions which have a longer pedigree. Thus in Section 18, a person is held to discriminate against a woman if in a protected period in relation to a pregnancy of hers that person treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of it (Section 18(2): see also Sections 18(3) and (4)). In this use it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability. Since the word "unfavourable" is the same word in section 15 as it is in section 18, in the same part of the same Act, it is likely that the draftsman had in mind that it would mean much the same in both.

29. I accept Mr O'Dair's submission that it is for a Tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in a position as good as others generally would be.

…

36. The fact that the Claimant was treated less favourably than those who, also disabled, and subject of the same ill-health retirement scheme, had a higher final salary than he did cannot assist the Claimant, since such reasoning adopts a test of less favourable treatment – in these circumstances, less favourable treatment than that given to others who were disabled, but whose disabilities came on suddenly – rather than applies the relevant word ("unfavourable"). The parties are agreed that that word was deliberately chosen so as not to be the same as "less favourable" and that a "less favourable" treatment test is inappropriate."

33. The President held that the tribunal was in error to adopt the claimant's analysis making a comparison between a person suffering a heart attack or stroke and a person such as the claimant whose disability worsened over time. He noted that "the tribunal wrongly conceived the former not to be disabled"; but that, as the Respondents rightly pointed out, no one who is not permanently incapable of carrying on his occupation is eligible for ill health retirement under the Scheme.

34. Langstaff J also criticised the tribunal's reliance on arguments which might have been presented if the claimant had brought a claim asserting a failure to comply with the duty under s 20 of the 2010 Act to make reasonable adjustments. Such a duty exists where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled; but the ill health retirement provisions of the Scheme could only operate in favour of members who were disabled. He added that if the analysis were to descend to the detail of the particular disability suffered by members of the group being considered it would need to be established that the claimant together with others sharing this disability were at a disadvantage compared with others who did not have that particular disability but had some other. The tribunal had not attempted such an analysis; yet many suffering very different disabilities would be given precisely the same advantage or disadvantage as the claimant. Moreover, the reduction in the Appellant's working hours in 2010 had been made at his request. The University had fulfilled its duty to make reasonable adjustments by acceding to that request.

35. Langstaff J observed:-

> "If it was a reasonable judgment in the light of his disability to reduce the claimant's hours of work, then the University was legally obliged to make that reduction: but if the reduction in hours was also held to be the consequence of the claimant's disability so as to render the reduced weekly payment for his labour unfavourable treatment within the meaning of section 15, the Act would in one breath be requiring the University to reduce his hours, but in the next be obliging it to pay the claimant as if there had been no such reduction."

Unfavourable treatment: *the Appellant's argument*

36. Ms Casserley for the appellant criticises the finding of the EAT that unfavourable treatment cannot be equated with the concept of detriment. She relies on the Code of Practice issued by the EHRC in 2011. At paragraph 5.7 the Code asks the question "what is unfavourable treatment?" and gives the answer:-

> "for discrimination arising from disability to occur a disabled person must have been treated unfavourably. This means that he or she must have been put at a disadvantage…"

At paragraph 4.9 the Code states:-

> ""disadvantage" is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that "detriment" a similar

> concept is something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and a worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonable say that they would have preferred to be treated differently".

37. Ms Casserley submitted that "unfavourable" equates to and is potentially broader than "detriment". She continued:-

> "Whether treatment is advantageous or not should be irrelevant. The question is whether, objectively, the treatment is unfavourable. An individual may benefit – for example, someone in receipt of salary or, as in this case, a retirement benefit. But that does not, nor should it, prevent a claim for unfavourable treatment if C is experiencing a detriment because of something arising in consequence of disability. That may be less pay or less benefit. The provision is a broad one which is controlled by justification."

38. At paragraph 73 of her skeleton argument Ms Casserley submitted:-

> "The claimant in this case was not working full time, and thus in receipt of his full salary, when he took ill health retirement. He was working reduced hours because of his disability – something which was undisputed. As a result his benefit was reduced. This was simply unfavourable treatment – a disadvantage because of something arising in consequence of his disability, regardless of the fact that he was benefiting in the first place from having been a member of the pension scheme."

39. Ms Casserley accepted (as did Mr Bryant QC for the Respondents) that the "treatment" under scrutiny is the award in 2013 of enhanced benefit under the pension scheme based on Mr Williams' (part time) final pensionable salary. The "treatment" complained of cannot be the establishment of the Scheme in 2008 nor its amendment in 2009. Apart from any other argument both these events occurred before the enactment of s 15 of the 2010 Act.

The Respondents' submission

40. Mr Bryant for the Respondents essentially relied on the judgment of the EAT on the points of law. He also emphasised that if Mr Williams had not asked for a reduction in his working hours in 2010 but had simply ceased to work for the Respondents he would not have been eligible for ill health retirement since he was not at that stage permanently incapable of carrying out his occupation.

Discussion

41. In *London Borough of Lewisham v Malcolm* [2008] 1 AC 1399 the House of Lords, reversing the decision of this court (Arden, Longmore and Toulson LJJ), held that the appropriate comparison to be made in cases of alleged discrimination on the ground

of disability was with a person who was not disabled but was otherwise in the same position as the claimant. It was common ground between Ms Casserley and Mr Bryant that the aim of section 15 was to reverse that decision and restore the position taken by the Court of Appeal in *Clark v Novacold Ltd* [1999] ICR 951. Mr Clark was absent from work for a year because of disability caused by an injury and was dismissed, the reason being that he could not perform the main functions of his job. That reason would not apply to those who were able to perform the main functions of the job, and they would accordingly not have been dismissed for that reason. Mr Clark had therefore been treated less favourably than a hypothetical comparator who was able to perform the main functions of the job. The issue of justification was remitted by this court to the employment tribunal.

42. In the leading cases cited to us the "treatment" complained of has been an act which itself disadvantages the claimant in some way. In *Clark v Novacold* the claimant was dismissed. In the *Lewisham* case Mr Malcolm was evicted. In *Shamoon v Chief Constable of the RUC* [2003] ICR 337 the claimant Chief Inspector had part of her duties as a manager (the appraisal of subordinates) removed. The House of Lords held that it was not necessary for her to show financial loss in order to establish a detriment; it was enough that she might reasonably feel demeaned by this decision in the eyes of those over whom she had authority.

43. Ms Casserley placed the *Shamoon* case at the forefront of her argument, but I do not consider that it assists her. Mr Williams' case does not turn on a question of reasonable perception. His pension is undoubtedly less advantageous or less favourable than that of a hypothetical comparator suddenly disabled by a heart attack or stroke. But it is far more advantageous or favourable than it would be if he had not become permanently incapacitated from his job. *Shamoon* is not authority for saying that a disabled person has been subjected to unfavourable treatment within the meaning of s 15 simply because he thinks he should have been treated better.

44. As I have noted above Ms Casserley submitted that at the time of the claimant's retirement "he was working reduced hours because of his disability…; as a result his benefit was reduced" and "that this was simply unfavourable treatment – a disadvantage – because of something arising in consequence of his disability" .

45. But this cannot possibly be sufficient to establish disability discrimination. If it were, it would be difficult to see why it would not apply to a disabled claimant who applies for and secures a part time job because that is as much as he can manage, but would otherwise have worked full time. He will be paid a part time salary because of something arising in consequence of his disability. It can hardly be said to have been Parliament's intention that he should be able to claim that he has been the victim of unfavourable treatment under s 15 and throw the onus onto the employers to establish that the part time salary is a proportionate means of achieving a legitimate aim. Similarly it would be remarkable if he could maintain an entitlement to the same retirement pension as he would have received had he worked full time throughout his employment. In oral argument Ms Casserley was disposed to accept that in those circumstances there would be no *prima facie* case of unfavourable treatment within s 15.

46. Suppose that one changes the facts slightly from the last example. A disabled person applies for a full time job with the University and works full time for (say) six

months. At this point, he realises that the full time job is too onerous for him and asks the University to reduce his working hours to 50% of full time salary. The employers agree and for the next 13 years he works 50% of full time working hours, before becoming permanently incapacitated and taking ill health retirement. It would be very surprising if on those facts he was entitled to a pension as if he had worked full time throughout his employment: yet the only difference between this and the previous example is that for his first few months in the job he tried full time working but found that he could not manage it.

47. In the present case the accrued benefit element of Mr Williams' ill health pension was calculated on a career average basis, about which no complaint is made in this litigation; and if the enhanced benefit element of the pension scheme had also been calculated on a career average basis it would (as it happens) have produced a higher pension for Mr Williams than the one he has been receiving. However the Scheme is fashioned, some people will do better than others. Take the case of an employee who works full time for ten years in a junior post before achieving promotion to a considerably higher pay grade. After three years in the higher grade post she has to take ill health retirement. In her case Rule 15.5 produces a much more favourable result than if the calculation had been on the basis of her career average, since her final pensionable salary is at the higher rate. If the trustees felt compelled to amend the Scheme to introduce career averaging for the enhanced benefit element of the pension this hypothetical employee might understandably complain that she has been hard done by, and that enhanced benefit should reflect the loss of a career in which she would have expected to continue for many years earning the salary in the higher grade post.

48. Ms Casserley's argument begins by treating "unfavourable" as not requiring any comparator but in reality it does depend on a comparator, namely another disabled member of the Scheme with a different medical history.

49. No authority was cited to us to support the view that a disabled person who is treated advantageously in consequence of his disability, but not as advantageously as a person with a different disability or different medical history would have been treated, has a valid claim for discrimination under s 15 subject only to the defence that the treatment was a proportionate means of achieving a legitimate aim. If such a claim were valid it would call into question the terms of pension schemes or insurance contracts which confer increased benefits in respect of disability caused by injuries sustained at work, or which make special provision for disability caused by one type of disease (for example cancer). The critical question can be put in this way: whether treatment which confers advantages on a disabled person, but would have conferred greater advantages had his disability arisen more suddenly, amounts to "unfavourable treatment" within s 15. In agreement with the President of the EAT I would hold that it does not.

50. This makes it unnecessary to consider Ms Casserley's arguments on justification, since on my view of the unfavourable treatment issue one never gets to the s 15(1)(b) defence. I will only say that I see considerable force in Langstaff J's analysis and his criticisms of the tribunal's decision on this point. It is also unnecessary to consider the arguments on behalf of Mr Williams on the legitimate aim element of justification.

51. I would therefore dismiss Mr Williams' appeal.

The Respondents' cross appeal

52. The one aspect of the case on which I would differ from Langstaff J is his order remitting the claim to a fresh employment tribunal for rehearing. On the view which I take (and which he took) that the undisputed facts of this case cannot amount to unfavourable treatment within s 15 there is no purpose to be served by remitting the claim to the employment tribunal. I would therefore allow the Respondents' cross appeal, set aside the order for remission to the employment tribunal, and substitute an order dismissing the claims.

Lord Justice Briggs:

53. I agree.

Lady Justice Arden:

54. I also agree.