FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 2
XA80/16

Lord President
Lord Malcolm
Lord Glennie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the NOTE by

DAVID LILBURN

Noter

against

(FIRST) AA, THE PENSIONS OMBUDSMAN

and (SECOND) CG, (former) DEPUTY PENSIONS OMBUDSMAN

Respondents

and

CPLAS TRUSTEES LIMITED

Third Respondents

for

An Order ordaining the Pensions Ombudsman to state a case for the Opinion of the Court

Noter: Bovey, QC, J Smith; Black and Markie, Alloa
First and Second Respondents: Connal, QC (Sol Adv); Pinsent Masons LLP
Third Respondents: Barne, QC; Burness Paull LLP

15 December 2017

Introduction

[1] This is an application to ordain the first respondent to state a case in relation to a determination of the second respondent, a former deputy Pensions Ombudsman, dated 28 March 2008. The primary issue is whether, given the significant passage of time since the determination, the court ought to allow the application late, by relieving the noter of the consequences of his failure to comply with the rules of court which prescribe a 14 day period.

Background

[2] The noter was employed as a loss adjuster by McLaren Dick & Co from 1 January 1983 until 31 January 2002. In 2001, McLaren Dick & Co were acquired by the Capita Group plc. Following the takeover, the noter became involved in a dispute with Capita about his pay and conditions. He initiated proceedings before the Employment Tribunal for unfair dismissal, breach of contract, payment of redundancy pay and remuneration. His employment was terminated following a "Compromise Agreement", dated 1 March 2002, which recorded that the termination was "on account of ... disability". He was paid the sum of £125,000.

[3] Very soon after the conclusion of the Agreement, on 17 April 2002, the noter applied to the third respondents for an ill-health early retirement pension. A pension was granted, along with arrears and interest, effective from that date. The noter was aged 39. His pension consisted of an unreduced lump sum and a reduced annual pension of about £2,500 per annum. Had the pension commenced at the age of 60 (his normal retirement date) it would have been about £16,800 per annum.

[4] In May 2004, the noter made a complaint to the third respondents about the reduced nature of the pension, its effective date and the interest payable on the arrears. In January 2005, not being satisfied with the outcome of that process, he complained to the Pensions Ombudsman. The second respondent determined his complaint. The noter was supported throughout the proceedings by his union, namely Unite, who funded legal representation. The second respondent's determination of 28 March 2008 rejected the noter's complaint. On 3 April 2008, Unite wrote to the noter explaining that the second respondent had held that the rules had required that the noter apply for a pension before his employment had terminated, if an unreduced pension were to have been granted. Capita would have had to have requested him to retire early to achieve that objective. Unite's solicitors advised that it had been open to the second respondent to reach his determination. There were no reasonable prospects of a successful appeal. Unite would not provide funding to appeal. No application for a stated case (*infra*) was made.

[5] On 18 July 2008, the noter was convicted of the murder of his wife on 28 July 2007. The jury rejected his plea of diminished responsibility. He was sentenced to imprisonment for life, with a punishment part of 19 years. His appeal against his conviction was refused (2011 SCCR 326). He pursued a complaint to the Scottish Criminal Cases Review Commission. The appeal, following upon the SCCRC's reference to the High Court made on the grounds of fresh evidence about his mental state, was refused (2015 SCCR 320). The noter is currently incarcerated at the State Hospital in Carstairs, following a transfer for treatment direction.

The Second Respondent's Determination

[6] The second respondent determined that the noter was not entitled to an unreduced

ill-health early retirement pension as he did not fall within the relevant provisions of the scheme. Notice of an intention to claim ill-health early retirement required to be given to the employer before the date of retirement. Where a pension was claimed early through incapacity, the sum would be actuarially reduced unless the employer had requested that the member retire. On the evidence, it could not be said that the noter had retired "at the request of" Capita (see *AGCO* v *Massey Ferguson Works Pension Trust* [2004] ICR 15). The noter had been in dispute about the conditions of his employment. He had initiated proceedings before the tribunal. As soon as the parties had entered into negotiations about the Compromise Agreement, the noter's departure was not in doubt. The agreement was a means by which the noter was able to negotiate his departure. There had been no request by the employer for the noter to retire early; as distinct from his employment being terminated on the grounds of disability.

Legislative framework and Procedure

[7] Section 151(4) of the Pension Schemes Act 1993 provides that an appeal on a point of law may be taken to the Court of Session from a determination of the Pensions Ombudsman. RCS 41.49 provides that an appeal under section 151(4) shall be by stated case. Such a case proceeds upon a minute lodged within 14 days of the decision (RCS 41.8(1) and (3)(b)). RCS 2.1 provides that the court may relieve a party from the consequences of a failure to comply with a provision of the rules "due to mistake, oversight or other excusable cause."

[8] On 26 July 2016, the noter lodged a Minute of Application (see *Edinburgh City Council* v *Rapley* 2000 SC 78) requesting that the first respondent state a case in respect of the determination of 28 March 2008 and craving the court to exercise its dispensing power under RCS 2.1.

[9] By letter dated 28 July 2016, the first respondent maintained that a stated case was not the correct procedure and that such a case would not be forthcoming. Rather, a statutory appeal under RCS Chapter 41 Part III was appropriate (*Trustees of the Lithgows Limited Pension Scheme* v *Board of the Pension Protection Fund* 2011 SC 426) within the time limit of 42 days (RCS 41.26(1)(b)). This position had been stated earlier in a letter to the noter dated 24 May 2016 but, standing RCS 41.49, it was not insisted upon. The noter then presented this Note craving the court to ordain the first respondent to state a case on nine questions of law; although none of these asks, at least directly, the critical question of whether the second respondent had erred in law in failing to find that the noter had retired at the request of Capita.

[10] The respondents answered that there was no material relating to the proceedings before the second respondent now available, other than the determination itself. The decision maker was no longer with the Pensions Ombudsman Service. It would not be possible to state a case.

Submissions

Noter

[11] The noter contended that the court should exercise its dispensing power to allow the noter to appeal although late. RCS 2.1 was designed to do substantial justice between the parties, and it was inappropriate to read any qualifying words into the rule (*Semple Cochrane* v *Hughes* 2001 SLT 1121; *Royal Bank of Scotland* v *Matheson* 2013 SC 146 at para 34; and *Nair* v *Secretary of State for the Home Department* [2014] CSOH 49 at para 21). At the time of the determination, the noter was in an anti-suicide cell in HMP Barlinnie. He had remained there until his transfer to the State Hospital in July 2009. He had not had the financial

resources to challenge the decision, following the withdrawal of support by Unite. His mental health had gradually improved. In 2014, he began studying for a law degree. In October 2015, he discovered an employment law case (*First West Yorkshire* v *Haigh* [2008] IRLR 182) which, he thought, suggested that the first respondent's decision might have been wrong. The legal advice from Unite, may have been mistaken. Thereafter, the noter had difficulty in persuading a solicitor to accept instructions. Obtaining legal aid, and instructing junior and senior counsel, had caused further delay. The balance of prejudice favoured the noter. Justice was better than finality (*Ras Behari Lal* v *King Emperor* (1933) 50 TLR 1, at 2). The first and second respondents had no interest in the matter. The third respondent had no interest in wrongfully depriving the noter of a pension to which he was entitled. It was accepted that the delay would result in practical difficulties, but these could be overcome. Although the second respondent had retired, and the papers had been destroyed, the determination did provide full reasoning.

[12] On the merits, the second respondent had erred in applying *AGCO* v *Massey Ferguson Works Pension Trust* (*supra*). The noter had not been made redundant, but had left his employment by agreement, although under threat of dismissal. The employer should not be permitted to go beyond the statement in the compromise agreement that the reason for the termination of the noter's employment was his ill health. Whether an employee left voluntarily due to ill health, or was dismissed because of ill health, his departure could properly be described as retirement (*IBM United Kingdom Holdings* v *Dalgleish* [2015] Pens LR 99). The second respondent had erred in concluding that the failure of the noter to give notice that he intended to retire due to ill-health had prevented him from being eligible for an unreduced pension. The noter did not leave his employment at his own instigation, but due to his employer's insistence.

First and second respondents

[13] The noter had failed to provide sufficient cause to justify invoking the dispensing power. There had been no mistake, but rather a deliberate decision. The absence of prejudice did not *per se* justify invoking the dispensing power (*Smith* v *Smith,* Inner House, unreported, 23 June 1995). *First West Yorkshire* v *Haigh* (*supra*) had existed at the time of the decision and the failure to consider it was a matter between the noter and his representatives. In any event, it was an unfair dismissal case involving an issue about implied terms. *IBM United Kingdom Holdings* v *Dalgleish* (*supra*) had been one of a series of cases about particular scheme terms. It had been overturned on appeal ([2017] EWCA Civ 1212). *Nair* v *Secretary of State for the Home Department* (*supra*) had concerned immigration rules.

[14] The noter had obtained legal representation on a number of matters during his incarceration and had been aware of the need for a prompt appeal (*Lilburn* v *HM Advocate* 2011 SCCR 326). He had taken 10 months from the discovery of the case to institute proceedings. His incarceration was not a justification, given that the noter had responded to correspondence in the interim. There were no papers left from the original determination, given the requirements of Data Protection legislation.

Third Respondents

[15] The noter was barred from proceeding with the note by *mora*, taciturnity and acquiescence. The delay had been inordinate and inexcusable. No adequate explanation or justification had been advanced. It had been reasonable for the third respondents: (i) to infer that the noter had accepted the determination; and (ii) to administer the scheme on that basis; Capita having funded the scheme accordingly. The employers would require to fund

the scheme in a manner which could provide the noter with any unreduced pension found due.

[16] The third respondents and Capita were at risk of being prejudiced as they are unable to ascertain the extent to which the noter's proposed questions of law were argued. The relevant file had been destroyed and the second respondent was no longer with the Pensions Ombudsman's Office. In any event, the substantive appeal was without merit. The second respondent had determined, as a matter of fact, that the termination of the noter's employment was never in question. It had not been "at the request of the employer". The noter had not applied for early retirement prior to the termination of his employment and could not (rule 15.2) obtain an unreduced pension under rule 15 but only one under other provisions of the scheme (rule 22).

[17] RCS 2.1 was not engaged. A decision not to appeal was not a failure to comply with the provisions of the rules, but a deliberate act (*Anderson* v *British Coal Corporation* 1992 SLT 398 at 401). The words "other such excusable cause" (*sic*) had to be read *eiusdem generis* with "mistake" and "oversight".

Decision

[18] RCS 2.1 allows the court to relieve a party from the consequence of any failure to comply with the rules where the failure has been caused by a "mistake, oversight or other excusable cause". The purpose of the power is to achieve justice between the parties, where such justice would not be achieved otherwise because of a procedural failure. Although the words "other such excusable cause" appear in the Parliament House annotated rules of court, and have done since the inception of the rules in the Act of Sederunt (Rules of the

Court of Session 1994) 1994, there is a significant error. The word "such" does not appear after "other" in the record copy.

[19] RCS 2.1 does not require any exceptional or extraordinary circumstances (*Semple Cochrane* v *Hughes* 2001 SLT 1121, Lord Carloway at para [10] citing the correct version, but it does require there to be a "failure" to comply with the rules. It is not normally open to the court to use the power to reverse an action which has been deliberately taken (*Anderson* v *British Coal Corporation* 1992 SLT 398, LJC (Ross), delivering the Opinion of the Court, at 401). There was no mistake or oversight or an event of an excusable nature in the noter's case. The noter took a conscious decision, following upon advice tendered by his union's solicitor, not to appeal the decision of the second respondent. Thus no stated case was requested then, or for the next 8 years. All that is now said is that the noter, when carrying out researches in 2015, came across an Employment Appeal Tribunal decision (*First West Yorkshire* v *Haigh* [2008] IRLR 182) which, he thought, might throw doubt on Unite's advice. That advice had been that there was no stateable appeal against a finding, which was one of fact (albeit in a legal context), that the noter's employers had not requested the noter to retire.

[20] Even if there was a stateable ground of appeal, upon which the court expresses no concluded view, the time which has elapsed renders it inappropriate for the court to exercise its discretion to invoke the dispensing power to allow the commencement of a stated case procedure over 9 years after the relative decision. The actings of the noter do indeed amount to *mora*, taciturnity and acquiescence. After the expiry of the days for appealing, or at least after a substantial additional period had passed, the third respondents were entitled to proceed on the basis that the noter had accepted the determination and that the scheme's liability to him was accordingly fixed. Were it to be otherwise, trustees would find it all the

more difficult to assess future liabilities and to organise their affairs accordingly. They are also substantially prejudiced by the absence of the papers which formed the background to the original determination. Even assuming that the second respondent is able to recollect the case, it would be wholly unreasonable for him to be expected to frame a case answering the multiple questions posed by the noter at this extremely late stage.

[21] The application to use the dispensing power under RCS 2.1 and to ordain the first respondent to state a case is therefore refused.