Appeal No. UKEATS/0004/18/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 23 February 2018

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MS NICOLA MURRAY APPELLANT

MACLAY MURRAY & SPENS LLP RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Ms N Murray (The Appellant in Person)
For the Respondent	Mr T Brown (of Counsel) Instructed by: Dentons UKMEA LLP Quartermile One 15 Lauriston Place Edinburgh EH3 9EP

SUMMARY

The claimant lodged a form ET1 citing the respondent as her former employer. She made claims of lack of notice of dismissal, and of indirect discrimination. The respondent ceased practice about six months later. The members of the respondent became Dentons UK and Middle East LLP and a senior employee of that LLP. The claimant became concerned that the respondent might have no assets. The claimant applied to join as respondents Dentons UK and Middle East LLP and three individuals, who were partners of the respondents at the time of her dismissal. The employment judge refused both applications. The claimant appealed against the refusal to join the three partners as respondents. She argued that they were each responsible as an individual for indirect discrimination; in terms of the Equality Act 2010 sections 109 and 110, the individuals and the LLP were liable for acts done by the individuals. Held: appeal refused. The claimant had not made any averments which sufficed to place liability on individuals. Her allegations were of indirect discrimination and lack of notice all carried out by the respondent, that is the LLP.

THE HONOURABLE LADY STACEY

1. This is an appeal from the decision at a preliminary hearing of Judge Lucy Wiseman sitting in Glasgow on 15 December 2017. The matter in issue is the appellant's application to join three individual partners ("the corporate partners") of the Respondent to the proceedings. Judge Wiseman heard the opposed application and refused it. She stated that the complaint made is of indirect discrimination; that the provision criterion or practice (PCP) relied on is that of the respondent not that of an individual or individuals. The appellant argued that Judge Wiseman erred in law in making that decision.

2. The grounds of appeal are that the employment judge erred in her interpretation of section 110 of the Equality Act 2010 ("the Act"). The claimant argued that the corporate partners are also liable with the respondent pursuant to section 110. The indirect discrimination which she alleges, as defined by section 19 of the Act, is subject to section 110 of the Act. By that section, if an employee or agent does something which amounts to a contravention of the Act by the employer or principal then the employee or agent is liable under the section. The claimant did not know whether any of the corporate partners are or were employees of the respondent but she argued that in light of section 6 of the Limited Liability Partnerships Act 2000 every member of a limited liability partnership is the agent of that limited liability partnership. She argued that in refusing her request to add the corporate partners as respondents the employment judge made an exception to section 110 for which she had no warrant. She accepted that it might not be appropriate to hold an agent liable in every case of discrimination but argued that in the current case the corporate partners as owners and managers of the respondent are in a position where they should be held to be responsible for their acts on behalf of the respondent. The application for appeal was sifted by HHJ Eady QC in London who, by

order seal date 17 January 2018, held that the appellant's grounds of appeal raised reasonably arguable questions of law.

3. The employment judge's decisions so far as relevant to the appeal is in the following terms: –

> **"The claimant, by email of 6 December, made an application to sist three former partners of the respondent to the proceedings. The three individuals where the partners in the Corporate Department of the respondent with the claimant worked and where, it was alleged, responsible for the claimant's dismissal, discrimination and breach of contract.**
>
> **Ms Jones objected to the application on the basis the application was out of time and there was no basis for adding individuals to a claim of indirect discrimination.**
>
> **I decided to refuse the claimant's application to add three individuals as respondents to the proceedings. The complaint is one of indirect discrimination and the provision, criterion or practice relied upon by the claimant is that of the respondent and not of an individual. I acknowledged the individuals named were each, as partners in the corporate team, involved with the claimant's work and her management. However, I did not consider, given the type of claim pursued by the claimant, that this was a basis for allowing them as respondents to these proceedings."**

4. The claimant is a solicitor who was employed by the respondent from 06 June 2016 to 19 December 2016. In her ET1 she claimed that she was discriminated against on the grounds of sex and that she is owed notice pay. She stated that she was bringing a claim for wrongful dismissal and a claim under section 19 of the Act. She worked as part of the Glasgow corporate team which consisted of three male partners (the corporate partners) and five solicitors. Her contracted working hours were 9 a.m. to 5 p.m. Monday to Thursday. She had to leave the office promptly after 5 p.m. to ensure that she picked up her daughter from childcare. The claimant was subject to an initial three month probation period which expired on 5 September 2016. On 6 September 2016 one of the corporate partners asked her to meet and said that they wanted to extend her probation period, because they had not seen enough of her work, and that they had concerns about a particular document; also that she could sometimes be late in the morning. The claimant noted that her probationary period had already expired.

5. On 13 September 2016 a letter from an assistant in the HR department of the respondent was left on her chair. That letter purported to extend the probationary period and noted that the respondent needed to see an improvement in timekeeping. It stated that the notice period would be one week. On 14 September 2016 the claimant responded by email asserting that her probationary period had concluded and therefore her notice period remained as it was contractually, at three months.

6. On 19 September 2016 one of the corporate partners asked the claimant to "think about things" and the next day he gave her a letter stating that it was "what we had discussed the other day". That letter contained a notice of termination of employment dated 20 September 2016 giving 12 weeks' notice of termination of employment. On 27 September 2016 another of the corporate partners met the claimant and discussion of time keeping took place. The partners stated it was not acceptable for her to come into work after 9 a.m. The complainer explained difficulties with arriving at 9 a.m. due to traffic and the necessity of taking her child to child care, and also said that she worked regularly on evenings from home and at the weekends. She also noted that was a pattern within the team of others coming to work after 9 a.m. The partners stated that it was not acceptable for the claimant to arrive after 9 a.m. because she was the only one who left the office at 5 p.m.

7. On 6 December 2016 a letter from an HR consultant of the respondent was left for the claimant. That letter stated that the notice of termination of employment given on 20 September 2016 had contained an incorrect period of notice and that her employment would be terminated on 19 December 2016.

8. Having given the above narration of facts, the claimant stated at paragraph 24 of her paper apart to her form ET1 that she believed that her employment was terminated because she usually left the office at 5 p.m. She then stated

> "I was also subjected to detrimental treatment during my employment because of this."

9. The claimant then went on to state that the PCP of requiring an employee to remain in the office beyond 5 p.m. could apply to a male as to a female, but was one which put women at a disadvantage because they were more likely than men were to have childcare responsibilities and more likely to be single parents, as the claimant is. She stated that it operated to her disadvantage as she had to leave the office at 5 p.m. for the purpose of collecting her child from childcare. She offered to prove that the requirement not to leave the office at 5 p.m. was not a proportionate means of achieving a legitimate aim.

10. The claimant then went on to state that if her employment was not terminated because she usually left at 5 p.m. it was terminated because she sometimes arrived in the office after 9 p.m., and usually left at 5 p.m.. She repeated the phrase quoted above, "I was also subjected to detrimental treatment during my employment because of this." She offered to prove that if the PCP of requiring an employee to be physically present in the office after 5 p.m. if she had arrived in the office after 9 a.m. was operated, it was one which put women at a disadvantage if they had childcare responsibilities. She offered to prove that it was not a proportionate means of achieving a legitimate aim.

11. The claimant stated that if employment was not terminated for either of the reasons set out in the paragraphs immediately above it was terminated because she regularly arrived after 9 a.m. Once again she repeated the assertion that she was subjected to detrimental treatment during her employment because of that. She made identical arguments, plainly drafted from

section 19 of the Act, that the PCP of requiring an employee to arrive at work by 9 a.m. was indirect discrimination.

12. Thus the claimant put forward in her form ET1 three possibilities of a PCP which she asserted amounted to indirect discrimination under section 19 of the Act.

13. In the form ET3, the respondent quoted the contract between claimant and respondent as stating inter-alia

> "The Glasgow office core working hours are 9 a.m. to 5 p.m. and while these should act as a guide you will be expected to work the hours that are required to both meet your chargeable hours target and to satisfy the requirements of the firm's clients. This will require a degree of flexibility on your part and as part of this you may be required to work not just at times outside the coreoffice hours, but also to work from the firm's other offices and at its client's offices. You will not normally be entitled to receive payment for hours worked in excess of the core office hours."

14. The respondent then went on to narrate its version of the events leading to the termination of the claimant on 19 December 2016. At paragraph 24 of the form, the respondent denied operating a PCP that employees must remain in the office beyond 5 p.m. It did not deny the other two sets of circumstances constituting a PCP claimed by the claimant. The respondent sought specification from the claimant of evidence upon which she relied to demonstrate that the PCP was operated by the respondent; the pool for comparison; and the exact nature of the detrimental treatment referred to by her.

15. In response to the request for specification, the claimant stated that the respondent terminated her employment because she usually left the office at 5 p.m., because sometimes she arrived in the office after 9 a.m. and usually left at 5 p.m. or because she had regularly arrived a few minutes after 9 a.m. in the morning. She stated that the respondent had applied one of the three sets of circumstances said by her to constitute a PCP. She stated that the respondent's letter dated 13 September 2016 was evidence that a PCP as set out was operated by the respondent.

16. In her further specification (page 38 of the core bundle) the claimant stated that one of the corporate partners told her that he felt that she was not pulling her weight. She alleged that could relate only to the time that she was present in the office. She prayed that in aid in her assertion that the respondent applied the PCP. She gave detail of a meeting with two of the partners in which she explained her childcare problems as both partners had noted that she struggled to get into the office on time, but left on time. She stated that that was evidence that a PCP as described by her was operated by the respondent. The claimant explained that she had raised a grievance which had led to the respondent compiling a table of times in the office relating to herself and certain other colleagues. She noted that other senior team members regularly arrived late but left later in the evening than she did. She asserted that the fact that the respondent did not object to those other senior team members being late in the morning, and they compiled a table of time in the office comparison to other senior team members to support the decision to dismiss her, was evidence that points to the PCP alleged by her being operated by the respondent and applied to her. The claimant argued that she was not aware of any of the three PCPs set out by her were applied by the respondent to teams in the firm, other than the Glasgow corporate team.

17. The claimant explained that she had named the LLP as the respondent as she thought that was the correct thing to do and as she wished to keep matters as straightforward as possible. Having lodged her form in April 2016, she became aware, in October 2016, that the respondent was about to cease its practice and that the only members of the respondent were to be Dentons and a senior member of that LLP. She was concerned that were she to succeed in her claim, the respondent might have no resources from which to make payment to her. She therefore decided to make application to the ET to include Dentons as an additional respondent. While awaiting a date for a hearing on that matter she decided to make application to include

the corporate partners also. The claimant made clear before me that the motivation for seeking to have the corporate partners added as additional respondents was that she was concerned that the respondent would have no resources. She made her applications and each was refused. She did not appeal the decision concerning Dentons as she thought she had no grounds to do so. She did however argue that she did have grounds for the current application which was refused and which she wished to appeal against.

18. The claimant argued that the statute was clear and that sections 109 and 110 of the Act simply stated that anything done by an agent must be treated as also done by the principal (section 109) and that an agent contravened the Act if he did something which by virtue of these sections is treated as having been done by the principal. She argued that there was no way in which these sections could be read as allowing exceptions when indirect discrimination was alleged. She made reference to the explanatory notes to the Act, arguing that the purpose was to ensure that both the person carrying out an unlawful act and any person on whose behalf he acted could be held to account where appropriate.

19. The claimant considered case law in respect of legislation enabling the claimant to raise an action in an employment tribunal against a fellow employee who had carried out alleged acts even when the employer was vicariously liable. She referred to **Barlow v Stone UKEAT/0049/12/MAA**, **Hurst v Kelly [2013] ICR 1225**, **AM v WC and SPV [1999] IRLR 410** and **International Petroleum v Osipov UKEAT/0058/17/DA**. She argued that **International Petroleum** was illustrative of her point. She noted in the judgement of Simler P the opinion that it is likely to be unusual for an employee to wish to pursue a claim against a fellow worker rather than pursuing the claim against the employer, but the president could see no principled reason for excluding it. The claimant sought to distinguish the case of **Peninsula Business Services Ltd v Baker [2017] I RLR 394** on the basis that that case provided that a

third party having no knowledge constructive or otherwise of the wrongful act should not be saddled with responsibility for it. She contrasted that with the current case on the basis that the corporate partners are well aware of what they were doing.

20. In the case of **Carreras v United Partners First Research UKEAT/0266/15/RN** it was held that a PCP could exist even though there was no absolute requirement but rather an expectation or an assumption that the employee work in a certain way.

21. The claimant argued that the argument made against her that her amendment was too late was misconceived. There being no time limit provided in statute or in rules, amendment was a matter of discretion. There was no prejudice to the corporate partners who were well aware of the litigation and who knew of all of the events. They were, according to the claimant's argument, the controlling mind and were therefore uniquely well-informed. She adhered to her explanation given in her skeleton argument that the reason why she wished to bring in the corporate partners was that she was concerned about the resources of the respondent. When the claimant attempted to introduce an argument involving the Law Society of Scotland and its code of conduct, I told her that new material could not be raised at the stage of an appeal. The claimant accepted that and emphasised that she had made no new claims and was not seeking to introduce any new legal or factual material. She referred to the case of **Argyll & Clyde Health Board v Foulds EATS 0009/06** as a case in which no amendment was allowed because a new case could not be introduced at a late stage. She distinguished the facts of the present case by reiterating that she did not seek to introduce anything new. Her pleadings were the same as they had always been and she only sought to introduce the corporate partners as respondents because the Act made it clear that they were responsible as individuals, and she felt the need to include them due to her concerns about the respondent having no resources.

22. Mr Brown, counsel for the respondent noted that the parties were agreed that it may be possible to have liability on an individual worker in the case of indirect discrimination. He contrasted the mind set required for liability for direct discrimination with that for indirect discrimination. By definition, indirect discrimination could occur where there was a PCP which seemed to be neutral but which in fact put members of a group at a disadvantage. Individual people in the workplace were less likely to know that there was any indirect discrimination caused by a PCP than were the employers. The question before the court will always be whether or not there was a PCP, and if there was by whom was it applied. He submitted that the claimant had had the opportunity to bring her application against the corporate partners as well as the respondent when she lodged her form ET1 but did not do so. Had she done so, there was every likelihood that an application would have been made for further and better particulars of the actions said to have been taken by the corporate partners. The difficulties if such applications were not made, and the liability of individuals considered at an early stage were seen in the case of **Sinclair Roche & Temperley v Heard [2004] I RLR 763** at page 765.

23. Counsel argued that the EJ had not made any error of law. The essential question before her was whether the pleadings were to the effect that any PCP had been applied by the corporate partners and she correctly found that there were no such pleadings. Even after further information was given by the claimant she was still referring to a PCP being applied by "the respondent". The letters to which the claimant referred were sent by the respondent. The claimant did not offer to prove that the corporate partners had acted together, and in her reference to them she did not consistently set out clear allegations of what each one had done or said. It would not be enough for liability as an individual for an agent to have been heavily involved in the events complained about. The corporate partners are members of the LLP but are not the only members. There was no claim made that they had acted as "the controlling mind" of the LLP.

24. Each case would turn on its own facts and in the current case there were no facts pled which would give rise to liability against the corporate partners personally. An agent may be personally liable for indirect discrimination if that agent has a discretion as to how to act, and in exercising that discretion adopts a PCP and then applies that PCP. If the agent has no choice as to how to act, then they are not likely to be liable for any indirect discrimination; the PCP has by definition been created by the employer and applied by him. If it be in contravention of the Act, it is the employer who is liable. In the current case, the contractual provision involved working between 9 a.m. and 5 p.m. The contract was between the claimant and the respondent. Any PCP referred to by the claimant was said by her to have been applied by the respondent.

25. Thus counsel argued that the facts of other cases such as those referred to by the claimant might be illustrative but were not necessarily helpful in applying the law to the facts of the current case. For example, in the case of **International Petroleum v Osipov**, Mr Sage, one of the directors, was found to be a possible respondent but that was on the basis that he had involved himself in decision-making, and was not simply as he would have it, the messenger. Thus in that case, the decision was that Mr Sage, (and others) might be liable as individuals. That turned on the facts. Counsel was not aware of any cases about personal liability for an employer's indirect discrimination.

26. Turning to the timing of the application counsel argued that it is for the claimant to give the reason for an application to add a respondent at this stage. Counsel acknowledged that the claimant had explained that her concern was that the respondent might have no resources. He submitted that there was nothing to show that that was a valid concern. He argued that a finding against an individual of discrimination was a very serious matter. He submitted that the claimant had given no good reason and had emphasised that she had not changed the pleadings

in any way. She did not argue that she would be prejudiced in presentation of her evidence. He argued that there was prejudice to the corporate partners, one of whom had retired, in being required to defend proceedings in which they had not been identified as parties during the first eight months of those proceedings. If the corporate partners were brought in at this stage then they had not heard the benefit of lodging their pleadings at the outset, and will be required to plead the cases as additions to the already existing pleadings.

Decision

27. I refuse the appeal. The claimant has not shown that any error of law was committed by the employment judge. On the state of the pleadings and on the oral arguments made by the claimant, there are no reasons given why the corporate partners should be liable as individuals for any indirect discrimination.

28. It is clear that the Act provides for liability on an employee or agent personally where because of section 109 the employer or principal is also liable. I do not however read the Act as providing that agents are liable for the application of a PCP by the principal. The terms of section 110 are as follows: –

> (1) A person (A) contravenes this section if –
> (a) A is an employee or agent,
> (b) A does something which, by virtue of section 109 (1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
> (c) the doing of that thing by A amounts to a contravention of this act by the employer or principal (as the case may be).

That section applies therefore when something done by an agent is, by virtue of section 109 treated as having been done by his principal. Turning then to section 109, it is in the following terms: –

> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
> (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

29. The difficulty for the claimant's proposed construction of the sections is that she does not offer to prove that the agent or agents did anything which amounted to indirect discrimination. Rather she offers to prove that the principal, that is the LLP did so. Therefore there is no act which fulfils the requirements of section 109(2). The claimant has not offered to prove that all or any of the corporate partners acted as individuals when they dealt with her. She has only offered to prove that the respondent, that is the LLP, applied one of three variants of a PCP.

30. If I had decided that there was a basis for the application made by the claimant in law, I would have had to decide whether it came too late. On balance, I was not persuaded that the prejudice to the corporate partners was such as to require me to refuse the application. While the application made by the claimant on a form ET1 is not an iterative process, and claimants should be careful to put all that they reasonably can into that form, there is provision for amendment after it is lodged. The claimant was correct to say that the corporate partners were aware of the events to which she referred and I was not persuaded by counsel's argument that they would be gravely prejudiced by requiring to plead their answers in light of the existing answers lodged by the respondent.

31. In any event, as I have decided that there is no proper basis for the application I refuse the appeal.