



EMPLOYMENT TRIBUNALS

Claimant

Ms H. Sked

Respondent

Northumberland County Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT North Shields

On 14, 15 and 16 May 2018

Before: Employment Judge Shepherd

Members: Ms E Menton

Mr T Denholm

Appearances

For Claimant: In person

For Respondent: Mr Sangha

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claims of indirect sex discrimination are not well founded and are dismissed.
2. The claims of victimisation are not well founded and are dismissed.

REASONS

1. The claimant represented herself and the respondent was represented by Mr Sangha.
2. The Tribunal heard evidence from:

Hillary Sked, the claimant;
Lorraine Summers, Employee Services Manager;
Sue Harvey, Shift Leader;

Estelle White, Workforce Planning and Information Manager;
Keith Teasdale, Senior Recovery Officer.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 605. The Tribunal considered those documents to which it was referred.

4. The issues to be determined by the Tribunal had been discussed at a Preliminary Hearing before Employment Judge Garnon on 6 March 2018. The claims brought by the claimant were for indirect discrimination and victimisation.

In respect of the indirect discrimination claim it was stated that the Provision Criterion or Practice applied by the respondent was not making overpayments but it was the operation of the Overpaid Salaries and Wages Policy (OSWP).

5. The three victimisation claims were set out as follows:

“Victimisation claim 1

The claimant says her job share partner left and in line with established practice she was expecting to be offered the vacant hours. When she applied she was told on 13 October 2016 the Council no longer has a job share policy so she was not entitled the vacant hours. She believed she was being treated unfavourably as a result of raising the discriminatory effect of the OSWP. For some reason the original response did not deal with this at all. Now it says the job share scheme was replaced by a Flexible Working Policy in July 2012 and automatic offers of job share partner’s hours are now not made but the partner can lodge an expression of interest. The respondent says the claimant was told this, but did not do so.

Victimisation claim 2

The claimant has consistently said most overpayments are made to part time workers the majority of whom are women. She requested statistical evidence about recoupment of overpayments and was given figures of 73.6% women part-time employees and 36.4% of male part-time employees. The percentages do not add up to 100 and neither the claimant nor Ms Thirlwall could tell me of what they were percentages. I allowed an addition to her claim. The claimant said that throughout her dealings with the Council, its officers have accepted errors were made but refused to address issues of discriminatory effect. The addition was

“All officers of the respondent have consistently failed to address my concerns raised in grievances and/or other correspondence that the OSWP is indirectly discriminatory. I believe they have avoided doing so because I have done protected acts and they believe I may do more.”

There does not appear, from the amended response, to be an answer to this but Ms Thirlwall does not admit that the claimant’s concerns went unaddressed. The Council employs more women than men, and its case on disparate impact will be that the apparent numerical disparity does not reflect

the percentages of women and men affected by application of the OSWP. The Council will say this was explained to the claimant

Victimisation claim 3

“On or about 28 November 2017, I was sent a letter demanding repayment of the full amount in 28 days. I complained to HR saying the Tribunal claim would address this. About four weeks later I received another letter demanding payment in 7 days. This was despite the respondent knowing I had lengthy sickness absence due to work related stress. I believe this too was done because I have done protected acts and they believe I may do more”

The response is that on 10 October 2017 HR asked Employee Services to send the claimant an invoice for the overpayment. One was sent on 28 November for the full amount. The respondent alleges it heard nothing so sent a letter on 2 January 2018 demanding payment in 7 days. It says this cannot be victimisation because HR asked for the invoice before the claimant issued on 16 November. That is not correct. There are four listed “protected acts”, but twelve situations covered. To each of the four acts one must apply two further possibilities which are (a) belief he has or (b) belief he may do. Thus, if A suspects B will allege any type discrimination and that is an effective cause (it need not be the sole cause) of treating B less favourably than it otherwise would, that is victimisation. The claimant commenced Early Conciliation on 9 October and had told the Council on 6 October that she was about to.

In victimisation, the quest is for the “reason why” the detrimental conduct took place. Victimisation cases require an analysis of the mental processes (conscious or unconscious) which caused the respondent to act as it did. In Nagarajan-v-London Regional Transport, Lord Nicholls explained conscious motivation on the part of the discriminator is not a necessary ingredient. Malicious motive is certainly not a requirement. A Tribunal cannot infer the reason why from the mere fact the employer has treated the employee unreasonably, see Glasgow City Council v Zafar [1998] ICR 120. or was incompetent, see Quereshi-v- London Borough of Newham.”

6. It was stated in the notes of the discussion that the issues could be shortly and simply expressed as:

- “1. Does the application of the OSWP place women at a particular disadvantage when compared with men?
2. Did the application of the OSWP put the claimant at that disadvantage?
3. Does the respondent show the OSWP was a proportionate means of achieving a legitimate aim?
4. Was any actual, suspected or anticipated protected act by the claimant, at least in part, the cause of any detriment to which she was subjected?”

7. It was agreed at the commencement of this hearing that these were the issues. The protected acts were discussed further and agreed as:

1. The grievance dated 8 December 2015.
2. The grievance appeal dated 4 February 2016.
3. The ACAS Early Conciliation notification on 9 October 2017 and the claimant having informed the respondent that she was about to commence early conciliation on 6 October 2017.
4. The presentation of the claim to the Employment Tribunal on 16 November 2017.

8. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings from which the Tribunal drew its conclusions.

8.1. The claimant commenced employment with the respondent in November 1989. She was employed as a Control Room Operator with the respondent's Valley Care Services Team.

8.2. On 18 October 2013 the claimant increased her working hours from four hours with enhanced payments for weekend work to 12 hours plus enhanced payments. Employee Services were informed of the change of hours but, due to a misunderstanding, the correct input of payment details is not made.

8.3. On 30 October 2015 the claimant told the respondent that she thought she had been receiving too much pay. She had not realised at the time because her payslip failed to show the number of hours paid. The respondent's Employee Services Department checked and found she had been overpaid from October 2013 to October 2015 in the sum of £6,038.34 gross of tax.

8.4. The respondent has an Overpaid Salaries and Wages Policy(OSWP) under which it makes deductions from ongoing pay. The OSWP states "if an overpayment of salary occurs for any reason the Council will recover the money from the employee". The practice is to recover over the same period as the overpayment. In the claimant's case this would be over 2 years. These deductions from wages are lawful under Part 2 of the Employment Rights Act 1996.

8.5. On 3 November 2015 the respondent wrote to the claimant. The claimant was told that £167.74 per month would be deducted from her pay and this would commence with the claimant's December 2015 salary and would continue each month for a further 35 months.

8.6. On 8 December 2015 the claimant submitted a grievance. Within this grievance she stated:

“I am a single parent and sole means of support for three children, the error in salary has serious implications on my financial situation as I have moved house in February 2014 and my mortgage was assessed on the basis of the higher (incorrect) salary and I entered into a four year contract for a new car in September 2015 as a result of the incorrect increase in my salary. My ability to make the car payments was calculated on the basis of the higher (incorrect) salary. I would not have undertaken either of these financial commitments had I been aware that my income was not as stated in my payslip and P 60. This error in the increase in salary has also resulted in:

- A reduction to my entitlement to working tax credit and any passported benefits.
- A reassessment of my entitlement based on the incorrect higher salary has resulted in an overpayment of tax credit amounting to £1500 which I’m currently repaying.
- Student loan deductions based on the higher salary have been made from my salary totalling £500 during the period in question.”

8.7. A grievance investigation was carried out by Sue Harvey, Registered Manager for Coanwood Children’s Home.

8.8. On 28 January 2016 Sue Harvey wrote to the claimant providing a copy of the stage 1 grievance report. Sue Harvey had interviewed the claimant, her line manager and Robert Galvin, Employee Services. The conclusion was that the claimant’s grievance was not upheld. It was indicated:

“To enable the grievance to be resolved I have recommended that consideration is given to explore the possibility of repaying the monies owed at a much reduced amount per month than the suggested amount of £167.74 per month.”

It was recommended that payslip should itemise the hours actually worked.

8.9. Within the notes of the interview with the claimant it was stated that the claimant believed that the policy and practice of recovering overpayments has a bigger impact on women. The claimant believed that the majority of part-time workers were women who would often have children and be claiming other benefits.

8.10. The claimant appealed against the grievance outcome on 4 February 2016.

8.11. On 8 February 2016 Marcus Weatherly, Senior Manager wrote to the claimant indicating that he appreciated and understood that the claimant was planning to progress to a stage 2 grievance as she was unhappy with the outcome. It was indicated that Employee Services may be prepared to consider if the total amount could be repaid over a longer period of time. The claimant was urged to discuss this with Employee Services and it was

indicated that Mr Weatherly was also exploring what support could be offered in relation to completing a financial statement.

8.12. The claimant attended a stage 2 hearing on 22 March 2016. She was accompanied by her Trade Union representative.

8.13. On 24 March 2016 Colin Logan, Head of Financial and Customer Services wrote to the claimant providing the outcome of the Stage 2 grievance. Within that letter it was stated that:

“Tax Credits

I do not dispute your calculation that you have lost a total of £2460.12. However, if the overpayment of salary is recovered from your gross pay over three years I have calculated that your tax credits will go up in the region of £1640.00 after allowing for the disregard in year 1. It is my view that the loss of £2460.12 tax credits could never warrant the total write-off of £6038.34 gross and that this sum must be recovered from you. However, I have decided to make you an ex-gratia payment of £820.12 to compensate for your estimated net loss in tax credits. This amount is the difference between your figure of £2460.12 and my estimated figure of £1640.00. This tax-free payment will be paid monthly with your Valley Care salary spread over whatever repayment period is agreed in respect of the overpayment of salary e.g. over 36 months you will receive £22.78 per month ex-gratia payment. I should be pleased if you would liaise with Lorraine Summers, Employee Services Manager... With a view to completing a Financial Assessment Form and agreeing a repayment period.”

8.14. On 27 April 2016 the claimant refused the offer of an ex-gratia payment and indicated that she should not be made to suffer any financial loss because of the respondents errors and the figure did not compensate for the money she had lost. She also indicated that she did not feel that the issue of indirect discrimination had been properly considered in the grievance procedure.

8.15. On 20 December 2016 Peter Gosling, HR Manager wrote to the claimant indicating that the claimant had not contacted Lorraine Summers with a view to completing a Financial Assessment form and indicating that if she failed to contact Lorraine Summers by 13 January 2017 the respondent would have no option other than to make the ex-gratia payment and to issue the claimant with an invoice for £6038.34 gross.

8.16. The claimant was off sick from 12 January 2017 and remained off sick for approximately six months with work-related stress.

8.17. On 13 January 2017 the claimant sent an email to Kelly Angus, HR, within that letter she stated:

“It is my belief that NCC’s aggressive recovery policy has a much greater effect on women/part-time workers/single parents and more

should be done to identify the impact on people on an individual basis. In particular, the request to fill in a financial statement should be made before any judgment is reached with regards to the person's ability to pay and on how much of the debt it is reasonable to recover in the circumstances. This should not be requested after the decision has already been made."

8.18. On 24 January 2017 Ann Meehan, HR Manager, Schools/Wellbeing, wrote to the claimant indicating that she had identified a date to meet with the claimant and where they should meet.

8.19. On 27 March 2017 Ann Meehan wrote to the claimant following a meeting which had taken place with the claimant and her line manager. In that letter Ann Meehan indicated that the respondent was going to offer the claimant a financial hardship assessment via the Council's recovery team and Keith Teasdale, the Recovery Manager would be in touch with the claimant.

8.20 On 3 April 2017 Keith Teasdale wrote to the claimant Indicating that he needed the claimant to provide full details of her financial circumstances in order to enable him to fully understand any potential hardship and to be able to determine the amount to be repaid each month. He pointed out that it was a priority debt and must be repaid within a reasonable period of time.

8.21. The claimant returned to work and, at the end of her phased return period, in mid-July she approached her line manager and asked if she could work the other part of her job share temporarily as her job share partner was on long-term sick. She also indicated that she would take the hours on a permanent basis if her job share partner did not return.

8.22 On 19 July 2017 further meetings commenced with Ann Meehan and the claimant in respect of recovery of the overpayment.

8.23. On 11 August 2017 Ann Meehan wrote to the claimant referring to the earlier emails and enclosing a financial assistance form. The letter referred to Keith Teasdale providing an illustrative position in terms of what the repayment schedule could look like. It was stated that this would need to be looked at when the claimant provided the details in the financial assessment form. It is also stated that if she did not hear from the claimant Ann Meehan would contact ACAS as previously discussed.

8.24. On 11 September 2017 Margaret Proud wrote to the claimant indicating that ACAS had advised that pre-conciliation would not be an appropriate course of action and proposing a meeting to resolve the issue.

8.25. On 6 October 2017 the claimant attended a meeting with Margaret Proud and Ann Meehan. The claimant informed them that she would approach ACAS herself with a view to taking an indirect discrimination case to the Tribunal.

8.26. On 9 October 2017 ACAS receive the early conciliation notification from the claimant.

8.27. On 16 November 2017 the claimant presented a claim to the Employment Tribunal.

8.28. On 29 November 2017 Lorraine Summers wrote to the claimant enclosing an invoice in the sum of £3422.31. It was stated that the claimant could contact the Accounts Receivable section direct to arrange a mutually acceptable repayment plan. The amount gave credit for the claimant's student loan overpayment of £494.00.

8.29. On 27 December 2017 the claimant wrote to Lorraine Summers indicating that the matter was currently subject to an Employment Tribunal case.

8.30. On 2 January 2018 an automatically generated reminder notice was sent to the claimant from the Accounts Receivable Team requesting payment within the next seven days.

8.31. On 11 January 2018 the claimant sent an email to Accounts Receivable stating that the matter was subject to the Employment Tribunal case.

The Law

9. Indirect Discrimination

Section 19 of the Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

10. The claimant accepted that making overpayments is not a "practice". The OSWP is the PCP in this case.

11. Section 23 states:

Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

12. Victimisation

Section 27 states:

Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

13. The Tribunal had the benefit of written submissions from the claimant and Mr Sangha together with further oral submissions. These submissions were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

14. The identification of the appropriate pool for comparison is an important step. The wording of section 23 (1) states that there must be no material difference between the circumstances relating to each case. This requires a comparison of people in the same relevant circumstances. In some cases the pool may consist of the entire national workforce. In others it will be appropriate to look at an internal pool consisting of the whole of the respondent's organisation or even a particular workplace or section of the work force within that organisation.

15. The appropriate pool for comparison in this case requires a comparison of people in the same relevant circumstances. This is those employees of the respondent who may be subject to the OSWP. It would not be appropriate to widen the pool to all men and women in the workforce. In the case of **Eweida v British Airways plc 2010 ICR 890** the Court of Appeal identified that the requirement was with regard to “an identifiable group is adversely affected, whether actually or potentially, by some ostensibly neutral requirement”

16. The pool should generally encompass all those affected by the PCP about which the complaint is made, including people who are disadvantaged and advantaged by it. In this case the employees of the respondent who may be subject to the OSWP.

17. The claimant contended that the application of the OSWP was such that women or part-time workers are affected more than men. The claimant referred to statistics found on the ‘gingerbread’ website in respect of single parents and that around 90% of single parents are women.

18. Statistics were provided by the respondent in respect of overpayment and recoveries. These statistics were not challenged by the claimant. They showed that the proportion of overpayments and recoveries sought from female employees (72%) is the same as the proportion of female employees within the respondent (72%). The proportion of overpayments made to part-time employees (55%) is significantly lower than the proportion of part-time employees (73%) within the respondent. This suggests that overpayments affect full-time employees proportionally more than part-time employees.

19. With regard to recoveries, the part-time recovery figures showed that the respondent sought recovery from 86% of female part-time employees whereas 81% of part-time employees within the respondent are female. The respondent sought recovery from 14% of male part-time employees. The proportion of part-time employees who are male is 19%. The figures do not suggest that the respondent sought recovery from more female part-time employees than male part-time employees.

20. The percentage of recoveries from part-time staff as a fraction of total recoveries is less than the proportion of part-time staff and the total workforce. The rate of recovery is significantly higher for full-time employees (45%) compared to the percentage of full-time employees (27%) within the respondent.

21. The claimant said that the policy placed women at a particular disadvantage when compared with men. She referred to women/part-time workers/single parents who rely on means tested benefits and may suffer a detriment in cases where an overpayment has continued over years and affected entitlement to tax credits and other means tested benefits. When the appropriate pool for comparison is considered It was not established that women were placed at a particular disadvantage when compared to men.

22. The claimant accepted that making overpayments was not a PCP. If it had been established that there was a particular disadvantage to women had it been shown that their entitlement to tax credits would have been more likely to be affected by the making of the overpayments, then the alleged disadvantage would have resulted from the making of the overpayments over a number of years. The recovery of the overpayments, the PCP of the application of the OSWP, did not cause the loss of the tax credits. That loss was as a result of the error providing the overpayments. The alleged disadvantage occurred before the application of the PCP. The detriment claimed by the claimant in this regard occurred before any alleged discriminatory treatment.

23. The claimant has not shown a particular disadvantage to women and, although the reasons for any group disadvantage do not need to be considered pursuant to the recent Supreme Court case of **Essop v The Home Office (2017) UKSC 27** it does need to be established that there is a causal link to the PCP and the claimant has not established that the application of the OSWP caused her a disadvantage. The disadvantage she suffered was caused by the overpayment, not the recovery.

24. The Tribunal has gone on to consider whether the application of the OSWP was a proportionate means of achieving a legitimate aim. It was accepted that the respondent has a duty to recover money overpaid from public funds. This was a legitimate aim. The question to be considered is whether this was proportionate. The Tribunal has to consider the proportionality of the application of the policy. In this case, the proposed time for recovery of the funds from the claimant's salary was over 36 months rather than the normal 24 months. Account was taken of the effect on the claimant's entitlement to tax credits. A calculation was carried out by Colin Logan, Head of Financial and Customer Services. The claimant did not agree with the calculation or the proposed ex-gratia payment. The claimant was asked on numerous occasions to complete a financial assessment in order to consider the potential hardship. There was consideration of the claimant's position and the respondent had made an adjustment in respect of the amount to be repaid and the time over which it should be repaid. The Tribunal considers that it was a proportionate means of achieving the legitimate aim.

25. The claimant disagreed with the calculation in respect of the net effect on her tax credit. If the calculation was incorrect, it may have been unfair to the claimant individually but it was not a disadvantage because of the claimant's sex.

26. With regard to the claim of victimisation, the claimant relied on four protected acts, the raising the grievance, the grievance appeal, the notification to the respondent of the claimant's intention to commence early conciliation and the filing of the claim with the Employment Tribunal. These are all protected acts and the question to be considered is the reason why the detrimental conduct took place.

27. The first detriment was that the claimant was not offered her job share partner's hours when he left. The respondent had previously had a job share policy whereby once a job share left, the other would be given the opportunity to take up the vacant

hours. The job share policy was discontinued and replaced by a flexible working policy. The claimant was no longer automatically entitled to take up the hours of her previous job share partner and the respondent had decided that it was more fair to open up vacancies to other employees. The claimant was asked to submit an expression of interest if she wished to increase her working hours. The Tribunal is satisfied that the reason that the claimant was not offered her job share partners' hours was not victimisation because of a protected act. It was because the policy had changed in July 2012.

28. The second detriment alleged was the respondent's refusal to address issues of the discriminatory effect of the OSWP at any stage. The claimant raised the question of indirect discrimination when she spoke to Sue Harvey during the investigation of her grievance. The grievance outcome letter provided statistics in respect of recent overpayments by gender and contract type. The claimant raised the question of an equality monitoring form in respect of the impact of the policy. In the outcome letter Colin Logan confirmed that it was not the respondent's practice to issue equality monitoring forms in respect of grievances and overpayment of salaries. It was not established that there was a failure to address the discriminatory effect of the policy because the claimant had done protected acts or that the respondent believed that she would do more. There was no detriment to the claimant and the respondent provided information in respect of the statistics relating to any alleged disproportionate effect of the policy.

29. The third detriment alleged was the respondents issuing of an invoice on 28 November 2017 and the further demand on 2 January 2018. The policy provides that overpayments are recovered from the employee's gross pay. The invoice was issued due to the claimant's failure to agree a repayment plan or to provide a financial assessment. There had been a number of attempts to meet and reach agreement with the claimant. The invoice was raised by Lorraine Summers as a result of the failure to agree a repayment arrangement. It was not established that the invoice was raised because the claimant had carried out a protected act. The further demand was automatically generated. It was not shown that the invoice or the further demand will rise because the claimant had made a protected act.

30. The Tribunal has considerable sympathy with the claimant. She has incurred loss as a result of the respondent's error. The claimant did not know she had been overpaid, she could not inform the respondent and ensure that the correct figures were given to the DWP. Had she received an itemised payslip, as is now in place, she could have informed the respondent of the overpayment, the adjustment could have been made to provide the correct details to the DWP and the claimant would have received the correct tax credit.

31. However, it has not been established that there was any indirect discrimination or victimisation because of the claimant's sex or protected acts. It may be that the claimant is right in her view that the calculation in respect of her loss of tax credits was not the correct calculation. It is unfortunate that the parties could not meet and reach a fair resolution of the claimant's concerns in this regard. The claimant

continues to be employed by the respondent and the Tribunal is concerned that efforts should be made to reach a satisfactory agreement in respect of the amount and period of repayments in order that the ongoing relationship can continue on an amicable basis.

32. However, in all circumstances, the claims of indirect discrimination and victimisation are not well-founded and are dismissed.

Employment Judge Shepherd

7 June 2018