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EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Ms P Bradley **AND** London School of English and Foreign Languages Limited

Heard at: London Central **On**: 17 January 2019

Before: Employment Judge Glennie
Ms C Ihnatowicz
Mr S Soskin

Representation
For the Claimant: Mr A Robinson, FRU Representative
For the Respondent: Mr A Johnston, Counsel

REASONS

1. These reasons relate to the single issue remitted to the Tribunal by the Employment Appeal Tribunal, namely the question as to proportionality in respect of the potential defence of justification in the complaint of indirect discrimination. This is governed by s.19 of the Equality Act which provides for the test as follows in sub section (2)(d):

"A cannot show it to be a proportionate means of achieving a legitimate aim".

2. We reminded ourselves that under this section it is for the Respondent to establish the defence of justification, and it is for the Respondent to show both elements of that test. The question of the legitimate aim is not now issue and the point that we have to consider is that of proportionality.
3. In our reasons for the original judgment we recorded the provision criterion or practice (PCP) as being that all staff were to arrive early for a 9am class at 8.45am, and that remains the PCP to be considered. It is common ground between the parties that the 9am start time for classes is not an issue, that is a given for today's purposes. We are considering the requirement to arrive fifteen minutes early for that time, namely at 8.45am.

4. In paragraphs 67 and 68 of our original reasons we identified two legitimate aims which, as we have said, are not challenged. In paragraph 67 we identified the aim that there should be a prompt and organised start to the class at 9am and that the teacher should have had sufficient time to do any last minute organising of the class or session material, to make sure that the room was in order, and to collect himself or herself so as to be ready for the student at exactly 9am. We noted that it was common ground that it would be unprofessional for the teacher to arrive flustered or not entirely ready.

5. In paragraph 68 the second aim that we found was established was that, if the arrival time of 8.45am was identified, then that involved the need for the teacher to indicate if they were en route but had not arrived by that time. That would enable the Respondent to be aware that, although there was going to be a late arrival, they did not need to arrange cover and the teacher was on their way.

6. It was also common ground that, when considering proportionality, we are concerned with group disadvantage and that we should take care not to approach the case on the basis that an exception should have been made for the Claimant, this being emphasised in paragraph 33 of the judgment of the Employment Appeal Tribunal in this case.

7. Mr Robinson invited us to apply the approach endorsed by the Supreme Court in **Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601** in the following terms. Here Lady Hale was quoting from an earlier case of **DeFreitas** in 1999 and approving the following statement of the test:

"First, is the objective sufficiently important to justify limiting a fundamental right, secondly is the measure rationally connected to the objective, thirdly are the means chosen no more than is necessary to accomplish the objective".

All of this was in the context of the comparative exercise that the Supreme Court recognised in paragraph 24 of the Judgment. This is put in the following terms:

"……the assessment of whether the criterion can be justified in terms of comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer".

8. Turning then to the three stage test, the first question is whether the objective was sufficiently important to justify limiting a fundamental right. The question of a fundamental right is engaged, as we have found, in that the PCP had a disparate impact on the group identified, namely single mothers with childcare responsibilities. The objectives are, we find, sufficiently important to justify limiting a fundamental right not to be indirectly discriminated against. The objectives were important to the Respondent's business. A prompt and organised start to a class is, in the Tribunal's judgment, important in any form of education. It was important to the Respondent as they were offering classes to business and professional people who, as we have already found, were paying at the higher end of the range for such classes. It was equally important that the Respondent should be made aware of the situation if a teacher had not arrived by 8.45am in case they needed to arrange cover.

9. The second element was accepted by the Claimant, so so we move to the third, which is whether the means chosen were no more than was reasonably necessary to accomplish the objective. (The word "reasonably" appears later in the judgment in **Homer** and it is common ground that the test should be read as including that word). Here we look at the impact on the group identified. We heard no further evidence in the present hearing and we had no evidence previously about how the 8.45am arrival requirement might impact on the group. We accepted, however, Mr Robinson's submission that we should rely on our own judgment, experience and knowledge in assessing this question.

10. We accepted that in many, probably most cases, facilities such as breakfast clubs for young school children would only be available from around 8am each day. So, if a single mother needed to leave her child earlier than that to get to work she would need assistance of some sort, whether from friends or family or indeed paid help. We also found that there would probably be a range of journey times to the Respondent's premises at Holland Park. These would obviously depend on factors such as the distance to be covered, the nature of the journey, what form of transport was available, how far the breakfast club might be from the station or the bus stop or whatever means of transport was being used.

11. Some members of the group would have no difficulty because, all told, they were less than forty five minutes' journey away from the Respondent's premises. Others, it seemed to us, would be unaffected by the PCP in question because in their particular circumstances, their journey would be more than an hour and they would not be able to make other arrangements so as to arrive for a 9am start. This would mean that they could not comply with the (unchallenged) 9am start time for classes in any event.

12. Others, typically but not exclusively with journeys of something like forty five minutes to an hour, as was the case of the Claimant after the change of school for her child, would be affected. They would necessarily be restricted in number, they would not, it seemed to us, constitute the whole or probably not even the majority of the group to be considered. That said, however, the effects on this part of the group could be severe. They might have to make more or less complicated child care arrangements (as did the Claimant before the change of school) in order to cover the time between leaving their child and the start of any available breakfast club. Failing that, they would be unable to do any or much work for the Respondent at all.

13. The Tribunal, however, concluded that the PCP was no more than what was reasonably necessary to accomplish the objectives. Ultimately, the Claimant argues not with the 9am start time, but with the requirement that she should arrive 15 minutes in advance of that.

14. Whatever the start time for classes, we found that arriving 15 minutes before that was realistically the minimum required to secure the two objectives that we have identified. Even reducing it by a few minutes would have left insufficient time to be able to accomplish those objectives and would have risked a disorderly and unprofessional start to the class. Furthermore, any lesser

margin would have left insufficient time for cover to be arranged, if necessary, or for the client to be given appropriate notice of a late arrival, and would have left the Respondent in a state of uncertainty as the start time of 9am approached.

15. We therefore find that the Respondent has established that the PCP in question was proportionate. The complaint of indirect discrimination must therefore be dismissed.

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Employment Judge Glennie

Dated: 5 June 2019

Judgment and Reasons sent to the parties on:

12 June 2019

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For the Tribunal Office