EMPLOYMENT TRIBUNALS

Claimant: Mrs L. Chapman

Respondent: Intercontinental Hotels Group Services Company

OPEN PRELIMINARY HEARING

Heard at: Watford **On**: 18 September 2019

Before: Employment Judge McNeill QC

Appearances

For the Claimant: Mr Bronze, Counsel
For the Respondent: Ms Tutin, Counsel

JUDGMENT

1. The Claimant's claim is struck out as having no reasonable prospects of success.

2. The hearing listed for 2-4 December 2019 is vacated.

REASONS

1. This case was listed before me to consider:

   a. Whether the Claimant's claim has no reasonable prospect of success and should be struck out under rule 37 of the Employment Tribunals Rules of Procedure;
   b. Whether the allegations or arguments have little reasonable prospect of success and a deposit of up to £1,000 should be ordered as a conditions of those allegations or arguments proceeding under rule 39 of the Employment Tribunals Rules of Procedure;

c. Any further case management orders for the final hearing.

2. The Claimant's claim is for indirect sex discrimination arising out of the terms of a severance scheme and the calculation of an enhanced redundancy payment paid to the Claimant when her employment was terminated by reason of redundancy on 15 June 2018.

3. In short, the Claimant was paid redundancy pay based upon her weekly salary at the time of termination of her employment. The formula for calculating redundancy pay involved applying a multiple to weekly salary at the date of termination. In the Claimant's case, the appropriate multiple was 37, based upon 14 completed years' service. At the date of termination of her employment, the Claimant had been working part-time for three years. For the first eleven years of her employment with the Respondent, she had worked full-time.

4. Should the claim proceed, the Claimant wishes to amend her claim to characterise her claim in the alternative as an equal pay claim. With the agreement of the parties, the consideration of the issues before the tribunal proceeded as though the amendments had been allowed. The parties did not contend that the characterisation of the claim as an equal pay claim made any difference to the material arguments.

5. The principles to be applied in dealing with applications for strike out and deposit orders were not in dispute. In relation to striking out a discrimination claim, both parties relied on the approach set out in **Mechkjarov v Citibank NA** [2016] ICR 1121 EAT, para. 14:

> "(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts".

6. In considering whether to strike out a claim, the tribunal should apply a two-stage process: (1) consider whether the claim has no reasonable prospect of success; and (2) if so, consider whether it should exercise its discretion to strike out the claim.

7. Where there is no dispute of fact, and a respondent is bound to make good its defence of objective justification so that the claim has no reasonable prospect of success, the claim may be struck out: **RMC v Chief Constable of Hampshire Constabulary** UKEAT/0184/16, EAT.

8. In relation to Deposit Orders, I was taken to **Tree v SE Coastal Ambulance Service NHS Foundation Trust** UKEAT/0043/17/LA in which

HHJ Eady QC set out the legal principles which the ET should apply in making Deposit Orders, including the principle that Deposit Orders should not prevent access to justice or be a backdoor means of striking out a claim.

9. The severance scheme operated by the Respondent contained a general statement that its terms and conditions: "aim to provide adequate compensation for an employee negatively impacted as result of restructuring, redundancy or retrenchment". In a letter dated 7 June 2018 from the Respondent's to the Claimant's solicitors, the Respondent stated that the "main aim of the scheme is to compensate employees and provide support for their loss of income caused by the redundancy for a period following such redundancy. It is to provide a cushion for that loss of salary rather than to remunerate for previous service." The Claimant did not dispute this stated aim and accepted that redundancy pay compensates employees for their loss of income following redundancy. The Claimant's counsel described this as a "truism".

10. The Claimant did not contend, nor could it reasonably be contended, that such an aim was not legitimate.

11. This is not a case in which the core facts are disputed. The Claimant accepts that her dismissal was by reason of redundancy and that she was paid redundancy pay, properly calculated in accordance with the terms of the scheme. If this were an unfair dismissal claim, there would be issues as to whether there was fair consultation during the redundancy process, but it is not. The terms of the scheme as applied to the Claimant were agreed with employee representatives, after employee representatives had asked the Respondent to calculate severance payments for employees who had moved from full-time to part-time work to take into account their full-time years of service.

12. Statistics have not yet been obtained and I have, therefore, without determining the matter, proceeded on the assumption that the Claimant will succeed in showing that significantly more female than male employees are disadvantaged by the application of the multiple to salary as at the date of termination, because the significant majority of those working part-time, having previously worked full-time, are likely to be women. In other words, I took the Claimant's case at its highest.

13. Further, the Respondent made it clear that it did not dispute, for the purpose of the strike-out application, that the Claimant had a reasonably arguable case on disparate impact. Specific disadvantage to the Claimant if the scheme was discriminatory was not in dispute.

14. The Respondent has described the Respondent as being "vague" as to the material terms of the scheme but the scheme is clear and its aim is undisputed.

15. The Claimant's case is that a provision, criterion or practice (PCP) was applied to her, which was "calculating severance payments on the basis of actual earnings at the time of termination of employment". The pool of employees relevant to the indirect discrimination claim, it was contended, were all those employees who received severance payments. The application of the PCP, the Claimant submitted, disadvantaged the group of employees who were working part-time at their date of termination but had previously worked full-time. That group was likely to include substantially more women than men because of the much greater proportion of women than men who undertake caring responsibilities. The Respondent did not dispute this. The Claimant submitted that the advantaged group should be all those whose redundancy payment was calculated on the basis of full-time pay, alternatively all those whose redundancy payment was calculated on the basis of full-time pay but who had previously worked part-time. At this stage in the proceedings, no statistical information having been obtained which would demonstrate the proportions of men to women in the advantaged group, I can draw no conclusions on this but assume the point in the Claimant's favour.

16. The Respondent initially pursued its application to strike out the Claimant's claim on the basis that it was bound to succeed in its defence of objective justification. It relied on the decision of the House of Lords in **Barry v Midland Bank plc** [1999] 1 WLR 1465 (I was taken to the decision in the Industrial Relations Law Reports (IRLR)) which the Respondent submitted was binding on the tribunal. After taking a little time to read and consider **Barry**, I invited further submissions from the parties on whether the decision of the majority in **Barry,** that the scheme was not of discriminatory effect, was binding on the tribunal.

17. The Respondent submitted that **Barry** was binding on the tribunal. A scheme which was materially identical to the scheme in the current case was held by four of their Lordships not to be indirectly discriminatory against women. As Lord Hoffmann stated at paragraph 61, the question was not whether part-time workers (the majority being women) would do better under another scheme but whether the scheme in question offended against the principle of equal pay for equal work. The scheme was held not to have a discriminatory effect. Mrs Barry, like the Claimant in the current case, was contending that the Respondent should have operated a different type of scheme which was not based on salary at the date of termination but on an averaging process which took into account time worked over the relevant period. Like the Claimant in the current case, Mrs Barry had worked full-time and then part-time and her redundancy payment had been calculated only on the basis of her part-time salary at the date of termination of her employment.

18. The House of Lords held that under a redundancy scheme, where payments were to provide support for lost income in the period following redundancy, it was not a relevant difference in treatment to base all severance payments on final salary.

19. Further, the Respondent submitted, a tribunal would be bound to find that the calculation of redundancy pay on the basis of final salary was objectively justified. The Respondent relied on **RMC v Chief Constable of Hampshire Constabulary**. The Respondent bears the burden of proving objective justification and a tribunal must assess whether the means adopted were proportionate, weighing the real needs of the employer against any discriminatory effects of the requirement: **Hardy & Hansons plc v Lax** [2005] ICR 1565.

20. The aim of the scheme was legitimate, the Respondent submitted and the Claimant did not dispute that providing compensation for loss of income following redundancy was a legitimate aim. The question then was whether the Claimant had any reasonable prospect of succeeding in an argument that it was not proportionate to calculate the severance payment on the basis of salary only at the date of termination rather than on some averaging basis. The Respondent again relied on **Barry.**

21. Lord Nicholls in **Barry** (with whom Lord Clyde agreed) approached the case from the angle of objective justification. He found that there was objective justification. His analysis is at paras 39-46. He stated that "the factors used in the bank's scheme [were] inherently apt for calculating severance pay. Severance pay is, or may properly be treated as compensation for loss of a job. Loss of a job entails the loss of the actual salary then being paid". Lord Nicholls noted the absence of evidence of the extent to which the bank scheme had a discriminatory effect on women. He nevertheless found that the scheme was objectively justified, noting that even under an averaging scheme as proposed in **Barry** (and the current case), most of the losers would be women because an averaging scheme would take into account years of part-time service for those in full-time service at the date of termination. The averaging scheme proposed would be a scheme which did not compensate for loss of a job but provided additional pay for past work.

22. Whilst the minority opinion on objective justification may not be technically binding on the tribunal, it is highly persuasive.

23. The Claimant submitted that:

    (i) There is scope for arguing what the true aim of the policy is in this case.
    (ii) The Respondent did not apply its mind to how redundancy pay was calculated. There was insufficient consultation about the terms of the scheme and even the Assistant HR Director did not know the reason for the calculation.
    (iii) **Barry** is distinguishable because statistics were not available, whereas in the current case, relevant statistics could be made available without too much difficulty.

(iv) **Barry** is an old case. Attitudes to discrimination have changed since **Barry** and policy has moved on.

(v) A less discriminatory scheme which took into account actual time worked over the full period of employment could have been set up with an averaging process: a scheme with averages would be difficult to criticise.

(vi) This is not a clear case. Even in the House of Lords in **Barry**, different Judges applied different analyses.

(vii) This is not an appropriate case for a strike out; nor should a deposit order be made.

Conclusions

24. I have concluded that the aim of the redundancy payment was clear. It was to provide adequate compensation to employees who lost their jobs, and therefore their income, because of redundancy. The Claimant does not dispute this. The provisions of the scheme, which had been in existence since 2005, were challenged during the consultation process on the basis of discrimination against those who had moved from full-time to part-time work, the same grounds as form the basis for this claim. The contemporaneous notes of the consultation meeting of 8 March 2018 record that it was concluded that no changes would be made to existing policies.

25. In relation to the absence of statistics in **Barry**, that matter did not impact on the opinions of the majority when concluding that the scheme was not discriminatory. In the current case, I have, in any event, proceeded on the basis that the Claimant would demonstrate disparate impact.

26. The fact that **Barry** is an old case (only 20 years' old) cannot impact on my judgment. The Claimant has not referred to any authority in which the Supreme Court has disagreed with the analysis in **Barry** and it is not obvious why **Barry** should be treated as reflecting an out-of-date approach to discrimination or as contrary to current policy on discrimination.

27. In relation to objective justification, only two of their Lordships in **Barry** decided the case on this point. Nevertheless, their opinions carry very considerable weight. I did not accept that an averaging scheme could not be criticised. The House of Lords in **Barry** sets out some of the difficulties with such a scheme. As the Respondent submitted, a scheme based on career average could also be discriminatory. Where long service was a relevant factor in making a payment, for example, part-time workers with equal length of service to full-time workers might complain that they were being treated less favourably or disadvantaged when compared to full-time workers if their days worked were averaged out.

28. The Claimant submits that their Lordships have applied different analyses in **Barry,** demonstrating how difficult the case is. He submits that that is a reason for allowing this claim to proceed. I accepted the

submission that **Barry** was not an easy case, as the different opinions demonstrate. However, four of their Lordships found, in relation to a scheme practically identical to the current case and on the basis of practically identical arguments as to why the scheme was discriminatory that the scheme was not a discriminatory scheme. I also apply the analysis of Lord Nicholls in relation to objective justification, no argument for any error in that analysis having been advanced.

29. I have concluded in all the circumstances that this case is not distinguishable from **Barry.** The Claimant's claim has no reasonable prospects of success.

30. Moving to the second stage of the test, I take into account that this case has been listed for three days. There will be significant costs involved in clarifying and obtaining the relevant statistics and preparing for trial. In my discretion, taking into account those factors together with the lack of legal merit in the claim, I consider that the high hurdle for striking out discrimination cases is reached in this case and the claim is struck out.

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Employment Judge McNeill QC

Date: 20 September 2019

Sent to the parties on: .....

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For the Tribunal