



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Broadist

**Respondent:** HM Prison Service

**Heard at:** Manchester

**On:** 9 March 2020

**Before:** Employment Judge Phil Allen

## REPRESENTATION:

**Claimant:** Ms L Quigley, Counsel

**Respondent:** Did not attend (no response having been received)

**JUDGMENT** having been sent to the parties on 13 March 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction

1. The claimant was employed by the respondent from May 1984. He was employed as a Dog handler from 15 May 1987. He worked part-time from March 2017. When his dog died, the respondent did not allow the claimant to return to work as a dog handler with an alternative dog. The claimant alleges that this was because he was part-time. He alleges this also amounted to indirect age discrimination (employees aged over 55 being more likely to work part-time). As he could not return to being a dog handler, the respondent required the claimant to move to a role and undertake duties which he had not undertaken since 1987. The claimant resigned in response.

### Claims and issues

2. The claims which the claimant brought were:
  - a. Indirect age discrimination under section 19 of the Equality Act 2010;

- b. Less favourable treatment on the grounds that he was a part-time worker contrary to regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000;
- c. Constructive unfair dismissal; and
- d. Breach of contract.

### **Procedure**

- 3. The respondent did not submit a response to the claim. Accordingly, as a determination could not properly be made of the claim on the available material, the hearing was arranged under rule 21 of the Employment Tribunals Rules of Procedure.
- 4. The claimant was represented at the hearing by Ms Quigley, counsel. A bundle was prepared and provided to the Tribunal. The claimant attended and gave evidence at the hearing, relying upon a witness statement which was provided to the Tribunal. The claimant was asked questions by the Tribunal. The claimant's representative made submissions on the claimant's behalf.

### **Facts**

- 5. The claimant was employed by the respondent from May 1984. He was employed as a Dog handler from 20 March 1987.
- 6. In March 2017, after his 55<sup>th</sup> birthday, the claimant semi-retired and reduced his working hours from full-time to 18½ hours per week.
- 7. The evidence before the Tribunal was that there were three other part-time dog handlers at the respondent, all of whom were aged 55 or over.
- 8. After the claimant's dog unfortunately died, he was told that he was not allowed to return to work as a part-time dog handler.
- 9. The claimant sourced an alternative dog who was trained and available, and which would cost the respondent significantly less than the cost of training a new dog. The claimant said the alternative dog could be trained within two weeks. The respondent refused to allow the claimant to return to work as a part-time dog handler with this alternative dog.
- 10. The decision made by the respondent was originally made on 10 September 2018.
- 11. The claimant followed a grievance process under the respondent's procedure. The relevant documents from this process were provided to the Tribunal.
- 12. The subsequent decisions made by the respondent as part of the grievance process were made on 4 December 2018 and 18 April 2019. Those decisions were that the claimant was not allowed to return to work as a dog handler.

13. In the light of the evidence heard at the hearing, the Tribunal finds that all of the decisions were made by the same person, being the Prison Governor. He was the underlying decision-maker throughout.
14. As the claimant was not allowed to return to the role of dog handler, he was instead required to work in an entirely different role doing something that he had not done for 32 years.
15. In the documents provided to the Tribunal, the respondent was open about the fact that it would not allow the claimant to return to work as a dog handler solely because he was part-time. The notes of one of the hearings record the decision-maker as saying that the respondent had had a review and the outcome of that review was to have a dog section which had only full-time dog handlers.
16. The claimant's evidence to the Tribunal, which it accepts, is that the respondent has 18 full-time dog handlers and has recruited full-time dog handlers since the claimant has ceased to work as a dog handler (all of whom are considerably younger than the claimant). The claimant also gave evidence that a full-time colleague whose dog was also put down, had then been provided with an alternative new dog and remained as a dog handler. That comparator was Amanda Rowe (being the comparator upon whom the claimant relied in his claim that he had suffered less favourable treatment as a part-time worker).
17. The claimant suffered a period of ill health. The claimant alleged that this was a result of his treatment from the respondent and that he was signed off work with depression. The Tribunal saw no evidence to substantiate the medical impact of these decisions on the claimant. The claimant's evidence was that as a result of his ill health he was too unwell to carry out any other work for the first month post-termination.
18. The claimant resigned from the respondent's employment on 12 May 2019 citing the decision made as the reason and explaining that he considered the respondent's treatment of him to be discriminatory, both by reason of age and part-time status.
19. Contractually, the claimant was entitled to thirteen weeks' notice. The claimant resigned with immediate effect.
20. The claimant gave evidence of the pay which he said he had lost as a result of the respondent's treatment of him and the fact that he had not been allowed to return as a dog-handler. His evidence detailed the pay he would have received as a dog-handler including overtime, when his sick pay was calculated based upon basic pay only.
21. Since leaving his employment with the respondent, the claimant has identified that his skills are niche and therefore he has not been able to obtain alternative employment doing what he has done for over 30 years. However, the claimant has attempted to mitigate his loss by operating a kennels. The claimant's evidence was that this kennels was not currently operating at a profit, but he hoped to operate at a profit in years 2 and 3 post-dismissal, with

the profits in year 4 meaning that (by that time) he would have no ongoing loss. The claimant's witness statement provided the detailed figures which recorded these expected losses and the period of loss.

### The law

22. Indirect discrimination is governed by section 19 of the Equality Act 2010. That provides that:

(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.*

23. The words provision criterion or practice, must not be given too narrow a meaning and can cover formal or informal practices of an employer (albeit it does not apply to every act of unfair treatment of a particular employer). For a claim to succeed, the PCP must put persons who share the claimant's characteristic at a particular disadvantage when compared with those who do not. It must put the claimant himself at a disadvantage.

24. Section 123 of the Equality Act 2010 says :

(1) *..proceedings on a complaint within section 120 may not be brought after the end of—*

- (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable.*

...

(3) *For the purposes of this section—*

- (a) *conduct extending over a period is to be treated as done at the end of the period;*
- (b) *failure to do something is to be treated as occurring when the person in question decided on it.*

25. The key authority on whether or not something is a continuing act is **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96**. The focus must be on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against was treated less favourably.

The Tribunal is required to distinguish between a one-off act with continuing consequences or a continuing act.

26. Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides:

*(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—*

*(a) as regards the terms of his contract; or*

*(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.*

*(2) The right conferred by paragraph (1) applies only if—*

*(a) the treatment is on the ground that the worker is a part-time worker, and*

*(b) the treatment is not justified on objective grounds.*

27. Regulation 2(4) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides, in relation to the comparator required (as an actual comparator is required):

*A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place—*

*(a) both workers are—*

*(i) employed by the same employer under the same type of contract, and*

*(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and*

*(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.*

28. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if:

*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

29. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

30. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

*“...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”*

31. Remedy is governed by Section 124 of the Equality Act 2010 and Sections 111-126 of the Employment Rights Act 1996 (as well as Regulation 8 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000).

32. Section 126 of the Employment Rights Act 1996 provides that the Tribunal shall not award compensation under either of the Acts, in respect of any loss which has been taken into account in awarding compensation under another Act. Accordingly, below, the Tribunal initially addresses remedy for discrimination under the Equality Act 2010.

33. Where compensation for discrimination is awarded, it is on the basis that (as stated in **Ministry of Defence v Cannock [1994] IRLR 509**):

*‘as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [her employer]’*

34. Section 124(4) and (5) of the Equality Act 2010 provide that a Tribunal must not make an order for compensation in an indirect discrimination case if it is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant. When this was highlighted to the claimant’s representative, she confirmed that it was the claimant’s case that the provision, criterion or practice was applied with the intention of discriminating against the claimant.

35. In respect of injury to feelings, HHJ Eady QC says in the Judgment of the EAT in the case of **Base Childrenswear Ltd v Otshudi UKEAT/0267/18**:

*“When making awards for non-pecuniary losses, it is trite law that an ET must keep in mind that the intention is to compensate, not punish. It must, therefore, be astute neither to conflate different types of awards nor to allow double recovery. The ET should, moreover, not allow its award to be inflated by any feeling of indignation or outrage towards the respondent. On the other hand, awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation. See, generally, the guidance set out by Smith J (as she then was) in **Armitage Marsden and HM Prison Service v Johnson [1997] ICR 275**, approved by the Court of Appeal in **Vento**.*

*...In **Vento**, the Court of Appeal laid down three levels of award: most serious, middle and lower. Specifically, at paragraph 65 of that Judgment, the Court of Appeal suggested that the top band should apply to the most serious cases, such as where there had been a lengthy campaign of discriminatory*

*harassment on the prohibited ground; that the middle band should be used for serious cases which do not merit an award in the highest band; and the lower band would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. It was accepted, however, that the precise level of award under any particular head would depend on the facts of the case, which, of course, will depend on the evidence before the ET.”*

36. The Tribunal also took into account the Court of Appeal Judgment in **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102** and the Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd.*

### **Applying the law to the facts**

37. The claimant claimed indirect age discrimination. He identified his age group as being those aged 55 or over. He said the provision, criterion or practice which had been applied to him was the requirement that existing part-time dog handlers could only remain part-time dog handlers until their dogs could no longer work or they fail their license, and that there would be no further patrol dog handlers undertaking part-time work in the future.
38. The Tribunal finds that is a PCP which the respondent applied and it was applied generally and not just to the claimant. The PCP was applied to the claimant. This PCP did put the claimant at a disadvantage, in that he was not able to return to being (or in practice to continue being) a dog handler.
39. The Tribunal finds that this PCP had a disparate impact on those aged 55 and over. This finding is based both on the general evidence which has been provided at page 135 of the bundle about the likelihood of those aged over 55 working part-time when compared to younger workers, and also the claimant's own evidence about those within the respondent's dog handling team.
40. The respondent did not establish that it had a proportionate means of achieving a legitimate aim. The respondent wasn't present at the hearing. From the limited information available about the respondent's aim from the papers, it appears that the legitimate aim may have been cost alone, which cannot be a legitimate aim for the purposes of section 19 of the Equality Act 2010. However, in any event, the respondent has not demonstrated a legitimate aim, nor has it proved that its approach was proportionate.
41. In the light of the claimant's evidence and in the absence of any evidence to the contrary from the respondent, the Tribunal finds that the provision, criterion or practice was applied with the intention of discriminating against the claimant.
42. As a result of the Tribunal's finding about the underlying decision maker, the Tribunal finds that the respondent's decisions not to allow the claimant to return to work as a part-time dog-handler were a continuing act which extended over a period, culminating on 18 April 2019.
43. Accordingly, the claimant's claim for indirect discrimination under Section 19 of the Equality Act is made out and succeeds.

44. The claimant also alleged that he suffered less favourable treatment on the grounds that he was a part-time worker under Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
45. The claimant was less favourably treated than a comparable full-time worker. As stated in the facts section above, the claimant was not allowed to return to work as a dog handler with an alternative dog after his dog died, when Amanda Rowe, a full-time comparator whose dog had been put down, was provided with an alternative new dog and remained as a dog handler. The Tribunal finds that the treatment was on the ground that the claimant was a part-time worker.
46. No justification for the treatment was made out.
47. Accordingly, the claimant's claim for less favourable treatment on the grounds that he was a part-time worker under Regulation 5 is made out and succeeds.
48. In terms of constructive dismissal, the claimant says that the treatment that he suffered was discriminatory, a breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, and a fundamental breach of the duty of trust and confidence contained in his contract. The Tribunal finds that the respondent did fundamentally breach the term of trust and confidence. It conducted itself, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence it had with the claimant, when it did not allow him to return to being a dog handler with an alternative dog and required him to undertake a role which he had not filled for over thirty years, particularly because its reason for doing so was both discriminatory on the grounds of age and less favourable treatment of the claimant on the grounds that he was a part-time worker.
49. The fundamental breach of contract was the reason why the claimant resigned. The Tribunal does not find that the claimant delayed too long in resigning nor does it find that he waived the breach. There was a limited period of time in any event between the fundamental breach and the resignation, but in any event the claimant was unwell during some of that period.
50. Accordingly, the claimant terminated the contract under which he was employed in circumstances in which he was entitled to terminate it without notice by reason of the employer's conduct, and was therefore dismissed (as provided by section 95(1)(c) of the Employment Rights Act 1996). As the employer has not shown a fair reason, that dismissal was unfair and the claimant's unfair dismissal claim is well founded and succeeds.
51. The breach of contract claim also succeeds on the basis that the respondent fundamentally breached its contract with the claimant as detailed at paragraph 48 above. The claimant ceased being employed with immediate effect, when he was contractually entitled to thirteen weeks' notice.

## **Remedy**

### *Breach of contract*



52. The claimant was entitled to 13 weeks' notice. The Schedule of Loss records gross weekly pay as being £802. Accordingly, the claimant is awarded **£10,426** in respect of breach of contract. That is a gross figure.

*Discrimination*

53. The claimant's losses during his employment following from the discrimination found were evidenced by the claimant as being **£6,445** (which was not quite the amount the claimant originally claimed, but it was accepted by his representative in the course of the hearing as being the correct figure).
54. The claimant in his schedule of loss claimed that his losses would continue for three years from dismissal, being: £30,444 in year one (13 May 2019 to 12 May 2020); £20,444 in year two (13 May 2020 to 12 May 2021); and £10,444 in year three (being 13 May 2021 to 12 May 2022). The Tribunal has decided to award the claimant £50,888, being the losses claimed for years one and two of the claimant's new operation. The Tribunal has decided not to award the claimant the amount claimed for year three, on the basis that: identifying when the claimant will (or should have) mitigated his loss is a somewhat speculative exercise (as the claimant himself acknowledged in his witness statement); the claimant may well have mitigated his loss by that time anyway if his kennel business is more successful than the schedule records; there is an argument that the claimant could have obtained alternative employment doing something quite different and if he had done so could/would have mitigated his loss by the end of that two-year period; and (taking those factors together) two years future loss seems an appropriate amount/estimate of loss. The Tribunal therefore awards the claimant two years loss from dismissal. The claimant also claims loss of statutory rights of £500, which the Tribunal awards.
55. The losses which followed from dismissal incorporated losses prior to the hearing and losses post-hearing (the hearing fell part-way through year one of the claimant's losses post-dismissal outlined above). The losses prior to the hearing also needed to be reduced by the amount separately awarded as damages for breach of contract, which needed to be deducted before loss is awarded. For future loss, the amount awarded also needed to be grossed up. As a result, the discrimination awards for loss from dismissal are as follows:
- a. **£14,944** as compensation for losses incurred between the date of dismissal and the date of hearing; and
  - b. **£37,585** as compensation for future loss (which have been grossed up).
56. In addition, interest is awarded on the losses as follows:
- a. **£429.67** as interest on the losses incurred prior to dismissal; and
  - b. **£498.13** as interest on the losses incurred between the date of dismissal and the date of hearing.
57. In terms of injury to feelings, the respondent has discriminated against the claimant and they have done so quite flagrantly. The respondent has been

upfront about why they have made the decision. The discrimination has led to the claimant losing his job. It is a one-off decision (albeit one repeated on three occasions), but one with significant consequences. The claimant contended that there were aggravating factors which should result in a higher award, but the Tribunal does not find that to be the case. The claimant has given evidence about the impact which the discrimination has had upon him and his health, albeit the Tribunal also notes the absence of any medical evidence which substantiates any such adverse health impact on the claimant over and above the evidence that he himself has provided.

58. Taking account of these factors and the law as described above, the Tribunal finds that the award for injury to feelings should fall in the mid band of *Vento*. However, the Tribunal does not award the claimant the amount claimed (which was £25,700). The claimant is awarded **£10,000** injury to feelings (being an award at the lower end of the middle *Vento* band).
59. That means that in total, the claimant is awarded **£69,901.80** as damages for discrimination.

*Less favourable treatment on the grounds that the claimant was a part-time worker*

60. As the claimant has been awarded his losses as damages for discrimination, the Tribunal does not make any further award as a result of the less favourable treatment of the claimant on the grounds that he was a part-time worker.

*Unfair dismissal*

61. As the claimant has been awarded his losses as damages for discrimination, the Tribunal does not make any compensatory award for unfair dismissal.
62. The basic award for unfair dismissal which is awarded to the claimant is **£14,700** (calculated on the basis claimed).

**Summary**

63. The claimant was discriminated against in relation to age by the respondent contrary to section 19 Equality Act 2010 (indirect discrimination) and his claim for indirect discrimination is well founded.
64. The claimant was less-favourably treated by the respondent on the grounds that he was a part-time worker contrary to regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and his claim under those regulations is well founded.
65. The respondent did fundamentally breach the claimant's contract of employment and his claim for breach of contract is well founded.
66. The claimant was unfairly dismissed by the respondent and his claim for unfair (constructive) dismissal is well founded.
67. The respondent is ordered to pay damages to the claimant for breach of contract in respect of notice in the sum of £10,426.

68. The respondent is ordered to pay the claimant the gross sum of £14,700 as a basic award for unfair dismissal.
69. The respondent is ordered to pay the claimant the gross sum of £69,901.80 as compensation for age discrimination.
70. No additional award is made in respect of the unfair dismissal compensatory award or an award for less favourable treatment on the grounds that he was a part-time worker.

Employment Judge Phil Allen

20 May 2020

JUDGMENT SENT TO THE PARTIES ON  
22 May 2020

FOR THE TRIBUNAL OFFICE

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