Appeal No. UKEAT/0194/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 10 September 2020

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

CHIEF CONSTABLE OF DEVON AND CORNWALL POLICE — APPELLANT

MRS N TOWN — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR JAMES ARNOLD (One of Her Majesty Counsel) Instructed by: Devon & Cornwell Police Legal Services Police HQ Middlemoor Exeter Devon EX2 7HQ
For the Respondent	MS BETSAN CRIDDLE (OF Counsel) Instructed by: Penningtons Manches LLP 125 Wood Street London EC2V 7AW

SUMMARY

SEX DISCRIMINATION

The Claimant was a police officer who was transferred from her Response Team to the Crime Management Hub after she became pregnant. There had been a risk assessment indicating that she could safely remain with the Response Team if certain adjustments were made but the Devon and Cornwell Police had a general policy that police officers on restricted duties would be transferred to the Hub and the risk assessment was ignored. The ET found that the police had discriminated against her (a) on grounds of pregnancy under section 18 EqA 2010 and (b) indirectly on grounds of her sex under section 19, on the basis that women were more susceptible to enforced transfer under the policy because pregnancy (as well as ill health) would lead to the application of the policy.

The police appealed saying (a) that the relevant treatment for the purpose of section 18 was removing her from danger and was not therefore unfavourable and (b) that any "particular disadvantage" under section 19 was suffered by pregnant women and not women in general.

The appeal failed on both grounds:

(a) The treatment of which the Claimant complained was not that she had been removed from danger but that she had been transferred to the Hub which she did not want and which made her ill. The ET had found as facts that this treatment was unfavourable and that it was because she was pregnant.

(b) It was not necessary for the purpose of section 19 that all women suffered from the particular disadvantage if women as a group were more likely to be subject to an enforced transfer because of the PCP

HIS HONOUR JUDGE SHANKS

1. This is an appeal against a Judgment in the Employment Appeal Tribunal sitting in Exeter dated 18 February 2019, under which Mrs Town succeeded in claims under Section 18 and 19 of the **Equality Act 2010** ("EqA") against the Devon and Cornwall Police. Two grounds were allowed to proceed by HH Judge Eady on the sift.

2. The background is that the Claimant was a serving police officer. She was a Response Officer on the front line which was the job she had always wanted. She got on with her colleagues and they were supportive of her.

3. She notified her Line Manager Sergeant Roper that she was pregnant on 21 November 2017. He conducted a risk assessment in relation to this under relevant internal police force guidance and he advised that she should be placed on restricted duties as a Response Officer. That involved her being in plain clothes, that jobs should be risk assessed and some recommendations in relation to night shifts, but crucially it meant that she could continue with the team that she was working with and that she would continue to be a Response Officer. That recommendation, which was put into effect for a short time, was entirely in accordance with her wishes.

4. On 21 December 2017, a month later, the Claimant was told that senior management in the police force had decided to move her to part of the force called the Crime Management Hub. That was more of a sedentary back office role which would not involve going out or responding directly to calls and would involve her being moved away from the team that I have mentioned. That was contrary to her wishes and not what had been identified as required in the risk

A assessment carried by Sergeant Roper. Indeed, the Tribunal was somewhat critical of the police force apparently completely ignoring the contents of that risk assessment.

B 5. The Employment Tribunal ("ET") accepted that this move was not only contrary to her wishes but also, objectively speaking, retrograde. They said this at paragraph 51(16):

> **"Though the Crime Management Hub is undoubtedly a vital part of the structure of Devon and Cornwall Police, the work undertaken in the Hub is very different from the work undertaken in the Response Team. It was understandable to the Tribunal that an ambitious front line Police Constable would be likely to view an enforced transfer to the work of the Crime Management Hub as a retrograde step in their career notwithstanding the obvious importance of the work undertaken in the Hub."**

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D 6. She took on the new role, but this caused her stress, anxiety, and migraines. The police had known in advance that she was likely to suffer as a consequence of being moved because she had foreshadowed the risks to her mental health which came about in written representations dated 20 November 2017. She did indeed suffer depression and anxiety and migraines as I

E mentioned, and she was off work for a while. She then returned in fact to the Response role in May 2018 after a period of sick leave and a grievance being upheld and she then went on maternity leave on 1 July 2018.

F 7. Before leaving the factual background, there is one relevant matter that I have not mentioned which is that on 21 September 2016, so before any of these matters arose, there had been a written principle set out, which the Tribunal found and it is not challenged, amounted to a

G practice which is recorded at paragraph 10 of the Judgment and it stated this:

> **"Restricted duties – If someone is on restricted duties beyond two weeks they will be considered for a role in Crime Hub or SODAIT to support reducing demand and crime management for the LPA. If there are exceptional reasons then this will be taken into account …"**

H The "this" is the exceptional reasons. Therefore, that was the policy or practice of the police which led to the decision to transfer the Claimant to the Crime Hub.

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8. As far as the legal background is concerned, I mentioned the claims were under Section 18 and 19 of the **EqA**. Section 18 concerns pregnancy discrimination and it says at Section 18(2), "A person A discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably — (a) because of the pregnancy." It is notable that there is no provision for justification if there is discrimination within the terms of that definition. Section 19 relates to indirect discrimination. Pregnancy is not one of the relevant protected characteristics, although sex obviously is. The section says this:

> **"(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—**
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> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
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> **(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,**
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> **(c) it puts, or would put, B at that disadvantage, and**
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> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim."**

(d) is the justification provision.

9. The Tribunal's essential conclusions are at paragraphs 60 and 61 of the Judgment. Paragraph 60 deals with the claim under Section 18 and paragraph 61 with the claim under Section 19. In paragraph 60.1 the Tribunal identifies the unfavourable treatment as the Claimant's transfer to the Crime Management Hub and they accept that that treatment was unfavourable to her basically for two reasons; they say it put her at a disadvantage because it removed her from a working environment she found particularly supportive against a background of an earlier miscarriage and moved her from work that she valued and enjoyed and then secondly, because it put her at risk of injury to her mental health which materialised in the way I described.

10. They then say that they rejected the Respondent's contention that the transfer was in reality an advantageous move. The argument was put on the basis that to continue to work in a Response Team was potentially dangerous for a pregnant woman, whereas the Crime Management Hub was safe and suitable for such women. The Tribunal say that was not a feasible argument because of Sergeant Roper's risk assessment in which he expressly found that the Claimant was fit to remain in the Response Team subject to certain adjustments. Therefore, that was their finding on the first element of a claim under Section 18, namely unfavourable treatment. At paragraph 60.2, they found that that treatment was because of her pregnancy. Although the conclusion at 60.1 is subject of an appeal there is no appeal, at least none allowed through by Judge Eady, in relation to the causation finding at paragraph 60.2.

11. The Section 19 claim is dealt with in paragraph 61. Paragraph 61.1 refers to the relevant PCP. That clearly existed and has not been challenged and I have mentioned the document referred to at paragraph 10 of the Judgment. Paragraph 61.2 says that that PCP puts women at a particular disadvantage because it can be triggered by pregnancy in addition to other triggers like illness which could be shared between men and women. At the end of the paragraph the Tribunal sum it up really by saying "the Tribunal was satisfied that pregnant officers, and therefore women, were at a particular disadvantage (in the form of susceptibility to an enforced transfer from operational role to a non-operational role), when it came to the application of the PCP." At paragraph 61.3 the ET deal with the question of justification and they reject the suggestion that what happened was justified. Again, there is no appeal in relation to that finding. The one thing that is in a sense missing is the requirement that the PCP puts the Claimant at the relevant disadvantage, but I imagine that it was thought that went without saying given their conclusions on the Section 18 claim.

12. Therefore, I turn first to the appeal in relation to "unfavourable treatment", the finding under Section 18. The law about this has been considered recently in the Supreme Court in a well-known case called **Williams v The Trustees of Swansea University Pension & Assurance Scheme and another** [2018] UK SC 65. There is a pithy Judgment given by Lord Carnwath who says at paragraph 12, in relation to really similar provision Section 15 of the **EqA**, that it appears to raise two simple questions of fact: what was the relevant treatment and was it unfavourable to the Claimant? He also at paragraphs 27 and 28 says a little bit more about the concept and says that there is not much advantage to be gained by seeking to go into whether the test is objective or subjective/objective. At paragraph 28, he makes the point that it is necessary first to identify the relevant treatment and in that case it was the award of the pension which had particular results.

13. Mr Arnold in this case says that the ET has misidentified the treatment. He says they should have found it to be removing the Claimant from the danger of being a full Response Officer when pregnant. He says that removing her from danger could have been done in a number of ways, either by keeping her in the Response Team on restricted duties or as was done later by moving her to the Crime Management Hub, but either of those was to her positive advantage insofar as it removed her from danger.

14. The problem with the submission it seems to me is that it is quite clear the Claimant was not complaining about being removed from danger. She was complaining about being transferred to the Crime Management Hub. That was made abundantly clear by her case as recorded at paragraph 2 of the Judgment where it says the alleged unfavourable treatment was the transfer of the Claimant from a frontline an operational role as a Police Constable in the Respondent's Response Team to a office-based role in the Respondent's Crime Management Hub. That was

A therefore the complaint. Plainly it happened, so the evidence was clear that it was factually right, and the only question was whether that was unfavourable. The question whether the treatment was unfavourable was as Lord Carnwath said a matter of fact and the ET found that the treatment in this case was unfavourable. They also found that it was caused by her pregnancy. As I said there is no appeal in relation to that.

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15. It seems to me that is really the end of the point. There is a finding of fact. It is not suggested it is a perverse finding of fact and therefore there is really no basis for the appeal.

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16. At Section 14.4 of the skeleton there are two points raised on which it is said insufficient weight was given and these also formed part of the oral submissions. The first was that there was apparently a demand for staff in the Crime Management Hub in addition to a demand for staff in Response. It is hard to see what the relevance of this point is but if it goes to anything it would go to causation, namely the reason why the Claimant was moved to the Crime Management Hub. It does not seem to me it goes to the issue of whether there was unfavourable treatment.

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17. The second point is it is said police officers as opposed to employees are subject to lawful orders. In his submissions Mr Arnold showed me where in the Judgment it is recorded that the Claimant accepted that she was subject to orders and that she had to do what she was told. Again, there is really nothing in the point: something can be lawful for other purposes but nevertheless amount to discrimination and give rise to a claim under the **EqA**. Therefore, the fact that she could be told by her senior officers what to do and had to do it does not mean it did not amount to discrimination. That is the first ground of the appeal.

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18. The appeal in relation to indirect discrimination really seems to have two limbs to it. First, Mr Arnold notes that pregnancy is not a relevant protected characteristic for the purposes of Section 19. He suggests that what the ET did is to wrongly compare pregnant women with men in reaching their conclusion. The simple answer to this is that, as is clear from Lady Hale's analysis in **Essop & Ors v UK (Border Agency)** [2017] I WLR 1343, is not necessary for every member of a group to be at a particular disadvantage for it to be said that the members of the group are at a particular disadvantage if a member of the group is more likely to be disadvantaged than the comparative group. That is plainly the case here since only women can get pregnant and pregnancy is an automatic trigger for the application of the policy and women are therefore plainly disproportionately liable to be transferred. That, it seems to me, is sufficient for the purposes of the comparative exercise.

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19. Mr Arnold also made a point that there was no evidence that the transfer itself would represent in general a disadvantage to women or pregnant women or men at all. He says that as the evidence stood, it might have been that a transfer was generally regarded in circumstances where someone was on restricted duties as a positive advantage and that for this purpose the Claimant's subjective position was beside the point. I am not sure that this point was really set out in the Notice of Appeal. However, in any event it seems to me that the answer lies in the words used by the Tribunal in their finding at paragraph 61.2, namely that the particular disadvantage was susceptibly to an *enforced* transfer. It seems to me that it is almost axiomatic that being forced to do something can be said to represent a disadvantage and therefore a particular disadvantage. I also repeat the finding at paragraph 51.16, which is to the effect that it is understandable and therefore an objective fact that an ambitious frontline police constable would regard it as a retrograde step to be transferred from operational frontline activity to a

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non-operational role. Therefore, one way or another that point does not seem to me to undermine the Decision.

20. For those reasons I dismiss both grounds of appeal.