



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111574/2019 (A)

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Held via telephone conference call on 5 June 2020

Employment Judge A Kemp

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Mrs S Campbell

**Claimant
In Person**

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Tesco Personal Finance plc

**Respondent
Represented by
Ms L Stratton -
Solicitor**

JUDGMENT

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The claimant's application to amend her Claim to include a claim of breach of section 19 of the Equality Act 2010 in respect of a provision, criterion or practice alleged by her to have been applied by the respondent, of requiring a full-time employee for the post involving the claimant, is allowed.

REASONS

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Introduction

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1. This Preliminary Hearing was arranged to address both an application for amendment by the claimant and issues of case management. Preliminary Hearings had been held on 24 January 2020 and 3 April 2020.
2. In the Note issued following the latter hearing I set out a provisional view on the application to amend made by the claimant, assuming it is such and not further particulars of the claim made. The respondent sent a written submission in relation to that, in which additional arguments were made with further authorities. The claimant responded to that by email.

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Arguments

3. The claimant made an application by email dated 28 February 2020. The respondent replied to that on 4 March 2020. Whilst the claimant argued that she was not amending the Claim, and that she had detailed in her Claim Form that she was discriminated against due to working part-time hours, I consider that the application does fall to be considered as one to amend the claim. It is to add an indirect discrimination claim in circumstances where at an earlier Preliminary Hearing before EJ Robison such a claim had not been identified. I understand that that hearing had been in person, which the claimant confirmed was the case during the hearing on 5 June 2020.
4. I clarified with the claimant during the hearing on 5 June 2020 that there had been a discussion with EJ Robison as to what claims she (the claimant) was seeking to make, and that at that stage the claimant had not identified a claim of indirect discrimination. She stated that the discussion had been very short, about five minutes, and had also addressed other issues such as the claims made, but she could not recall what was said about indirect discrimination. When she received the amended grounds of resistance, which challenged whether Andrew Binnie was an appropriate comparator, that led her to consider indirect discrimination further. She did not consider that she had formally disavowed that claim at the first Preliminary Hearing, but was maintaining the claim she had referred to in the Claim Form. It would cause her hardship if the scope of her claim was narrowed to direct discrimination only.
5. Ms Stratton has opposed the amendment. I outlined the arguments she made during the first hearing before me in the Note issued after that. Since then she has sent a written submission with additional points and authorities. She was not able to assist further with what had or had not been said at the first Preliminary Hearing as she had not been present, and relied on a report from a colleague. She explained in answer to a point made by the claimant on paragraph 2 of the respondent's written submission that the reference was to the change to add indirect discrimination not to the Claim Form itself.

Discussion

6. I have considered all that has been put before me both orally and in writing. Having done so, I confirm that I have decided to allow the amendment made by the claimant, such as to include within the claims made one for indirect discrimination under section 19 of the Equality Act 2010.
7. I shall not repeat the analysis of the law set out in the earlier Note following the previous hearing before me, but rather address the additional matters raised by the respondent in its written submission made thereafter. This Note should therefore be read together with the Note from the earlier Preliminary Hearing held before me.
- (i) *Nature of the proposed amendment*
8. The respondent argues that the indirect discrimination claim proposed is a new claim, and one that was not pursued by the claimant when the nature of the claims made was raised with her at the first Preliminary Hearing.
9. The respondent refers to a quotation from the case of ***British Gas Services td v Basra [2015]*** ICR 25, which I consider does not add to the analysis of the law set out earlier, rather it summarises the law in my opinion.
10. The application was made on 28 February 2020. That was shortly after the first Preliminary Hearing. It has been accepted by the claimant that Employment Judge Robison did discuss the other potential discrimination claims that the claimant may make beyond direct discrimination, one of which was for indirect discrimination, but she disputes that she said something to the effect that indirect discrimination was not being argued for. Ms Stratton had not been present, but relied on what was reported by a colleague who was. The Note from EJ Robison does not deal with that point directly. Against that background I consider that it is not clear that the claimant disavowed an indirect discrimination claim. When the Note was received with a list of issues, the claimant responded reasonably quickly to raise the matter of an indirect discrimination claim.
11. I do not consider that the claimant not raising the issue of an indirect discrimination claim specifically during that hearing, or saying specifically

that such a claim was not pursued if that were to have been what happened, would prevent her doing so thereafter. The claimant did, as indicated above, raise the issue promptly after receiving the Note of that hearing. These are not simple matters for a lay person to understand, not
5 least during a Preliminary Hearing. This was not a case of a legally represented claimant withdrawing or disavowing a particular claim on advice and after time for reflection, but of a claimant acting for herself who does not have legal experience giving what may have amounted to an immediate indication of her position, which she shortly afterwards asked
10 to change. I take into account that her agenda return did not refer to indirect discrimination at that stage.

12. Even if the claimant had disavowed the indirect discrimination claim, I do not consider that that is an absolute bar to the application now made. If such a bar did apply, it would have been referred to in the case of
15 **Anderson** referred to below.

13. In short this aspect of matters clearly favours the claimant.

(ii) The applicability of time limits

14. It is argued that the application to amend is out of time, and that it is not just and equitable to allow it to proceed. Reference is made to **British
20 Transport Police v Norman UKEAT/0348/14**. The facts of that case however are very different. There the claimant was represented by a solicitor. An appeal against allowing a just and equitable extension was granted, and the issue was reserved for consideration at the Final Hearing. The relevant questions for consideration in relation to the just and
25 equitable extension were in that case confirmed to be those proposed by the EAT in **ABM University Local Health Board v Morgan UKEAT/0305/13/**, which are (1) why was it that the primary time limit had been missed? and (2) why after expiry of the primary time limit was the claim not brought sooner than it was?

30 15. The context of the present claim is consideration of an application to amend in circumstances where there is a basis in the Claim Form for the claim of indirect discrimination, in the sense of a reasonably strong

causative link as I shall refer to below, however in any event the claimant has explained the reason for the delay in making the application to amend, being her lack of knowledge or experience of discrimination law, the amended grounds of resistance challenging her proposed comparator for the purposes of the direct discrimination claim, and undertaking further research and consideration after the first Preliminary Hearing, after which she made the application now disputed promptly.

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16. In *Miller v Ministry of Justice UKEAT/0003/15* the EAT noted that the prejudice that may arise in considering whether it is just and equitable to allow a new claim may be both (a) lack of a limitation defence and (b) forensic prejudice, in respect of an effect on the quality of the evidence. There is no suggestion made in this case that (b) applies.
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17. Reference is further made by the respondent to *Department of Constitutional Affairs v Jones [2008] IRLR 128* and to *Chief Constable of Lincolnshire Police v Caston* referred to in the earlier Note. They argue that the burden is on the claimant to prove that the claim is within the jurisdiction of the Tribunal, and that allowing an amendment to introduce a new claim is the exception not the rule. That must however be seen in the context of the latter case, in which the court referred to *Robertson v Bexley Community Council 2003 IRLR 434* where the reference to amendment being the exception not the rule arose, which the Court of Appeal in *Caston* said did not mean that the exercise of discretion was to be undertaken in a restrictive manner.
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18. I consider that the balance of hardship clearly favours the claimant in that regard. The degree of prejudice to the claimant may, if her allegations are correct in fact, be highly significant in that she would be denied a remedy for discrimination. An indirect discrimination claim is a different kind of claim to that of direct discrimination, and the analysis of each is different, such that the outcome in relation to each can be different.
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19. Lady Hale in the Supreme Court gave the following guidance in *R (On the application of E) v Governing Body of JFS [2010] IRLR 136*

“The basic difference between direct and indirect discrimination is plain.....Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.”

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20. Lady Hale was speaking in the context of that case, but the same principle applies to other protected characteristics, including sex.
21. The respondent has referred to the cost of answering a new set of allegations, the need to repeat much of the preparation, delay in fixing a Final Hearing and that the claimant already has a potential remedy. I consider that the degree of prejudice to the respondent is relatively minor. Whilst there will be cost in answering an amendment, as outlined earlier it is understood that the respondent simply denies that the PCP proposed was applied to the claimant, and the cost to investigate that is therefore very limited. If the respondent wishes to investigate a defence of objective justification for the PCP in the event that it is held that it was applied that is likely to be more material, but not unduly significant in my opinion. It is a matter that the respondent has not yet decided upon, as referred to in the case management section below. No detail as to cost was provided by the respondent.
22. I do not consider that the issue of amendment and the response to it is likely to cause any material delay to the fixing of the Final Hearing.
23. Whilst the claimant does have a claim of direct discrimination already pled and to which the respondent does not take objection, that is a different claim in kind to that of indirect discrimination, and I do not accept the argument that because a direct discrimination claim is pled and is to proceed the claimant has a remedy. Whilst the respondent states that it is an issue of labelling, in my judgment that is not the case. Different considerations arise in claims of direct and indirect discrimination, as noted above.

24. I consider therefore that the analysis under this section also favours the claimant.

(iii) *Timing and manner of the application*

25. The respondent refers to ***Anderson v Network Rail Infrastructure Limited UKEATS/0056/09***. In that case the claimant drafted a Claim Form. By the time of the Preliminary Hearing the claimant was represented by solicitors and counsel. Following that the solicitors wrote to the Tribunal to set out the claim that was made, and formally to withdraw all other claims. The claim made was one under what was then section 3A(1) of the Disability Discrimination Act 1995. At the Final Hearing to address that claim the solicitors and counsel acting for the claimant withdrew from acting, and the hearing was discharged. A new final hearing date was arranged. On the first day of that second final hearing the new counsel for the claimant sought to add a new claim under section 3A(2). It was refused by the Tribunal, and the EAT refused the claimant's appeal. The EAT considered that there was no hint of the section 3A(2) claim in the Claim Form, and noted that the claimant had been legally represented since the Preliminary Hearing, with the application to amend coming very late.

26. Those circumstances I have set out fairly fully as they are entirely different to those that apply to the claimant. She has been representing herself. She is not legally qualified. She raised the amendment application shortly after the first Preliminary Hearing. The claimant did not make explicit that she was pursuing a claim of indirect discrimination in the Claim Form, but it was an inference that could be drawn from her reference in the Claim Form to being disadvantaged by being a part-time employee. There is a reasonably strong link between the Claim Form and the amendment now sought, and there is far more than a hint of that in the Claim Form, which is a distinction from the facts in ***Anderson***.

27. If there was a requirement that the person appointed be a full-time employee, which the respondent denies, that is I consider naturally seen as a PCP for an indirect discrimination claim. It could also be a fact relied on in a direct discrimination claim under section 13 of the Equality Act 2010, but it more readily fits within the terms of section 19 of that Act.

28. This aspect in addition in my judgment favours the claimant.

(iv) Conclusion on application

29. All of the facts of the case are considered, and the matters raised weighed
in the balance. It is not a simple balance to strike. The strongest argument
5 for the respondent is that the claimant on their submission disavowed an
indirect discrimination claim at the first Preliminary Hearing. I do not
however consider that it is clear that that is what happened, as the claimant
denies it and there is no indication in the Note that that occurred, nor do I
consider that is determinative. In my judgment it is outweighed in particular
10 by the following matters (i) the terms of the Claim Form (ii) the lack of delay
in her making the application (iii) the limited real prejudice that the
respondent will suffer and (iv) that the claimant has been acting for herself.

30. It is for these reasons that I have decided to allow the issues to be
amended as proposed by the claimant in order to include a claim for
15 indirect discrimination, with the respondent able to defend that firstly by
their denial that the PCP of full-time workers was applied to the claimant
and secondly that, if it was, it was objectively justified.

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Employment Judge: A Kemp
Date of Judgement: 05 June 2020
Entered in register: 11 June 2020
and copied to parties