EMPLOYMENT TRIBUNALS

Claimants: Ms A Bukowska (1)
Ms K Adamska (2)

Respondent: Mizkan Euro Limited

Heard at: London Central (Remote via CVP) **On:** 13 April 2021

Before: Employment Judge K Welch (sitting alone)

Representation
Claimants: Mr M Kozic, Legal Representative

Respondent: Mr A Mathur, Counsel

RESERVED JUDGMENT ON OPEN PRELIMINARY HEARING

The decision of the Tribunal is as follows:

1. The Claimants are given leave to amend their respective claims to reflect that the Provision Criterion or Practice ('PCP') relied upon for their indirect race discrimination complaint is as follows:
   "A policy or practice that all employees are required to speak English at all times including:
   a. during breaks; and/or
   b. when the only people within the room have a common language which is not English."
2. The Respondent's application for the indirect race discrimination complaints to be struck out is unsuccessful.
3. The Respondent's application for the indirect race discrimination complaints to be made subject to a deposit order is unsuccessful.

RESERVED REASONS

1. This is a claim brought by the Claimants against their current employer, the Respondent.

2. The Claimants have been employed by the Respondent as technical team members since at least 2008.

3. The Claimants' claims are for indirect race discrimination under section 19 Equality Act 2010 ('EQA'). Their direct discrimination complaints under section 13 EQA were dismissed upon withdrawal at an earlier case management preliminary hearing.

4. The hearing was a remote public hearing conducted using the Cloud Video Platform ("CVP") under Rule 46.

5. In accordance with Rule 46, I ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended. The parties were told that it was an offence to record the proceedings.

6. From a technical perspective, there were some minor difficulties experienced in that the Second Claimant was disconnected and reconnected a few times, but other than that, the hearing was able to proceed. The decision was reserved.

7. I had been provided with a number of documents electronically which included a hearing bundle and any page numbers referred to in this Judgment refer to page numbers within that bundle. I was also provided with a statement of means for each of the Claimants, together with documents supporting those statements.

8. No witness evidence was required at the hearing as it was conceded by the Claimants' representative that both Claimants were in a position to pay a deposit of £1,000 each should they be ordered to do so by the Tribunal. On this basis, the

Respondent's Counsel confirmed that there was no requirement to cross-examine the Claimants on their means for the purposes of the preliminary hearing.

9. A preliminary hearing for case management purposes took place on 8 March 2021 before Employment Judge Hodgson. The case management Order appeared at pages 42 to 47 of the hearing bundle. At this hearing, Employment Judge Hodgson listed the claim for a public preliminary hearing. The purpose of the preliminary hearing was stated to be

"*such as may be determined by the tribunal at that hearing and may at that tribunal's discretion consider the following:*

3.2.1 to identify the claims and thereafter to consider if all or any of the claims should be struck out pursuant to rule 37(1)(a) Employment Tribunal Rules of Procedure 2013 on the ground that any claim or part has no reasonable prospect of success;

3.2.2 to consider pursuant to rule 39 Employment Tribunal Rules of Procedure 2013, if any allegation or argument has little reasonable prospect of success and if so, whether there should be a deposit as a condition of the Claimant continuing to advance any allegation or argument. The Claimant's ability to pay will be considered. The Claimants should be prepared to give evidence with supporting documentation if needed;

3.2.3 to determine any further case management directions;

3.2.4 to set the matter down for a final hearing."

10. The Claimants had been ordered to provide further particulars of the basis of their indirect race discrimination complaints. An unless order was made by Employment Judge Hodgson such that each Claimant had to identify what was alleged to be the PCP, or PCPs, relied upon and for each to state the alleged particular disadvantage by 19 March 2021. Failing which, their claims would be dismissed without further order or

warning. The Claimants provided particulars [pages 49 and 50] which referred to the PCPs relied upon as follows: –

11. For the First Claimant (Ms Bukowska)

"*A policy that each individual, irrespective of nationality or origin or command of English language, must at all times, including breaks when on respondent's premises as well as situations when those individuals who are not native English speakers, but are of the same nationality / origin and speak the same first language remain one on one in a room without any other individuals of different nationality / origin or native English speakers present.*"

12. For the Second Claimant (Ms Adamska):

"*A Policy that each individual, irrespective of nationality or origin or command of English language, must at all times (which extends breaks) when on respondent's premises as well as situations when those individuals who are not native English speakers, but are of the same nationality/ origin and speak the same first language remain one on one in a room without any other individuals of different nationality a bleak origin or native English speakers present*."

13. I was not satisfied that the PCPs provided on behalf of each of the Claimants at pages 49 and 50 were sufficiently clear to identify the basis of the Claimants' indirect race discrimination complaints. The Claimants' representative confirmed, during discussion, that the Claimants were relying on a policy or practice as he could see no differentiation between the two.

14. I considered that the PCP relied upon by both of the Claimants appeared to be:

"A policy or practice to speak English at all times including

(a) during breaks; and / or

(b) when the only people in the room have a common language which is not English."

15. The Claimants' representative was content with this being relied upon as the PCP for both Claimants' indirect race discrimination complaints.

16. As the original claim forms made no reference to a requirement to only speak English during breaks, I explored with the parties whether there was a need for the Claimants to make an application to amend their claims. The Claimants considered that there was no need for such an application to amend the claims as their representative considered that this was already covered in the claim forms already presented. The Respondent considered that such an application was required but objected to any application to amend the claims on the basis that the new PCPs as against their originally stated case, showed no reasonable prospects of success. Further that the Claimants' indirect race discrimination complaints were misconceived and therefore the Respondent resisted any such amendment application.

17. Whilst the amended PCPs include a reference to an obligation to only speak English during break times, and this was not clearly set out in the claim form, there was reference to the Respondent "*operat[ing] an official policy of using English language only in all circumstances*" and I therefore considered, that it was unnecessary for the amendment to the PCP to require formal leave to amend. .

18. Even if it were required, in considering any such application to amend in accordance with the case of Selkent Bus Co Ltd (trading as Stagecoach Selkent) v Moore [1996] IRLR 661 and the presidential guidance in considering whether to exercise my discretion in a way that was consistent with the requirements of, "relevance, reason, justice and fairness inherent in all judicial discretions". I would have granted the amendment. Considering the nature of the amendment, the applicability of time limits on the timing and manner of the application, I do not consider that the making of the amendment would have resulted in any injustice or hardship to the

Respondent and it would have been in the in the interests of justice to allow the amendment. Therefore, the PCP relied upon by both Claimants is as stated in this judgement at paragraph 14.

Application to strike out/deposit order

19. Turning to the application to strike out the claims and/or order a deposit, I heard submissions from both parties' representatives and was provided with a written note by the Respondent.

20. The Respondent contended that the Claimants' indirect discrimination claims had no reasonable prospect of success and, in the Respondent's view, were fundamentally misconceived. There was no policy giving requirements on workplace language as these were matters which were left to line managers to implement and the Claimants accept that they were told there was no such policy in place. Further, the Respondent contended that, even if that were wrong, and the PCP existed and were applied, it would not put Polish employees at a particular group disadvantage compared to non-Polish employees when considering the correct comparator group as required under section 23 EQA. For the purposes of an indirect discrimination claim, there must be no material difference between the circumstances relating to each case. The Respondent contended, therefore, that the comparator group for the purposes of the section 19 indirect race discrimination claims would be non-Polish employees of the Respondent who were non-native English speakers and had discomfort speaking English. Therefore, in the Respondent's view, there would be no group disadvantage.

21. The Respondent further asserted that the Claimants were not themselves put to a particular disadvantage since they had a substantial grasp of English. This was shown by their ability to work in English and the signing of detailed employment contracts in English, a fact accepted by the Claimants' representatives who confirmed that they had understood. Finally, the Respondent would, in its view, be

able to rely upon the obvious justifications in requiring employees to speak English whilst working which, in its view, far outweighed any discomfort caused in having to speak English.

22. Finally, should the Respondent not have satisfied the Tribunal that there were no reasonable prospects of success, it considered that it should have satisfied the Tribunal that the claims of indirect discrimination brought by both Claimants had little reasonable prospects of success and therefore a deposit order should be granted.

23. The Claimants' representative did not consider that there was any degree of incoherence in the PCPs pleaded or, as amended in the further and better particulars. He did not accept that there was any obvious inconsistency between the two. He agreed that a conversation had taken place where it was said to the Claimants that they could speak Polish during breaks. However, he referred to paragraph 13 of the particulars of claim referring to the ability to have a "chit chat" at work from time to time concerning private matters, which, in his view, extended the requirement to speak English to matters not just about work. He did not consider that the Respondent had reached the level required to strike out the claims.

24. Concerning the group disadvantage, the Claimants' representative considered that all non-English native speakers might be placed at a similar disadvantage. He contended that the Respondents would be unable to justify having to speak English when the Claimants were alone in a room with no one around and that there could be no legitimate aim in asking them to speak about private matters in English.

25. The reason that the Claimants contended that lunch breaks were also subject to the requirement to speak English was because of the pandemic which no longer allowed the Claimants to go to the canteen, but instead they were forced to have their lunch at their workplace.

26. In respect of the deposit order, the Claimants' representative considered that, as the tribunal did not have all the evidence, it could not say that there were little reasonable prospects of success in the indirect race discrimination complaints.

27. The Claimants therefore contended that the indirect race discrimination complaints should continue, without strike out or deposit orders.

Jurisdiction on the ground that they were presented out of time

28. The Respondent further contended that the Tribunal should exercise its discretion in not accepting jurisdiction for the indirect race discrimination complaints on the basis that they had, on the face of them, been made out of time. This was on the basis that the last of the two cited incidents referred to in the particulars of claim took place on 9 March 2020, the ACAS conciliation period took place between 27 April 2020 and 11 May 2020, and yet the claims were not presented until 30 September 2020.

29. The Claimants' representative agreed that had there being a specific discriminatory act occurring only on 9 March 2020, the claims would be out of time. However, he contended that there was a continuing act due to the PCP continuing in place after this time. Further, section 19(2)(b) EQA refers to PCPs that, "puts, **or would put**, persons with whom B shares are characteristic at a particular disadvantage when compared with persons with whom B does not share it." [Emphasis added].

The Law

30. Rule 37 in the Employment Tribunal's Rules of Procedure 2013 ('the ET Rules') provides that a Tribunal cannot at any stage of the proceedings strike out all or part of the claim on the grounds that it has no reasonable prospects of success.

31. The Tribunal should not strike out any claim where there is a Court of disputed fact and that discrimination issues "should as a general rule, be decided only after

hearing the evidence" Ayanwu v South Bank Students Union and another [2001] ICR 391.

32. This is recognised as being a high test and the Tribunal must consider all material before it concludes that there is no reasonable prospect of success and should not make such a ruling save in the plainest and most obvious cases. The Claimants' case must ordinarily be taken at its highest when considering whether to strike out a claim. However there is no bar on striking out discrimination claims

33. Rule 39 of the ET Rules provides that where a tribunal considers that any specific allegation or argument has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. The rule also provides that the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

34. The test for deposit orders is therefore lower than the threshold required for striking out claims.

Conclusion

35. Whilst I considered the time limitation points as raised by the Respondent, I consider that the Tribunal at the full merits hearing will be better placed on hearing the evidence to decide whether there was conduct extending over a period in accordance with section 123(3) EQA.

36. I therefore do not consider it appropriate to make a ruling on the jurisdiction point relating to whether the claims have been presented out of time and/or whether time should be extended on a just and equitable basis under section 123 (1) EQA.

37. This should rightly be determined at a full merits hearing before a panel when evidence has been considered relating to whether the Claimants' contention that the application of the PCP throughout the period of employment can be referenced to conduct extending over a period in accordance with section 123 (3)(a) EQA.

38. In considering whether to strike out the Claimants' complaints of indirect discrimination, I am not satisfied that the high threshold required to strike out discrimination claims has been passed in this case. I cannot say that there are no reasonable prospects of success and therefore this application fails.

39. Turning to whether a deposit order should be made in order for the Claimants to continue with their complaints, this is a lower threshold than strike out situations. I consider that the Tribunal will need to hear evidence as to whether the PCP relied upon existed and was applied, and whether this caused group disadvantage and also particular disadvantage to the individual Claimants.

40. I am not satisfied that the Claimants' indirect race discrimination claims have little reasonable prospects of success. It will be necessary to hear evidence on the group disadvantage, and also the particular disadvantage that the Claimants allege to have been subjected to, and without hearing evidence, I cannot say that the claims have little prospects of success.

41. For these reasons, I make no strike out or deposit orders.

Employment Judge Welch

Date 16 April 2021

JUDGMENT SENT TO THE PARTIES ON

19/04/2021.

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FOR THE TRIBUNAL OFFICE