EMPLOYMENT TRIBUNALS

Claimant: Mr I Brown

Respondent: Music In Hospitals and Care Limited

Heard at: Manchester (by CVP) **On:** 29 March 2021

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Miss A Strzyzewska, Solicitor

JUDGMENT having been sent to the parties on 6 April 2021 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. A hearing took place on 29 March 2021 to decide the respondent's application for striking out the claimant's claims of indirect disability discrimination by association and unfair dismissal. Following the hearing Case Management Orders were made.

The Law

Unfair Dismissal

2. To qualify for the right to claim unfair dismissal, unless it is automatically unfair dismissal which is not an issue in this case, employees must have worked for the respondent continuously for at least two years (section 108(1) of the Employment Rights Act 1996), which says that:

> "Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."

Facts

3. The claimant commenced employment with the respondent on 25 February 2020 as a part-time fund raiser working 22.5 hours per week over three days. The claimant resigned from his employment with immediate effect on 26 March 2020. The respondent treated the claimant's employment as having terminated on 31 March 2020 as they had already paid him up to that date.

4. The claimant clearly did not have two years' service and therefore could not qualify to bring a claim under section 94 of the Employment Rights Act 1996, and accordingly that claim was struck out.

Law on striking out applications

5. Under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1, a claim or response can be struck out on the following basis:

> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
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> (c) for non-compliance with any of these rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or the response or the part to be struck out.

6. In relation to the relevant ground here, which is "no reasonable prospect of success", it can relate to the merits of the claim factually or legally. The Tribunal has to be satisfied it has **no** reasonable prospect of success.

7. In **A v B & another [2011]** the Court of Appeal decided a Tribunal was wrong to strike out an employee's claim of sex discrimination/unfair dismissal on the basis they had no reasonable prospects of success. The Court of Appeal concluded that there was more than fanciful prospect that the employer would not be able to discharge the reverse burden of proof to show that the employee's dismissal was not sex discriminatory. Accordingly, the EAT had been right to decide that the employer had not succeeded in demonstrating that the claimant had no reasonable prospect of success.

8. Similarly, in **Short v Birmingham Council & others EAT [2013]** the Employment Judge had misdirected herself in law by considering whether "on the balance of probabilities" the claimant was likely to succeed in her claim.

9. Discrimination cases in particular are highly sensitive and the House of Lords has stressed in the past, particularly for example in **Anyanwu & another v South Bank Students Union & another [2001]**, that they are generally fact sensitive and require full examination to make a proper determination.

Law on indirect discrimination by association

10. In relation to other forms of discrimination, section 13 of the Equality Act 2010 allows a claim to be made without the claimant having the protected characteristic, as the wording was changed to:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably."

11. This proved more difficult to apply in disability discrimination claims but was more easily applied in (for example) an age discrimination claim where a worker is a parent, son or daughter, partner, carer or friend of someone with a protected characteristic a direct claim could be made. In a disability case it would be possible to claim direct discrimination where the reason for the treatment was some disability related action rather than because the person themselves had a disability.

12. In **Coleman v Attridge Law & anor [2008]** which predated the revision of section 13 the ECJ, on a reference from an Employment Tribunal, agreed that the framework directive protected those who were not themselves disabled but nevertheless suffered direct discrimination or harassment owing to their association with a disabled person.

13. However, it is arguable this does not apply to indirect discrimination as section 19 appears to require that the claimant has to have the protected characteristic themselves.

14. Section 19(1) of the Equality Act 2010 states 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.
>
> (2) For the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B if:
>
> (a) A applies it 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."

15. In **Perrott v Department for Work and Pensions** (an Employment Tribunal case from 2011) the employer operated a special leave policy for employees who wanted to take periods of care leave, but it was treated as unreckonable service and annual leave was not accrued in respect of it.

16. The claimant took two periods of special or unpaid leave under the policy to care for his disabled sister and sought to complain of direct disability discrimination by association when he suffered these detriments. The Tribunal opined that his claim would have failed in spite of the fact it was out of time as the special leave policy benefitted innumerable employees not just ones caring for somebody with a disability, and it would equally apply to all those individuals therefore there was no less favourable treatment in P's case. In effect, it would have to be brought as an indirect discrimination claim.

17. The question has arisen in European case law as to whether it is possible to have an indirect discrimination claim in an association context, which was discussed in the case of **Razpredelenie Bulgaria AD v Komisia Za Zashtita ot Diskriminatsia C-83/14 [2015] ECJ**. It was held that:

> "The principle of equal treatment in the directive is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds."

18. The claimant owned a shop in a predominantly Roma district in Bulgarian town, but she was not Roma. She complained about the practice of the electricity distributor placing meters in that distinct on concrete pylons at a height of between six and seven metres as she could not monitor her electricity consumption or check her bills. This was not the practice in non Roma areas and was apparently undertaken to prevent tampering and fraud, although no evidence was adduced to show this was more likely in Roma areas. The court held that this practice in relation to the placing of meters could amount to direct discrimination if the reason for doing it related to the ethnic origin of people living in the area. Moreover, if that was not the reason then it could be indirect discrimination if the practice put persons of that origin at a particular disadvantage as people who were likely to live in the area. The ECJ held that:

> "The Equal Treatment Directive 2000/78/EC affords protection to an individual who is subject to less favourable or particular disadvantage even though they are not themselves a member of the race or ethnic group."

19. The reference to both less favourable treatment found in the definition of direct discrimination and the particular disadvantage found in the definition of indirect discrimination suggests that "associative indirect discrimination" is, as a matter of law, possible. The word "associative" should not be over-thought as it does not require that the person associates with the person with the protected characteristic.

20. The question then arises whether section 19 of the Equality Act 2010 can be read in a manner consistent with the ECJ Judgment, as section 19(1) requires that for B to be discriminated against A must have applied a PCP which is discriminatory

"in relation to a relevant characteristic of B's", therefore B should have the characteristic.

21. In **Follows v Nationwide Building Society** (an Employment Tribunal case from March 2021) the Tribunal considered that it had to and could read section 19 so as to give effect to the Bulgarian decision and provide protection against indirect associative discrimination. However, it would appear the Tribunal in that case was dealing with a different kind of associative indirect discrimination going beyond the ground mapped out by the ECJ. The claimant was told by her employer that in future she could no longer work at home which resulted in her losing her job because she had to be at home to care for her disabled mother. The Tribunal read section 19 to apply to a case where a PCP put workers who were associated with disabled people at a particular disadvantage and where the claimant also was associated with a disabled person who suffered the same disadvantage. However, Article 2.2 of the Equal Treatment Directive defines indirect discrimination as occurring "when an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability or particular age or a particular sexual orientation at a particular disadvantage". It does not say anything about putting a person who associates with people with such a characteristic at a disadvantage.

Application of European Law

22. In citing cases on the European Law the approach was always that:

(1) Domestic provisions must, so far as possible, be interpreted in such a way as to give effect to European legislation as interpreted by the ECJ;

(2) There could be direct effect where individuals can rely directly on rights conferred by European Law in domestic proceedings; and

(3) The state could be sued, for instance by way of Judicial Review, for failing to implement an EU directive.

23. The approach was set out in **Vodafone 2 v Revenue and Customs Commissioners [2009]** as follows:

> "In summary the obligation on the English courts to consider domestic consistent with community and law obligations is both broad and far-reaching. In particular:
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> (a) It is not constrained by conventional rules of construction (per Lord Oliver in Pickstone);
>
> (b) It does not require ambiguity in the legislative language (per Lord Oliver in Pickstone and Lord Nicholls in Ghaidan);
>
> (c) It is not an exercise in semantics or linguistics;
>
> (d) It permits departure from the strict and literal application of the words which the legislator has elected to use;

(e) It permits the implication of words necessary to comply with community law obligations; and

(f) The precise form of words to be implied does not matter.

He also added that:

> "The only constraint on the broad and far-reaching nature of the interpretative obligations are that:
>
> (a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed". An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment.
>
> (b) The exercise of the interpretative obligation cannot require the courts to make decisions for why they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate."

24. In **Coleman v Attridge** the ECJ decided that associative discrimination does fall within the protection of the Equal Treatment Directive because the principle of equal treatment applies to the grounds of discrimination set out in Article 1 not simply to people who themselves have a disability.

25. This was clearly also set out in **Marleasing SA v La Comercial Internationale de Alimentacion SA [1990]** which required domestic courts to go "so far as possible" to interpret domestic legislation to give effect to a state's obligations.

26. There was also an obligation of national courts to disapply any provision of national legislation if it is contrary to a protection which individuals derive from EU law. He said:

> "If it is impossible to arrive at an interpretation of national law that is consistent with the directive, it is nonetheless under an obligation to provide the legal protection which individuals derive from EU law, disapplying if need be any provision of national legislation which is contrary to the principle."

27. The application of European Law in the Tribunal post Brexit is a difficult question, and I did invite the respondent to make further submissions on this point after the hearing if they wished to do so, in which case I would have reconsidered my decision.

Facts

28. The facts in this case are that the claimant, when lockdown was introduced, panicked because his wife was also ill. In addition to his son who had cerebral palsy, hydrocephalus, cortical visual impairment and epilepsy he had two other young children to look after so he resigned. However, when he looked at the details of the furlough scheme he felt that he could be furloughed and therefore asked the respondent to reinstate him. The claimant wrote to them again when they began to furlough staff but the respondent again refused to furlough him.

29. The respondent says that at the time the claimant first asked to be reinstated on 6 April 2020 they had a policy not to place any staff on furlough, and they were uncertain as to the claimant's eligibility for the furlough scheme as he had not been with them for very long. When subsequently they did furlough employees they decided not to fill any vacant roles to minimise costs and liabilities, and this included not reinstating any employees who had resigned. Four posts were left vacant to reduce the employer's costs and liability. Two other employees had resigned and made similar requests as the claimant and they were also refused. The disabilities of the claimant's son had no bearing whatsoever on the respondent's decision to reject the claimant's request to be reinstated.

Conclusion

30. It is no doubt the case that it will be difficult for an associative indirect discrimination claim to be brought in the area of disability, and probably in every other area, because of the wording of section 19(1). The issue may arise as to how far the Tribunal would be allowed to take a purposive approach to the Equality Act in light of the Bulgarian case, but there may also be points of difference between the Bulgarian case and the claimant's case, however I took the view that the claimant should be given the opportunity to argue the point at a full hearing, which did not preclude the Tribunal hearing the case ultimately to make a decision that such a claim was not permissible under the Equality Act 2010.

31. The ECJ clearly opines that a case is possible where a neutral provision applies which has a disparate impact in relation to a protected characteristic and that the complainant need not have that protected characteristic.

Employment Judge Feeney
Date: 7 July 2022

REASONS SENT TO THE PARTIES ON
8 July 2022

FOR THE TRIBUNAL OFFICE