EMPLOYMENT TRIBUNALS

Claimant: Mr Paolo Messeri

Respondent: The Royal Hospital for Neuro-Disability

Date: In chambers on 7 December 2022

Before: Employment Judge Pritchard
Ms B Leverton
Mr S Townsend

JUDGMENT UPON RECONSIDERATION

Upon reconsideration the Tribunal's judgment dated 10 January 2022 is confirmed.

REASONS

1. Following a hearing held over five days in December 2021 and deliberation in chambers on 6 January 2021, the Tribunal determined, among other things, that the Claimant's indirect race discrimination claim succeeded. Judgment on liability dated 10 January 2022 was sent to the parties on 12 January 2022.

2. The case was listed for remedy hearing to take place on 9 June 2022. However, the parties informed the Tribunal that they were not ready to proceed. In particular, the Claimant was seeking lifelong loss of earnings and personal injury and wanted time to instruct a psychiatric expert.

3. The remedy hearing was therefore vacated and converted to a preliminary hearing to clarify the issues relating to remedy. Both parties were represented by counsel at the preliminary hearing.

4. The parties felt that the Tribunal's judgment had been broadly stated in relation to its finding of indirect race discrimination and that clarification would be helpful. The parties agreed that such clarification should be provided by way of the Tribunal's reconsideration of its decision.

5. The Tribunal issued a case management order which, among other things, required to the parties to draft the terms of a further case management order

and to inform the Tribunal no later than 30 June 2022 precisely the clarification being requested.

6. The parties jointly requested that the Tribunal provide clarification of its liability judgment as follows:

   6.1. With reference to the issues identified by the Tribunal at paragraph 15 of the Judgment, and its finding at paragraph143, confirm the specific disadvantage(s) to which the Tribunal found the Claimant was put;

   6.2. State whether the finding of indirect discrimination at paragraph 145 arising from the practice of holding disciplinary hearings without arranging an interpreter to provide support to employees amounted to a finding that the Respondent discriminated against the Claimant by:

      6.2.1. subjecting him to any other detriment, contrary to Section 39(2)(d) EqA, dismissing him, contrary to Section 39(2)(c) EqA, or both;

      6.2.2. if the finding of indirect discrimination amounted to a finding that the Respondent discriminated against the Claimant by dismissing him, state the reasons for that finding; and

      6.2.3. with reference to paragraphs 29.2,121-122 and 150 of the Judgment (which states that the amount of adjustment is to be determined at the remedy hearing), confirm whether the Tribunal has found that an ACAS uplift applies in principle or whether that also remains to be determined at the Remedy Hearing.

7. The Respondent put the Tribunal on notice that in light of the individual disadvantage now being sought, it also intended to ask the Tribunal to clarify its findings on group disadvantage at paragraph 138 and, because the Claimant did not agree to the request being included in the joint request, it would be applying for clarification by way of reconsideration.

8. The Respondent subsequently made its application for reconsideration under Rule 71 as follows:

   8.1. At paragraph 138, that the application of the PCP identified at paragraph 137.5 (a practice of holding disciplinary hearings without arranging an interpreter, instead of leaving it to the employee if they felt they needed one) puts or would put persons whom English is not their first language at a particular disadvantage compared to persons for whom English is not their first language; and

   8.2. At paragraph 145, that the Respondent indirectly discriminated against the Claimant.

9. The Respondent stated that its reasons for the request was because it was unclear as to:

   9.1. The precise particular (group) disadvantage being referred to at paragraph 138 (of which the Tribunal has taken judicial notice);

9.2. Whether the disadvantage referred to at paragraph 143 is the same disadvantage as referred to at paragraph 138 or a different disadvantage; and

9.3. If a different disadvantage, how it can be said that Section 19(2)(c) (it puts, or would put, B at that disadvantage) has been met.

10. The Respondent stated that these points were of heightened significance as the question had now been raised as to the specific disadvantage(s) to which the Claimant was put (at paragraph 143) and whether the finding of indirect discrimination amounts to a finding that there was a dismissal (at paragraph 145).

11. The Tribunal exercised its discretion to extend time under Rule 5 to allow the Respondent's application to be considered and thereafter proceeded in accordance with Rule 72.

12. By email dated 6 September 2022, the Claimant submitted that the Respondent's application appeared to be going further than simply seeking clarification of the finding of indirect discrimination and appeared to be questioning whether the Tribunal should have made a finding of indirect discrimination at all. If the Respondent was seeking clarification, the Claimant agreed that the reconsideration could take place without a hearing.

13. By email dated 13 September 2022 the Respondent explained, in terms, that it was seeking clarification of the matters raised in its application and confirmed that the application could be considered without a hearing.

14. On 15 September 2022, the Tribunal informed the parties that the Tribunal would not be reconsidering whether it should have made a finding of indirect discrimination but, rather, seeking to clarify its decision by way of reconsideration. The parties were informed that having considered the correspondence, the application for reconsideration would be considered without a hearing.

15. The Tribunal met in chambers on 7 December 2022 and provides the requested clarification as follows.

16. At paragraph 137.5 of its Judgment, the Tribunal found that Respondent adopted a practice of holding disciplinary hearings without arranging for an interpreter to provide support for employees and that that practice amounted to a PCP. This was a finding in relation to the issue set out at paragraph 13.2 of the Judgment.

17. That PCP affects all employees of the Respondent who attend, or might attend, a disciplinary hearing including employees who are advantaged and employees who are disadvantaged by it, namely those for whom English is their first language and those for whom English is not their first language. (The Tribunal notes that it would produce an absurd result if the pool were to include only those employees for whom English is not their first language who attend, or might attend, a disciplinary hearing). This was the Tribunal's finding in relation to the issue at paragraph 14 of the Judgment.

18. When compared with employees for whom English is their first language, the Tribunal took judicial notice that the PCP puts or would put persons for whom English is not their first language at a particular disadvantage. A failure to provide an interpreter for a person with limited English language skills at a disciplinary hearing is undoubtedly something a reasonable person would complain about.

19. Such employees might misunderstand and/or be misunderstood (in particular in relation to evidence given and/or allegations made). This was the Tribunal's finding in relation to the issue at paragraph 15.2 of the Judgment. The Tribunal had regard to the EAT decision of Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729 referred to by Mr Peck in submissions.

20. Although the Tribunal heard no evidence as to the proportion of employees for whom English is not their first language, nor any evidence as to their English language skills, the Tribunal notes paragraph 4.22 of the Code of Practice on Employment (2011) which states that it is not necessary to show that the majority of those within the pool who share the protected characteristic are placed at a disadvantage. The Tribunal also had regard to guidance set out Essop v Home Office (UK Border Agency) [2017] UKSC 27 referred to in Mr Peck's submissions.

21. The disadvantage at paragraph 143 is the same disadvantage as that referred to at paragraph 138 and which refers to the issue referred to in paragraph 15.2 of the Judgment. In particular, the Claimant was misunderstood in relation to evidence given and/or misunderstood allegations made against him at the disciplinary hearing. This is set out in paragraph 134 of the Judgment and, as noted at paragraph 140, he was misunderstood as to what he said about hugging.

22. The Respondent indirectly discriminated against the Claimant by subjecting him to a detriment under section 39(2)(d) of the Equality Act 2010. However, the Tribunal was unable to conclude that the Respondent indirectly discriminated against the Claimant by dismissing him under section 39(2)(c) of the Equality Act 2010. The evidence did not suggest a sufficiently strong link between the failure to provide an interpreter and the dismissal to suggest such a finding. (The Tribunal notes that the Claimant was not dismissed for having hugged the patient which was something about which he was misunderstood). The matters identified at paragraphs 123 to 126 of the Judgment strongly suggest that it was these failings that ultimately led to the Claimant's dismissal which would have taken place whether or not he had been provided with an interpreter.

23. The Tribunal finds that the ACAS uplift applies in principle in that the Respondent unreasonably failed:

    23.1. To keep the Claimant's suspension as brief as possible (he was suspended for a period of approximately three months) and it was not kept under review (paragraph 8 of the ACAS Code of Practice).

23.2. To ensure that the notification contained sufficient information. The allegation of "Conduct that brings the RHN's name into disrepute" did not make clear whether it was an allegation relating to unspecified misconduct or whether it simply related to the first allegation (paragraph 9 of the ACAS Code of Conduct).

23.3. To ensure that the Claimant had reasonable time to prepare for the disciplinary hearing. The Claimant was provided with the second investigation report together with witness statements on 14 February 2020 and the disciplinary hearing took place on 18 February 2020. Under the Respondent's disciplinary policy an employee wishing to submit any written evidence in support of their case must provide it no later than three calendar days before the formal meeting. The Claimant thus had only one day in which to submit written evidence or other details or documentation (paragraph 11 of the ACAS Code of Practice).

24. Given the failings demonstrated by the Respondent during the disciplinary process, it was not unreasonable that the Claimant decided not to appeal the Respondent's decision to dismiss him having lost all trust in faith in his former employer.

Notes

Employment Judge Pritchard
Date: 7 December 2022