



EMPLOYMENT TRIBUNALS

Claimant: M TRACEY

Respondent: SECRETARY OF STATE FOR WORK & PENSIONS

Heard at: Cloud Video Platform **On:** 21 March 2023

Before: Employment Judge McCluggage

Appearances

For the Claimant: In person

For the Respondent: Mr Tibbits (counsel)

JUDGMENT

1. The Claimant's claim of indirect disability discrimination is struck out as having no reasonable prospect of success.
2. The Claimant's claim of unlawful deduction from wages is struck out as having no reasonable prospect of success.
3. The claims are therefore dismissed.

REASONS

1. By her ET1 dated 07 April 2022, the Claimant has brought a claim for indirect disability discrimination and unlawful deduction from wages against the Respondent, her former employer. The Claimant was a Case Manager concerned with Child Disability Living Allowance.
2. The case arises from the introduction of a new collective agreement called the "Employee Deal" bargained between unions and the Respondent in 2016. Employees were offered the opportunity to sign up for the new scheme between 22 June 2016 and 28 August 2016. The essence of the new contract was increased pay in exchange for employees agreeing to increased flexibility in their rota, including potentially being asked to work until 8.30 pm, and further, to Saturday working. The agreement expressly stated that persons with protected characteristics would have the Equality Act 2010 applied in its implementation.
3. The Claimant, employed since 1986, chose to remain on her 'Legacy Contract'. She made this decision because she had caring responsibilities for her mother, who unfortunately had dementia. She complains that the Senior Leadership Team refused to give assurances about how the flexibility would work in practice. She criticises their attitude as being 'draconian.' Consequently, the Claimant received significantly less pay under the Legacy Contract than her colleagues at the same grade from 2016 to when she took early retirement last year.
4. In short, the Claimant says that her shortfall in pay resulted from unlawful disability discrimination.
5. The Claimant's case is essentially an 'associative discrimination' claim. The Claimant agrees that she was not disabled; however, she says that her mother, for whom she cared, was "disabled" within the meaning of the Equality Act 2010. The Respondent does not contest this.
6. The Respondent denies that implementing the Employee Deal, whether for the Claimant individually or other employees, was discriminatory.
7. On 10 May 2022, the Respondent applied to strike out the claim and alternatively sought a deposit order.
8. The matter was case managed by Employment Judge A.M.S. Green on 24 October 2022. The employment judge provided a complete exposition of the background to the claim as presented in ET1. At [23] of the minute of the hearing, EJ Green stated, "it was clear that the claimant was only claiming indirect discrimination." The minute of discussion did not precisely identify the Provision, Criterion or Practice ('PCP') required for a claim for indirect discrimination. However, at [23.3], the Respondent's counsel described the PCP as "not providing the adequate support in the run-up to the

Employee Deal." Counsel for the Respondent explained that this PCP was agreed upon between the Judge and the parties. The Claimant affirmed that this was the basis of her complaint.

9. Though jurisdiction based on time limits is an issue in this case, time limits were not listed as a separate issue. Instead, the Respondent seeks to strike out, alternatively, a deposit based on the time limit issue, given the act complained could be analysed as taking place in mid-2016. The Respondent contends that the claim was only brought some five years later, so the prospects of success in establishing jurisdiction are low.
10. The analysis below will appear extraordinarily legalistic to the Claimant. The Tribunal recognises that dementia is a highly distressing illness for those who experience it and those who care for the sufferer. For the purpose of the application, I accepted that the Claimant was forced for reasons out of her control to seek to balance the needs of her seriously ill mother with the uncertainty of a reform programme at her employer. That she put her late mother first is a testament to the Claimant's character. The Claimant dealt with matters with dignity and courtesy during the hearing. However, in this challenging area of discrimination law, the Tribunal is bound to apply the law strictly rather than yield to the sympathetic background of this case.

Essential Law

11. The jurisdiction to strike out is raised in the context of rule 37(1)(a) of the Employment Tribunal Rules 2013. The Respondent relies upon the part of the rule giving jurisdiction to strike out where there is "no reasonable prospect of success." I take the following as relevant principles to apply:
 - 11.1 Where central facts are in dispute, it will be rare/exceptional that tribunals should strike out claims for having no reasonable prospect of success (Ezias v North Glamorgan NHS Trust [2007] ICR 1126 and Abertawe Bro Morgannwg UHB v Ferguson [2013] ICR 1108). I start from the premise that discrimination cases are ordinarily fact-sensitive and tribunals should be slow to strike out.
 - 11.2 It is necessary to take the Claimant's case 'at its highest' when considering an application to strike out a claim. This approach means examining the pleaded facts and for the strike-out assuming (unless there is a compelling reason not to) that the Claimant's version of any key disputed facts is correct. That is what I propose to do here, with an assumption for purposes of the application that the Claimant was not given adequate assurances by her management as to how they would exercise their discretion to set rotas in light of her caring responsibilities.
 - 11.3 Concerns about discrimination being fact sensitive are less applicable where, as here, the issue is essentially one of law. The Respondent's primary contention is that section 19 of the Equality Act 2010 does not apply to 'associative discrimination' claims as a matter of law.

12. Rule 39(1) of the 2013 rules governs the jurisdiction to order a deposit. Where a tribunal finds that any specific allegation or argument in a claim has "little reasonable prospects of success", an order requiring a party to pay a deposit not exceeding £1,000 may be made to allow that allegation or argument to continue.
13. The relevant parts of section 19 of the Equality Act 2010 state:

Indirect discrimination

(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—

- (a) A applies, 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.

.....

14. The key question here relates to whether the "PCP" identified has been applied "to a relevant protected characteristic of B" if the Claimant is to be regarded as 'B' on the present facts, given it is undisputed that the Claimant is not disabled.
15. The relevant provisions concerning time limits are well known and found within 123 of the Equality Act 2010. The claim must be brought within three months of "the act complained of". If it has not, there is a "just and equitable" basis for extending the time limit. That allows for broad-based discretion.
16. This is a case where the nature of a "continuing act" under s.123(3)(a) of the 2010 Act is in issue. The provision defines a continuing act as "conduct extending over a period is to be treated as done at the end of the period". The renowned House of Lords judgment in Barclays Bank v. Kapur [1991] ICR 208 distinguishes between a 'continuing act' and an act with 'continuing consequences'. This principle can notoriously be challenging to apply in practice.

Analysis and Conclusions

17. I conclude that section 19 of the Equality Act 2010 does not allow for associative indirect discrimination claims. My view is that the matter is clear in terms of the wording

of the domestic provision but also its origin in the European Framework Directive. That analysis is confirmed by case law which is indistinguishable in terms of approach, albeit on different provisions of the Equality Act.

18. The wording of section 19 is expressly articulated in terms of the subject of the alleged discrimination ('B' in its description of participants) possessing the protected characteristic. That wording is consistent with Council Directive 2000/78/EC which it seeks to implement. Article 2(2)(b) reads:

"indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
- (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice"

19. The article frames indirect discrimination in terms of persons having the particular disability being put at a disadvantage.

20. Coleman v. Attridge Law [2008] ICR 1128 was a decision of the European Court of Justice that considered associative discrimination in the context of direct discrimination and harassment. The ECJ drew a conceptual distinction between direct discrimination and harassment on the one hand and indirect discrimination on the other. The ECJ contrasted "inclusionary" and "exclusionary" mechanisms of avoiding discrimination. Indirect discrimination was described as an inclusionary mechanism to accommodate the needs of individuals with specific characteristics. It contrasted with the exclusionary mechanism of harassment, which allowed for associative discrimination.

21. The analysis of the ECJ in Coleridge, in my judgment, supports the Respondent's position in the present case.

22. The domestic courts adopted the same analysis when denying that the concept of associative discrimination applied to a claim for reasonable adjustments under section 20 of the 2010 Act. In Hainsworth v. Ministry of Defence [2014] IRLR 728, the Court of Appeal accepted that article 5 of the Framework Directive concerning reasonable adjustments involved an inclusionary mechanism: see [19] within the speech of Laws LJ. The Court of Appeal rejected the employee's submissions as an "ingenious attempt to escape the coils of this contrast".

23. It is evident that through such language, the Court of Appeal believed that the attempt to circumvent the plain language of section 20 to introduce an associative element was weak in substance.

24. In my view, the attempt for an employee to escape these "coils" in respect of section 19 indirect discrimination is weaker still. Section 20 only requires the contrast in respect of an individual. For indirect discrimination, the PCP would need to be applied and compared with classes of persons who do not work for the employer. That would be a nigh impossible challenge. For better or worse, neither the European Union (when it was relevant) nor the United Kingdom's legislators have sought to make "caring for third parties" a protective characteristic. In my view, that would need to be the case for an employee to take advantage of section 19.
25. In the circumstances, I conclude that the Claimant's case is bound to fail.
26. Were I wrong on the issue of strike out for the section 19 claim, I would make a deposit order in respect of the time jurisdiction point. The facts of this case fall into the category of an act that has concluded but has continuing consequences. The act complained of in this case through the PCP was a lack of support from management leading to the Claimant's decision not to join the Employee Deal. That alleged lack of support had stopped being "an act" as of 28 August 2016. The Claimant's complaint was after that about the consequences of being excluded from the Employee Deal. I believe the facts and rationale of the Court of Appeal's decision in Sougrin v. Haringey Health Authority [1992] ICR 650 are apposite to the present case. The Court of Appeal treated a decision based on lower pay resulting from discrimination as a consequence rather than continuing discrimination. The current case is indistinguishable in principle.
27. Therefore, in my view, the claim should have been brought by 27 November 2016. The Claimant brought her claim some 5 ½ years out of time. I consider there to be no reasonable prospect of a different finding on this point at a final hearing.
28. I did not hear evidence of any justification for the delay at this hearing. The Claimant told me that she complained about the matter to her employer and her union over the years. She felt both parties had let her and others sharing her circumstances down severely. Five and a half years is an extreme delay in the context of tribunal claims. There would be inevitable evidential prejudice in seeking to revisit the Respondent's management style so long ago. In my judgment, the Claimant would struggle to persuade a tribunal to exercise its discretion on a "just and equitable" basis. Overall, I conclude that there would be little prospects of success on the time jurisdiction point. As I have decided to strike out the claim, I do not make a deposit order.
29. For completeness, I note that the claim for unlawful deductions was misconceived. As the Claimant did not sign up for the Employee Deal, she could not claim an unauthorised deduction from wages as she had no such entitlement. That claim, therefore, had no reasonable prospect of success.

Employment Judge McCluggage on 02/04/2023