Neutral Citation Number: [2023] EAT 66

Case No: EA-2021-000366-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 February 2023

Before :

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

D	**Appellant**
- and -	
E	**Respondent**

- -
- -

MS MARTINA MURPHY (Instructed via Advocate) for the **Appellant**
MS JULIE DUANE (Instructed by Make UK) for the **Respondent**

Hearing date: 1 February 2023

- -

JUDGMENT

SUMMARY

SEX DISCRIMINATION

The Employment Tribunal erred when striking out the claim of indirect sex discrimination arising from the claimant's dismissal, on the basis that dismissal was not a possible consequence of the application of the particular (reformulated) provision, criterion or practice (PCP) relied on. The claim was remitted to the Employment Tribunal.

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. In this judgment, I shall refer to the parties as they were before the Employment Tribunal: as "the claimant" and "the respondent".

2. This is an appeal from the judgment of an Employment Tribunal sitting at Birmingham (Employment Judge Hughes, sitting alone) which was sent to the parties with written reasons on 4 February 2021. By paragraph 1 of the judgment, the Employment Tribunal struck out the claimant's claim of indirect sex discrimination contrary to section 19 of the **Equality Act 2010 ("EqA")** on the ground that it had no reasonable prospect of success.

3. The claimant now appeals against the Employment Tribunal's decision to strike out his indirect discrimination claim. On 29 June 2021, the appeal was sent to a preliminary hearing by an order of HHJ Katherine Tucker. The preliminary hearing took place before the President, Eady J, on 4 May 2022. One ground of appeal was permitted to proceed to a full hearing.

4. Before the Employment Tribunal, the claimant represented himself and the respondent was represented by its solicitor, Mr Stephen Willey. On this appeal, both at the preliminary hearing and at this hearing, the claimant has had the benefit of representation by Ms Martina Murphy of counsel appearing *pro bono* (at the preliminary hearing under the ELAAS scheme and now through the charity Advocate). The respondent is represented on the appeal by Ms Julie Duane of counsel, who did not appear below. I am grateful to both counsel for their submissions and in particular to Ms Murphy for appearing *pro bono* for the claimant during the appeal process.

5. In the Employment Tribunal, a restricted reporting order was made under Rule 50 of the Employment Tribunal Rules of Procedure preventing the publication of matters likely to identify the

respondent, the claimant or any person referred to in the claim or response. On appeal an order has similarly been made under Rule 23 of the Employment Appeal Tribunal Rules. I shall not in this judgment refer to either of the parties by name or by way of identifying details.

Background

6. The respondent is an organisation that works with young people. The claimant was employed for a period of 18 months until his dismissal in April 2020. During the claimant's employment, an allegation of rape was made against the claimant to the police. The allegation was not related to the claimant's employment. Although the respondent would have suspended the claimant from duty as a result of that allegation, the claimant was already suspended (in relation to an entirely unrelated matter) at the time the respondent was informed of the allegation. His suspension continued until his dismissal.

7. The claimant in his claim form before the Employment Tribunal says that in April 2020 he was told by the respondent's HR department, by implication if not expressly, that he was being dismissed as a result of the allegation of rape that had been made against him. The police investigation was at that point still ongoing.

8. The respondent contends in its response form and its original and supplementary grounds of resistance before the Employment Tribunal, that the claimant was dismissed by reason of redundancy following the loss of the contract on which he had been deployed. It stated in its supplementary grounds of resistance that the claimant was not redeployed for a number of reasons, one of which was that he remained under investigation for a sexual offence.

9. The claimant appealed against his dismissal, contending that his dismissal was an act of sex discrimination because he had been dismissed as a result of the police investigation into the allegation

of rape. The appeal was dismissed.

10. The claimant filed a claim to the Employment Tribunal contending that his dismissal was an act of sex discrimination contrary to the provisions of the **EqA** which I have already referred to, for which there is no minimum period of service. The claimant did not have the necessary two years' service under section 108 of the **Employment Rights Act 1996** in relation to a claim of unfair dismissal. The respondent defended the claim on the basis that the dismissal was not an act of sex discrimination.

11. There was a case management hearing before Employment Judge Cookson on 17 November 2020. The judge ordered a preliminary hearing on whether the sex discrimination should be struck out or, alternatively, whether a deposit order should be made. The record of the case management hearing before Judge Cookson sets out that the claimant told the Employment Judge that he was not making a claim for direct sex discrimination, only for indirect sex discrimination. At that stage the provision, criterion or practice ("PCP") relied upon by the claimant was put as follows, in paragraph 41 of the judge's reasons:

> **"The claimant says that the PCP in this case is a practice that, if an allegation of rape is made, it is investigated by a line manager who makes the decision about the individual's employment and he says this impacts disproportionately against men because only men will be accused of rape."**

12. Employment Judge Cookson considered that the claimant's PCP might not be a neutral PCP because, in formulating it, the claimant relied on the fact that only men could be charged with the offence of rape (i.e., the offence under section 1 of the **Sexual Offences Act 2003**) and thus that the PCP could not be applied to both men and women, referring in the reasons to the case of **Taiwo v Olaigbe** [2013] ICR 770, EAT.

13. The preliminary hearing took place before Employment Judge Hughes on 1 February 2021. As I have already indicated, the claimant appeared in person and the respondent was represented by Mr Willey, its solicitor. The Employment Tribunal recorded in the reasons appended to the judgment that it had been agreed that if the claimant had not already been on suspension because of the unrelated matter, he would have been suspended on full pay pending the outcome of the police investigation into the allegation of rape. It was also recorded that it was agreed that the respondent had lost the contract on which the claimant had been working and had undertaken a redundancy exercise with the affected staff.

14. The Employment Tribunal recorded that it was disputed that, firstly, the claimant had been offered redeployment at another site before the respondent knew about the rape allegation and, secondly, that the claimant had been told, as he alleged, during a telephone call that he was going to be dismissed rather than redeployed because of the rape allegation.

15. As the Employment Tribunal was determining an application to strike out the claimant's claim, it approached the claimant's case at its highest: that is, on the basis that he had indeed been dismissed as a result of the outstanding allegation against him. The Employment Tribunal nonetheless considered that, even if that was shown to be the case on the evidence at a final hearing, the claimant's claim had no reasonable prospect of success and should be struck out. The Employment Tribunal set out the relevant law at paragraphs 10 to 11 of the reasons:

> **"The Law**
>
> **10 Rules 37 and 39 of the Tribunal Procedure Rules provide me with the power to strike out all or part of a claim or make a deposit order. The relevant parts are as follows:**
>
> **37 Striking Out**

> **(1) At any stage of the proceedings…on the application of a party, a tribunal may strike out all or part of a claim…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… has been scandalous, unreasonable, or vexatious;**
>
> **(c) for non-compliance with any of these Rules or with an order of the Tribunal.**
>
> **39 Deposit orders**
>
> **(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**
>
> **(2) 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.**
>
> **(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.**
>
> **11 The test to be applied in respect of striking out is not whether the claim is likely to fail but whether it has no reasonable prospect of success such that it cannot be said that the prospects are more than fanciful. It is well established that it is inappropriate to strike out claims which are fact sensitive and where there are central disputes of fact. This applies particularly to discrimination and public interest disclosure claims (Anyanwu v South Bank Student Union and another [2001] UKHL 14; [2001] 1 WLR 638 and Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, CA)."**

16. No criticism is made on appeal of the directions given by the Employment Tribunal or the summary of the test to be applied. The decision on the application to strike out the claim was then set out in the following paragraphs of the reasons:

> **"12 I have taken the claimant's indirect sex discrimination case at its highest i.e.**

that 8.1 and 8.2 are proved correct i.e. that he was not offered redeployment because of the rape allegation. That cannot possibly succeed as an indirect sex discrimination claim because the claimant cannot establish it is a neutral PCP. His case is predicated on the argument that only men can be accused of rape and therefore the alleged PCP places men at a disadvantage, and that he, as a male, was disadvantaged by not being retained. That PCP would not apply to women and is therefore not neutral.

13 I have explained this to the claimant, but he did not accept it.

14 I have suggested that the claimant's case, as put by him, would be of direct sex discrimination i.e. that not being retained because of the unresolved rape matter, was less favourable treatment because he is a man. Judge Cookson also explored that possibility. A direct sex discrimination claim, in my judgement, is arguable in law, but is not without real evidential difficulties. If that had been the claimant's case, it is likely that I would have ordered a deposit on grounds of little reasonable prospect of success. However, the claimant confirmed three times that he is not claiming direct sex discrimination, but indirect.

15 My reasons for concluding that this is not a tenable argument in law are essentially the same as those set out by Judge Cookson when she explained her reasons for listing a strike out/deposit hearing. I infer, from the wording she used, that she did not think the claimant understood the point she was making. I have tried to explain the point again, because indirect discrimination is a very difficult concept, but I fear that I too was unsuccessful. The claimant described the case management discussion as a "breakthrough moment", which rather missed the point.

16 Because the claimant is unrepresented, I canvassed an alternative PCP with the respondent and with him. This was, that when an allegation of serious sexual misconduct is made against a member of staff, they are suspended on full pay, pending the outcome of the police investigation, after which consideration is given as to whether further action by the respondent is necessary. Mr Willey was prepared to concede that the respondent might be said to operate such a PCP. He was prepared to concede, for the purposes of the hearing before me, that such a PCP might disadvantage men more than women if, statistically, men are more likely to be accused of a serious sexual offence. Without seeing statistics, and without wishing to make stereotypical assumptions, it seemed to me the latter proposition was tenable. Mr Willey said that if such a PCP were to be established, then it would evidently be justifiable because of the nature of the respondent's business. That is a fair point. Also, given the (agreed) circumstances, it could be argued that suspension on full pay is the least detrimental course of action, and preserves the status quo.

17 Whilst not accepting my suggested formulation of a PCP, the claimant conceded that it would be a reasonable PCP and that it would be justifiable to be suspended on full pay, but said it would still be unlawful because it disadvantaged him as a man accused of rape because it resulted in his dismissal. Put another way,

> **the claimant's explanation of why my suggested PCP was unlawful relied on direct, not indirect, sex discrimination.**
>
> **18 The above arguments were canvassed a number of times, with the same result and it is fair to say that the argument became circular.**
>
> **19 Since the claimant expressly confirmed (more than once and on more than one occasion) that his claim is not for direct sex discrimination, I concluded that the indirect sex discrimination argument was untenable in law, and must be struck out as being totally without merit.**
>
> **20 In my judgement, the claimant's claim is more properly viewed as one of unfair dismissal, which the Employment Tribunal has no jurisdiction to hear because he has insufficient service."**

The Appeal

17. The appeal has been permitted to proceed on a single ground, reformulated after the preliminary hearing before Eady J. That ground of appeal is that the Employment Tribunal applied the wrong test when striking out the indirect discrimination claim, in particular in relation to the identification of the particular disadvantage arising from the application of the PCP at paragraphs 16 and 17 of the written reasons. Eady J said in her reasons for permitting the appeal to proceed that it was arguable that the Employment Tribunal had erred in failing to approach the application of the PCP on the basis of the particular disadvantage claimed by the claimant (dismissal) and only in relation to suspension, and so that it had not addressed the heart of the claimant's case which was that he had suffered indirect discrimination in relation to the decision that he should be dismissed instead of being redeployed.

18. On behalf of the claimant, Ms Murphy made clear during argument this morning that he was now only relying on the PCP identified by the Employment Tribunal in the second sentence of paragraph 16 of the reasons. Ms Murphy submits that the Employment Tribunal's failure to consider the possibility of dismissal as a particular disadvantage arising from this provision, criterion or practice is fatal to the analysis on the strike-out application and that the claim should be remitted to

the Employment Tribunal.

19. For the respondent, Ms Duane submits that the Employment Tribunal applied the right test on strike-out and came to the correct conclusion in the circumstances, and that the criticisms of the Employment Tribunal's analysis made by the claimant are of the type deprecated by this Appeal Tribunal and the Court of Appeal in cases including **ASLEF v Brady** [2006] IRLR 576 at paragraph 55, **Fuller v LB of Brent** [2011] ICR 806 at paragraph 30, and most recently in **DPP Law Limited v Greenberg** [2021] IRLR 1016 at paragraph 58.

The Law

20. Section 19 of the **EqA** states as follows:

> **"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."**

Sex is one of the relevant protected characteristics under subsection (3).

21. In **Essop v Home Office** [2017] IRLR 558, Lady Hale set out the legal basis of a claim of indirect discrimination under the **EqA**. In particular at paragraph 25 of her judgment, Lady Hale said:

> **"A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."**

22. Lady Hale went on to describe the other elements of an indirect discrimination claim, including the demonstration of the relevant disadvantage, in the succeeding paragraphs of her judgment: see paragraphs 26 to 29.

23. As the Employment Tribunal observed in the decision under appeal, appellate courts have cautioned against striking out discrimination claims save in clear cases. See, for example, the case of **Anyanwu v South Bank Students Union** [2001] IRLR 305, at paragraph 25. More recently, Eady J, the President of this Appeal Tribunal, has emphasised that strike-out is for the clearest of cases where the outcome is plain and obvious: see **White v HC-One Oval Limited** [2022] IRLR 576 at paragraphs 22 to 23.

Discussion

24. I reject the submission made by Ms Duane that the claimant, a litigant in person, should have been held to his case as set out on the face of his ET1 and in the form initially articulated by him, and

that at the preliminary hearing the Employment Tribunal should not have gone down the route that it did in terms of identifying an alternative PCP, or that the claimant should either, before the Employment Tribunal or now on appeal, be held to the PCP originally identified by him before Employment Judge Cookson. This was, it seems to me, a paradigm example of the approach adopted by HHJ James Tayler in **Cox v Adecco** [2021] ICR 1307 at paragraphs 28 to 30, of the Employment Judge "rolling up her sleeves" and striving to identify the nature of the claim actually being made. That was, in my judgment, an entirely permissible approach on the part of the Employment Judge.

25. I note that in relation to the reformulated PCP set out at paragraph 16 of the judge's reasons, it was accepted before the Employment Tribunal by the respondent's solicitor that, firstly, the respondent did operate such a PCP and, secondly, that it might disadvantage men more than women on the basis that men were more likely to be accused of serious sexual offences, that concession being for the purposes of the argument before the Employment Tribunal. Although Ms Duane in her submissions sought to challenge the Employment Tribunal's assumption in this regard, I do not consider it is now open to the respondent on this appeal (no issue having been taken in this regard in the respondent's answer) to go behind either of those concessions. In my judgment, the Employment Tribunal was entitled to approach the strike out application on the basis that there was a sufficiently arguable case to be considered at a final hearing in the Employment Tribunal that men would be more disadvantaged than women by the application of such a PCP.

26. Ms Murphy's criticism of the Employment Tribunal is that at paragraph 17 of the judgment, it did not address the particular disadvantage being relied on by the claimant in relation to the application of the PCP identified in paragraph 16 of the reasons, the particular disadvantage being dismissal.

27. In my judgment, the Employment Tribunal's conclusion at paragraph 17 of the reasons in relation to this issue was based on the view, as set out at paragraphs 16 and 17, that the way in which

the claimant put his claim that he would be disadvantaged by the application of the PCP was in substance a claim of direct discrimination because the disadvantage he was relying on was dismissal and not suspension. I accept Ms Murphy's submission that the Employment Judge materially erred in considering that the particular disadvantage relied on by the claimant, namely his dismissal, could only arise in connection with a direct discrimination claim and not by the application of the PCP referred to in paragraph 16 of the reasons. Even though the claimant may have been emphasising the particular offence of rape in the way he put his case about particular disadvantage, in my judgment it is clear that the substance of the disadvantage being claimed by him before the Employment Tribunal was dismissal.

28. In my judgment, the Employment Tribunal focused the consideration of disadvantage in paragraph 17 of the reasons on one aspect of the PCP, namely suspension following an allegation of sexual misconduct pending the outcome of the police investigation, to the exclusion of the other elements of the PCP, in particular the respondent giving "consideration as to whether further action by the respondent is necessary" as a result of the allegation of sexual offending. This reference within the PCP's formulation to the possibility of "further action", takes the potential consequences of the PCP wider than just the express reference to suspension. Ms Murphy submitted, in my judgment correctly, that this was the active or important element of the PCP insofar as the particular disadvantage of dismissal was concerned and that the crucial point was that, following the making of an allegation of a serious sexual offence, the respondent would consider what further action it was necessary for it to take against the employee in question.

29. As Ms Murphy submitted, in this case, the respondent did, on the claimant's version of events, (which the Employment Tribunal assumed to be correct for this purpose) consider that further action was necessary as a result of the allegation having been made and decided to dismiss him, something for which there is at least some support at paragraph 6 of the supplementary grounds of resistance,

where the respondent states that the claimant was made redundant for a number of reasons, including that he was "under investigation for a sexual crime".

30. In my judgment, Ms Murphy is right in her submission that the Employment Tribunal failed at paragraph 17 of the reasons to consider the particular disadvantage being claimed by the claimant, namely dismissal, in relation to the PCP that it had identified, apparently because the Employment Tribunal considered that such disadvantage could not arise in relation to an indirect discrimination claim by the application of this PCP and could, inevitably, only found a claim for direct discrimination. That may well have been correct in relation to any formulation which specifically relied on the offence of rape under section 1 of the Sexual Offences Act 2003; but not, in my judgment, to the broader outcome of dismissal connected to an allegation of serious sexual offending. That was, as Ms Murphy submits, a potential consequence of the PCP as formulated at paragraph 16 of the Employment Tribunal's reasons.

31. Was the error made by the Employment Tribunal that I have identified material to the outcome of the strike-out application? In my judgment, it was. Ms Duane is right to point out that both Employment Judges who considered the claimant's claim had considerable concerns as to whether the claimant's claim might succeed, but that is not the same as it having no realistic, i.e. only a fanciful, prospect of success. I do not accept Ms Duane's submission that the claimant's claim of indirect discrimination had no realistic prospect of success, even absent this error. Because the Employment Tribunal did not consider that dismissal was even a potential outcome of the application of this PCP, it did not address justification in that respect and I do not think it would be safe for me to assume that the Employment Tribunal would have held that dismissal in these circumstances would so clearly have been justified that the claim should be struck out.

32. Ms Murphy submitted, in my judgment correctly, that there might have been other options available to the respondent, including redeployment as an alternative to dismissal, and I note that the

claimant had not, at the point of the dismissal, either been charged with or convicted of any offence. Moreover, I do not accept that the claimant's acceptance before the Employment Tribunal that suspension on full pay would be a justifiable act, equates to an acceptance that a dismissal would also be justifiable. Indeed it is clear, in my judgment, from the submissions made by the claimant, that he considered that dismissal was not justifiable.

33. I do not accept Ms Duane's submission that this analysis of the Employment Tribunal's judgment and reasons involves the sort of impermissible approach on appeal set out by the Court of Appeal in **DPP v Greenberg** and the other cases to which I referred earlier in this judgment. The error made by the Employment Tribunal was to consider that the disadvantage of dismissal could not be a potential consequence of the application of this reformulated PCP. I accept Ms Murphy's submission that this PCP was sufficiently broadly worded to encompass that. This should not, however, be taken as an indication that the claimant's claim is likely to succeed if it proceeds to a full hearing. It may well face considerable evidential difficulties in relation to the primary factual scenario, the demonstration on those facts of both group and individual disadvantage, and also in relation to a defence of justification. But I do accept Ms Murphy's submission that the Employment Tribunal materially erred in law in striking it out at this stage, apparently on the basis that a claim in respect of dismissal was only capable of being a claim for direct discrimination.

34. I note additionally that the Employment Tribunal did not address, because it was unnecessary to do so, the question of whether a deposit order ought to be made in relation to the indirect discrimination claim. That, if the respondent pursues its application, is no doubt a matter which the Employment Tribunal would need to consider if the claim progresses further when it is remitted.

Conclusion

35. I will therefore allow the appeal, set aside paragraph 1 of the judgment striking out the claim

of indirect discrimination and remit the claim to the Employment Tribunal for further case management, including consideration of the respondent's application for a deposit order in relation to that allegation. My preliminary view, upon which both counsel will be entitled to make submissions, is that having regard to the judgment of this Appeal Tribunal in the case of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, the claim can be remitted to any Employment Judge. It need not be remitted to Employment Judge Hughes, but there is nothing in the Employment Judge's judgment and reasons to preclude her from undertaking the further management or indeed the trial of this claim, should she be allocated to it by the Regional Employment Judge.