



EMPLOYMENT TRIBUNALS

Claimant: Ms. Victoria Whitehall
Respondent: Dorset County NHS Foundation Trust
Heard at: Southampton Employment Tribunal
On: 14 September 2023
Before: Employment Judge Hay

Representation

Claimant: Mr Flaherty (Counsel)
Respondent: Mr Zovidavi (Counsel)

REASONS FOLLOWING A PRELIMINARY HEARING

1. At a hearing on the 14th of September 2023 Employment Judge Hay determined the employment tribunal had no jurisdiction to hear the claimant's claim for indirect associative disability discrimination. Employment Judge Hay gave an oral judgement explaining her reasons for the decision on that date. Written reasons were requested and appear below.
2. Ms. Whitehall brought a claim under section 19 of the Equality Act 2010 alleging indirect disability discrimination. Ms. Whitehall claimed she was discriminated against because of her association with a person who has the protected characteristic of disability. That person was her child.
3. The claimant relied upon a European case called *CHEZ Razpredelenie Bulgaria AD v Komisia za zashita ot diskriminatsia* [2015] IRLR 746 to establish a right to claim indirect associative discrimination. In that case a woman owned a business in a predominantly Roma area. The utility company supplying her electricity deliberately placed the meters at a height which meant they could not be easily tampered with, saying this was because of a prevalence of tampering among that community. The claimant explained this meant that she could not easily verify her electricity charges and this placed her at a disadvantage. She argued that this was because of the direct discrimination towards Roma people with whom she

shared a geographical association because of where her business was located. The result was that she was directly disadvantaged by the discrimination directed at her neighbours.

4. The claimant also provided a case called *Fellows v Nationwide Building Society*; an employment tribunal decision number 2201937/2018. In that case the claimant was employed on a “homeworker” contract which allowed her to work from home. The principle reason for having that term, so far as the claimant was concerned, was that she was a carer for her disabled mother. She was selected for redundancy and argued that one of the reasons for her selection was the PCP for all managers in her position to be office-based, and she could not be. In that way, she claimed that she had been indirectly discriminated against because of her association with a person with the protected characteristic of disability.
5. Ms Whitehall said this was an example of the reasoning in *Chez* being applied in support of a claim for indirect associative discrimination. In that case the claimant was a worker with a contract which involved working from home. By contrast Ms. Whitehall’s contract was site specific and required her to work at locations as directed by her employer.
6. The respondent disagrees with the claimant’s reasoning and says in the case of *Chez* there was a “shared disadvantage” which was the basis for the claimant's success. The respondent says the claimant in *Chez* succeeded because they had themselves experienced an actual disadvantage because of their geographical association with Roma people against whom the respondent (in that case) had directly discriminated. The respondent says that is not the case here because Ms. Whitehall has not identified any wider group with whom she has shared an actual disadvantage.
7. The respondent submits that what was described in *Chez* was in fact direct discrimination because the reasoning of that case fits within the application of section 13 of the Equality Act. The respondent says that if the claim brought in *Chez* was brought using UK legislation it would be a section 13 direct discrimination claim.
8. They say that the case of *Fellows* was a “friends and family” claim, in which a person is discriminated against because they were family or friends of a person with a protected characteristic. But the respondent says that when allowing that claim the Tribunal in *Fellows* did not notice that the claim was not a “shared disadvantage” claim like the one made in *Chez*, and so the Tribunal did not grapple with whether they could or should extend the principle to “friends and family” type claims. They say that the associative disadvantage in a “friends and family” claim goes beyond the facts in *Chez* in which there was a shared disadvantage. The claimant in *Chez* said “I am not Roma but I experienced the same disadvantage AS Roma and therefore had been discriminated against because of my association with them”. That was not the case in *Fellows* and is not the instant case.
9. The respondent says applying the reasoning in *Chez* and/ or *Fellows* would be contrary to the wording of section 19 of the Equality Act 2010 which is clear in its terms.

10. Those terms are; “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 characteristic of B’s.” The respondent says in order for section 19 to apply the person with the relevant protected characteristic must be the person bringing the claim.
11. Parties agree that there was no settled answer to this question.

The Law

12. *CHEZ* was a claim in which an act of direct discrimination towards the Roma people also adversely affected a woman who was not herself Roma but who had a business in a predominately Roma area. She was directly disadvantaged by the discriminatory treatment the Roma people received. The claim related to the provision of utility services in a geographical area where meters were installed at height to prevent tampering and fraud. This meant they could not be read, and thus customer bills could not be checked for accuracy. This was a practice the utility company used in this predominately Roma area, but not in non-Roma areas where it also provided services. The European Court of Justice found for the claimant, saying that “*the principle of equal treatment...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*”.
13. The problem of transposing this into the law of England and Wales is the use by the ECJ of both “less favourable treatment” and “particular disadvantage”. This is because it is understood that the Equality Act 2010, the piece of legislation intended to give effect to Equal Treatment Directive 2000/78/EC, classes “less favourable treatment” as direct discrimination contrary to s13 of the Equality Act, and “particular disadvantage” as indirect discrimination contrary to s19 of that Act. The two sections are worded differently: s13 refers to discrimination “because of a protected characteristic” and s19 refers to discrimination “in relation to a protected characteristic of B’s” where B is the person bringing the claim.
14. *Chez* has been interpreted as extending the principle of indirect discrimination to those who experience the same disadvantage caused by a provision, criterion, or practice (PCP) as another group even though they do not share the protected characteristic of that group. The logic is that a claimant in such a situation may not share the protected characteristic but they have a “shared disadvantage” which arose because of the discriminatory treatment, even though the discrimination was not aimed at them.
15. What is less clear is whether *Chez* extends the principle of indirect discrimination to the “friends and family” of those who have the protected characteristic but do not experience the actual disadvantage themselves. Article 2.2 of the Directive itself says nothing about persons who associate with those who have the protected characteristic, but the statement from *Chez* quoted above has been argued in support of the “friends and family” type of claim. These are claims arising where a claimant argues that a

PCP puts them at a disadvantage because of their association with a person who has the protected characteristic, but where the claimant has not experienced a shared disadvantage with that person.

16. The claimant relied on *Follows v Nationwide Building Society* decided by the London Central Employment Tribunal. That Tribunal acknowledged that *Chez* did not specifically consider whether someone not sharing the protected characteristic but associated with someone who did, and thereby disadvantaged by the PCP, would be included in the indirect discrimination provisions. The Tribunal went on to conclude that the reasoning in *Chez* meant that s19 had to be read so that the “relevant characteristic of B’s” must apply to employees who are associated with a person with the relevant characteristic.

17. In effect this would mean re-writing s19 so that it reads:

“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 or of a person with whom B associates” (additional words underlined)

18. I was also referred to a case called *Rollett v BA* (unreported 332541) a 2023 case in which *Chez* was cited as authority for allowing a “shared disadvantage” claim to proceed but was said not to be authority for a family and friends claim of indirect associative disability discrimination.

19. For completeness I was also referred to a Scottish Employment Tribunal case: *Groves v William Walker Transport Limited* (4100338/20). In that case it was successfully argued that because of the decision in *Chez*, the Equality Act 2010 should be read in a way that prohibits indirect disability by association. Employment Judge Hosie reached that conclusion “*with some hesitation given the clear terms of s19 of the 2010 (Equality) Act*” but concluded s19 was not compatible with EU law. The effect of that decision would be to incorporate into s19 the words which are underlined above.

Conclusion and decision

20. My review of the cases I have been referred to shows there are two types of indirect associative discrimination case: one in which there is a shared actual disadvantage between a group with a protected characteristic and the claimant, and the second type where somebody is disadvantaged by their association with friends or family who have the protected characteristic. The claim Ms. Whitehall presents is a “friends and family” type of claim.

21. I considered whether there was justification for allowing one type of claim, but not the other and I concluded that there was. The claimant in *Chez* suffered the same disadvantage because of the respondent’s unlawful discriminatory treatment of people with whom the respondent had a direct relationship as customers. That unlawful treatment also affected the Claimant because she too was a customer.

22. That is not the case here. I considered it important that this is an employment relationship and does not relate to the provision of goods or services. I concluded that the effect of extending the reasoning in *Chez* to include a claim of indirect discrimination by association would be to require employers to consider not just the rights of and their obligations to current or prospective employees but also to the family, friends, and other people associated with prospective employees. That would mean that employers would have to arrange and manage their businesses in such a way as to protect the interests of or extend their obligations to people with whom they have no direct relationship. In my view that goes too far and in circumstances where there is no identifiable shared disadvantage, goes further than *Chez* anticipated.
23. In a notice of further and better particulars dated the 21st of November 2022 on behalf of the claimant it was said the disadvantage she experienced was placing her daughter in breakfast and after school club which meant she was unable to provide the care required by her daughter. I cannot see how this is a shared disadvantage that Ms. Whitehall shared with another identified or identifiable group.
24. The facts of this case can be distinguished from those in *Fellows* because the claimant there was contracted as a home worker whereas Ms. Whitehall was not. Her contract included the provision that she would work where directed on site as required by the respondent. That is a significant difference.
25. I do not accept that the case of *Chez* requires an employment tribunal to extend the protection of section 19 of the Equality Act in an employment context to a family member of an actual or perspective employee. I note that not all parts of the Equality Act disability protection extend to associative discrimination on the basis of disability. For example section 20, the requirement to make reasonable adjustments, is a claim which cannot be brought on the basis of somebody's association with disabled person. One can imagine the type of claim that could be brought if it were argued that s20 of the Equality Act 2010 extended to include indirect associative discrimination.
26. That is not to say that my decision should be used to suggest it is permissible to discriminate against those who do the important job of caring for family and friends who are disabled. That is and remains unlawful. I simply find that it is not appropriate in the circumstances of this case to interpret the cases which had been presented to me in such a way as to extend the application of section 19 of the Equality Act, which is clear in its terms, in the way that the claimant contends.

Case Number: 1402871/2022

Employment Judge Hay
Date: 14 December 2023

Judgment sent to the Parties: 16 January 2024

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.