Neutral Citation Number: [2024] EAT 108

Case No: EA-2021-001358-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 July 2024

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Minis Childcare Ltd

Appellant

- and –

Ms Z Hilton-Webb

Respondent

David Green (instructed by Pinney Talfourd LLP) for the **Appellant**
Jonathan Cook (instructed by Leigh Day) for the **Respondent**

Hearing date: 4 June 2024

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JUDGMENT

SUMMARY

Disability Discrimination

The respondent produced standard documentation in font sizes that may have been, on occasion, as small as 10 point, but, it appears, generally were 11 or 12 point. The Employment Tribunal described this as the "small font" PCP. The claimant is disabled because she has Apert Syndrome, which results in impaired vision. The Employment Tribunal dismissed a claim of failure to make reasonable adjustments because the respondent lacked requisite knowledge; but upheld an indirect disability discrimination claim. The reasoning was insufficient to understand what the Employment Tribunal meant when it said that there was "no legitimate aim" for the "small font" PCP, in circumstances in which the respondent had asserted that the legitimate aim it pursued was "efficient management". This complaint was remitted to the same Employment Tribunal to be redetermined in accordance with the approach to the law set out in this judgment.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of the Employment Tribunal; London South (Croydon) by CVP; Employment Judge Tsamados with members. The hearing took place on 1-4 and 8-9 February 2021, with further days in chambers 17-19 February, 23 & 24 March and 8, 15 and 19 April 2021.

2. The parties are referred to as the claimant and respondent as they were before the Employment Tribunal.

3. The claimant brought multiple complaints of disability discrimination. The number of complaints explains the amount of time spent in deliberation. There were 19 asserted acts of unfavourable treatment, detriment or harassment; 12 PCPs; 6 substantial or particular disadvantages; 11 proposed reasonable adjustments; 2 protected acts, and 7 detriments said to flow from them.

4. This appeal concerns the one complaint that succeeded. The Employment Tribunal held that the claimant had been subject to indirect disability discrimination by the respondent providing documentation with "small" font sizes.

5. The claimant is a disabled person because she has Apert Syndrome, which, so far as relevant to this appeal, results in impaired vision.

6. At the time relevant to the appeal, the claimant had not told the respondent that she had difficulty reading standard documents because of the font sizes they used. A claim of failure to make reasonable adjustments failed because the respondent lacked requisite knowledge.

7. In the indirect discrimination claim the respondent accepted that it applied a PCP of providing documents with a "small" font size; and that the PCP placed the claimant at a substantial disadvantage in comparison with people who are not disabled by having Apert Syndrome.

8. It is not entirely clear what was meant by "small" font size. The Employment Tribunal recorded that part of the claimant's case was "that she required documents to be in a font size of a

minimum of 18 point in order to read them". That is why I have directed that a copy of this judgment be provided for her in 18 point.

9. The respondent called Julie Coackley, the Nursery Director, who said in her statement:

> 77. In respect of the practice of providing documentation with small font sizes, documents are provided in standard font sizes, generally 11 or 12. Zoe has been able to read the same as set out above. Once Zoe made us aware that she required larger font, this was accommodated.

10. I was told that a number of the relevant documents were in the Employment Tribunal bundle and that some of the font sizes may have been a small as 10 point, but no smaller. It would have been better had the PCP expressly stated the range of the "small" font sizes for the purposes of the PCP.

11. In closing submissions in the Employment Tribunal, the respondent confirmed that the legitimate aim that it relied on for the application of the PCP was "the efficient management of the Respondent's workforce."

The finding of the Employment Tribunal

12. The Employment Tribunal dealt very briefly with the indirect discrimination claim:

> 356. With regard to paragraph 16.4, small font sizes, there is simply **no objective justification** for this. **There is no legitimate aim**, and it **cannot be proportionate when the simple thing to do would be to provide documents in larger font**. It is **unfortunate that the Claimant simply did not explain her difficulty with documents in small font size** to the Respondent at the time of the events in question. [emphasis added]

The appeal and response

13. The respondent appeal under the following headings:

(1) Legitimate aim

(1)(a) Wrong test
(1)(b) Lack/insufficiency of reasons
(1)(c) Perversity

(2) Proportionality (wrong test)

14. The fundamental response to the appeal is that the respondent did not establish in evidence that it applied the PCP to achieve the legitimate aim. The claimant asserts that the respondent presented no evidence on this point and so the Employment Tribunal was entitled to say that there

was "no legitimate aim".

The Law

15. Section 19 **Equality Act 2010** ("**EQA**") provides:

> 19 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.

16. As stated above, the respondent accepts that it applied the PCP of producing documents with small font sizes for the claimant and others; and that the PCP put the claimant, and would put others with Apert Syndrome, at a particular disadvantage in comparison with those who do not have Apert Syndrome. The question for the Employment Tribunal was whether the respondent had a legitimate aim and whether the application of the PCP was a proportionate means of achieving that aim.

17. In **Heskett v Secretary of State for Justice** [2020] EWCA Civ 1487, [2021] ICR 110 Underhill LJ stated:

> 17 It will be seen that section 19(2)(d) requires the putative discriminator to show two things - (a) that the purpose of the PCP was to achieve a legitimate aim; and (b) that it represented a proportionate means of achieving that aim. The distinction between the two is in principle important since the aim, so long as "legitimate", must be a matter for the choice of the employer whereas the proportionality of the means chosen must be assessed by the tribunal. A recent example of that distinction being applied was the decision of this court in *Chief Constable of West Midlands Police v Harrod* [2017] ICR 869 (per Bean LJ at para 30, myself at para 41 and Elias LJ at para 48); but see also *Chief Constable of West Midlands Police v Blackburn* [2009] IRLR 135. Having said that, it has to be recognised that the case law sometimes slurs over the distinction between aim and means, perhaps because it is not always easy, or necessary, to draw it.

18. I consider that it is helpful to break down the justification requirement a little further. The respondent must assert and establish the aim. It is for the Employment Tribunal to decide whether the aim is legitimate. The respondent must establish that the PCP was a means of achieving that aim. It is for the Employment Tribunal to decide whether the adoption of the PCP was proportionate to achieve the aim.

19. The **EHRC Employment Code of Practice** provides that:

> 4.28 … The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration.

20. The legitimate aim need not necessarily have been thought about specifically at the time that the PCP was applied, but the aim must nonetheless be genuine and legitimate and be a means of achieving the aim; **British Airways plc v Starmer** [2005] IRLR 862, EAT:

> 8.3 Whether the tribunal erred in rejecting the respondent's case of justification. It is important to make clear that the respondent did not refuse the claimant's request for 50%, did not apply the PCP, by reference to safety considerations, but only to 'resource' considerations. The respondent sought before the tribunal to rely, not only on such resource considerations, upon which it did rely at the time, but also on safety considerations, which it did not have in mind at the time. There was and is no issue as a matter of law that justification of an otherwise discriminatory PCP can be put forward by reference to consideration not in mind at the time of application of the PCP (see **Schönheit v Stadt Frankfurt am Main** [2004] IRLR 983 at paragraphs 86–87).

21. The **EHRC Employment Code of Practice** says of proportionality:

> 4.31 Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

22. Necessary has been interpreted to mean reasonably necessary; **Hardy & Hansons plc v Lax** [2005] EWCA Civ 846, [2005] ICR 1565:

> 32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (*Barry v Midland Bank plc* [1999] ICR 859) and I

> accept that the word "necessary" used in *Bilka-Kaufaus* [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. …

23. Justification cannot be established by mere generalisation.

24. If the setting of a rule is justified, the application of the rule to an individual will also generally be justified; **Seldon v Clarkson Wright & Jakes** [2012] UKSC 16, [2012] ICR 716:

> 64. The answer given in the Employment Appeal Tribunal [2009] 3 All ER 435, para 58, with which the Court of Appeal agreed [2011] ICR 60, para 36, was:
>
> > "Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, which is itself an important virtue."
>
> Thus the appeal tribunal would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare.
>
> 65. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it.

Reality Check

25. The respondent did not know that the claimant had difficulty reading the documents that it produced for all staff. The documents were printed in a font between about 10 and 12 point. According to Ms Coackley they were generally between 11 and 12 point. These are standard font sizes for word processors. Most organisations produce their documents in these font sizes. The judgment of the Employment Tribunal was published in the usual 12 point font.

26. Producing standard documents in such standard font sizes should not cause problems for those with visual impairments because it should be easy to reprint documents in a larger font size

or to provide them in an electronic format that can be magnified when required by a person with a visual impairment.

27. Indirect discrimination is about the application of a PCP to a group of people which disproportionately affects those who share a protected characteristic. The way to avoid the discrimination is to adopt a different PCP that does not result in such disparate impact. The PCP is no longer applied to anyone. What would that mean in this case? Should all documents be printed in 18 point, or larger for those who have more severe visual impairments? Should the documents be printed in a range of sizes, and different formats? Commons sense suggests that there should be nothing objectionable to providing documents in a standard format provided it is made clear that they can be provided in any format that can reasonably be produced if required by an employee who requires it, including those with disabilities. That is typically the territory of reasonable adjustments; and as is commonly the case, making the adjustment should not be problematic if the employer knows it is required.

Approach to appeals

28. That said, the grounds upon which a decision of the Employment Tribunal can be challenged in the EAT are limited: **DPP Law Ltd v Greenberg** [2021] IRLR 1016. The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. Where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal should be slow to conclude that it has not applied those principles.

29. The duty to give reasons was summarised by Cavanagh J in **Frame v The Governing Body of Llangiwg Primary School** UKEAT/0320/19/AT. The duty to give reasons is a duty to give sufficient reasons so that the parties can understand why they won or lost and so that the appellate tribunal can understand why the Employment Tribunal reached the decision. The scope of the obligation to give reasons depends on the nature of the case. The judgment must have a coherent

structure. It is not acceptable to use a fine-tooth comb to comb through a set of reasons for hints of error or fragments of mistake, and try to assemble them into a case for oversetting the decision. Nor is it appropriate to use a similar process to try to save a patently deficient decision.

Analysis

30. To analyse the appeal we have to go back to the single paragraph in which this complaint was decided:

> 356. With regard to paragraph 16.4, small font sizes, there is simply no objective justification for this. There is no legitimate aim, and it cannot be proportionate when the simple thing to do would be to provide documents in larger font. It is unfortunate that the Claimant simply did not explain her difficulty with documents in small font size to the Respondent at the time of the events in question.

31. I appreciate that the brevity of the analysis of this single complaint must be seen in the context of a judgment of 383 paragraphs over 69 pages. The reason that this complaint was dealt with briefly is because there were so many other complaints, which are not subject to challenge.

32. The claimant accepts that the "efficient management of the Respondent's workforce" is capable of amounting to a legitimate aim. It was apparent from the way the submission was developed that it is also accepted that applying the "small font" PCP could possibly be a proportionate means of achieving that legitimate aim.

33. What is asserted by the claimant is that it was not established in evidence that the respondent had this legitimate aim and/or applied the small font PCP to achieve it.

34. The key to this appeal is what the Employment Tribunal meant by saying "there is simply no objective justification" and that there is "no legitimate aim".

35. The Employment Tribunal may have meant:

35.1. the respondent did not identify an aim

35.2. the aim the respondent identified, "efficient management", could not be legitimate in any circumstances

35.3. the aim the respondent identified could not be a legitimate reason for applying the "small font" PCP

35.4. the respondent did not establish in evidence that the PCP achieved the legitimate aim

36. I simply do not know which of these was meant, although I think some are less likely than others. There is not a generous reading of the paragraph that resolves the problem. The fact that I expect this infelicitous expression results from the huge number of claims the Employment Tribunal had to decide also does not resolve the problem. I consider that all but one of the meanings would involve an error in law.

37. I consider it is unlikely that the Employment Tribunal overlooked the fact that the respondent had advanced the "efficient management" aim for the application of the "small font" PCP; although it is possible as it only seems to have been explained in clear terms in closing submissions. However, it is accepted that this aim was put forward by the respondent for the application of the PCP, so, if the Employment Tribunal decided otherwise, that would be an error.

38. I consider the least likely meaning is that the "efficient management" aim can never be legitimate as it was accepted to be legitimate in respect of another PCP the application of which was found to be justified. If it was decided that the "efficient management" aim can never be legitimate that determination would clearly involve an error of law.

39. If the Employment Tribunal meant that "efficient management" could not be a legitimate aim for which the "small font" PCP was applied I consider that would involve an error of law. Management of the workforce includes providing instructions, including by standard documents. It can be efficient to provide documents in a standard form. It would be inefficient to provide documents in a large range of formats most of which would not be required. Accordingly, I consider that there is only one possible answer that "efficient management" can be a legitimate aim for the application of the "small font" PCP. Whether it is a proportionate means of achieving that aim is another matter.

40. If the Employment Tribunal meant that the respondent had failed to establish in evidence that the application of the "small font" PCP had the legitimate aim of "efficient management" that

might be sufficient for the defence to fail. I do not consider that this is the most likely explanation of the finding of the Employment Tribunal. If the justification defence failed on evidential grounds one would have expected the Employment Tribunal to say so. While an evidential basis for such a defence is necessary, in the circumstances of this case that has to be seen in the context of the large number of complaints and the fact that the aim need not necessarily have been expressly considered by those who organised the printing of the documents. The evidential basis might come from the evidence of Ms Coackley about the use of standard fonts.

41. Accordingly, as I do not consider the reasons explain why the Employment Tribunal stated that there was "no legitimate aim" the appeal must succeed.

42. If the Employment Tribunal on remission concludes that the respondent did genuinely apply the "small font" PCP which was a means of achieving the legitimate aim of "efficient management" I do not consider that the current reasoning on proportionality could stand. The fact that documents could have been provided in larger fonts does not answer the question because this would have to be done for all employees, by disapplying the PCP, which might not be proportionate. The provision of large font documents for the claimant alone would be a reasonable adjustment; a claim that failed because of the respondent's lack of requisite knowledge. If the Employment Tribunal concludes that the respondent did apply the PCP with a legitimate aim it should redetermine the issue of proportionality.

43. The appeal is remitted for redetermination of this complaint in accordance with the analysis of law in this judgment. The parties understandably agree that the remission should be to the same Employment Tribunal. I do not know to what extent Ms Coackley was asked about the "small font" PCP and what the quality of the notes of the Employment Tribunal and Counsel are. It will be a matter for the Employment Tribunal to decide whether further evidence is required in respect of this complaint. The Employment Tribunal will also have the opportunity to clarify what font sizes were used by the respondent so as to better analyse the "small font" PCP.