FARRAR'S BUILDING

Employment Law Newsletter - August 2017

Contents

Editorial

The Supreme Court's decision in **R (UNISON) v Lord Chancellor [2017] UKSC 51** is undoubtedly the block-buster case of 2017. With one voice, and with one stroke, the seven Justices quashed the Tribunal fees regime. If there was a stand-out point that resonated with the country's most senior judges, it was the dramatic fall in the number of claims by some 66-70%. In and of itself, this indicated a 'system failure'. Those being failed were low to middle income employees. Quite simply, they were being priced out of access to the tribunals.

A secondary point related to the two-tiered nature of the fees regime. In setting higher fees for discrimination claims (classed as 'Type B' claims), the regime was *itself* considered to be indirectly discriminatory against women. How ironic.

The Supreme Court's decision will be roundly welcomed by all practitioners, whether employer- or employee- focussed. It is a significant victory for access to justice. Whether or not the 'empire strikes back' with, perhaps, a renewed and better-considered fees regime, remains to be seen.

In this edition of the newsletter, Rob Golin considers the concept of associative discrimination in the pregnancy context. His article explores the question: to what extent can *male* employees invoke rules designed to protect pregnant women?

Meanwhile, Tom Emslie-Smith provides a case law round-up, selecting some of the more significant appellate decisions. They include the Supreme Court's other big decision this summer, **Essop v Home Office [2017] UKSC 1264**, which rejects

attempts to over-complicate the law on indirect discrimination. To establish a prima facie case, a claimant need only *identify* a disparate impact produced by a PCP and does not need to hypothesize or explain *why* it exists.

Happy reading.

Changez Khan.

Associative Discrimination: Are claims by men of Pregnancy discrimination alive and kicking?

By Robert Golin

Introduction

1. My intention in this article is to explore the concept of associative discrimination in general terms and to then consider an issue that arose in a recent case of mine: whether a man can bring a claim for associative pregnancy discrimination.

2. Section 13(1) of the Equality Act 2010 ("EqA") provides that: *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

3. Eagle-eyed readers will note that Section 13(1) uses the wording, *"because of a protected characteristic"* and not *"because of person B's protected characteristic"*. The result is that "person B" does not need to be the person with the protected characteristic. The concept of associative discrimination exists in this space.

4. Some cases fit easily into the concept of associative discrimination. Imagine that person B has a disabled child and that, because of the child's disability, person B is treated less favourably than a person with a child without a disability. Those were the facts in **Coleman v Attridge Law [2010] I.C.R. 242** in which the EAT found that, in order to give effect to EU Directive 2000/78/EC, the Disability Discrimination Act 1995 had to be read such that person B did not need to be disabled herself. This was found to be theoretically possible unless the legislation (the DDA 1995 in that case) contained an express and unambiguous indication to the contrary.

5. There have been several interesting cases since. In **Thompson v London Central Bus Company Ltd UKEAT/0108/15/DM**, the EAT allowed a claimant's appeal against a decision to strike out his claim for associative victimisation under Section 27 EqA. In that case the claimant alleged that he had been victimised because he reported that he overheard a conversation suggesting that the bus company had dismissed two employees who had opposed racism. Although Section 27(1) refers to victimisation because of person B's protected act, it was found that this section had to be read so as to allow claims for associative victimisation of person B because of a third party's protected act.

6. A less claimant-friendly decision is **Hainsworth v Ministry of Defence [2014] EWCA Civ 763,** in which the Court of Appeal found that Section 20(3) EqA – which provides that reasonable adjustments should be made where A's provision, criterion or practice puts a disabled person at a substantial disadvantage – did not require an employer to make reasonable adjustments on behalf of the claimant's disabled daughter. An important feature of that case, however, is that Schedule 8 para.5(1) EqA restricts the effect of Section 20 to employees and applicants for employment.

7. But does this principle extend to associative pregnancy discrimination? Can a man bring a claim on the basis that he was treated less favourably because of the pregnancy and/or maternity of his wife or partner? And, in general terms, what avenues are open to both men and women?

Associative pregnancy discrimination

8. The starting point is Section 25(5) EqA, which provides that *"Pregnancy and maternity discrimination is discrimination within section 17 or 18 [of the EqA]."* While all of the other protected characteristics are linked explicitly to Section 13 EqA, pregnancy and maternity discrimination are tied to Sections 17 and 18 only.

9. Accordingly, it is not possible to bring a claim for direct discrimination because of pregnancy and/or maternity under Section 13 EqA, and this applies to both men and women.

10. In a work context, Section 18 EqA is the relevant provision in relation to pregnancy and maternity discrimination (Section 17 deals with non-work cases). Section 18(2) states that:

> *"A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*
>
> *(a) because of the pregnancy, or*
>
> *(b) because of illness suffered by her as a result of it."*

11. By the use of the word "unfavourably" instead of the phrase "less favourably", this provision indicates that a claimant does not need to establish a comparator. Objectively unfavourable treatment is sufficient.

12. In my case, which involved a claim of associated discrimination because of the claimant's wife's pregnancy, the Tribunal accepted my submission (on behalf of the Respondent) that the language in Section 18 – *"pregnancy of hers"* and *"treats her unfavourably"* – demonstrates it is expressly and unambiguously aimed at women and cannot be interpreted to allow a claim of associative discrimination by a man.

13. This is consistent with the pre-EqA case law and in particular the Scottish EAT decision in **Kulikaoskas v Macduff Shellfish [2011] ICR 48**, which found that there was no basis for reading associative discrimination into Section 3A of the Sex Discrimination Act 1975 and there was no basis for re-casting Section 3A of the 1975 Act in light of EU Directive 2006/54.

14. In **Kulikaoskas** the EAT noted that the definition of "discrimination" at Article 2(2)(c) of the 2006/54 Directive is as follows:

> *"2. For the purposes of this Directive, discrimination includes… (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC."*

15. Interestingly, this wording (i.e. *"less favourable treatment of a woman related to pregnancy"*) might allow a claim by a pregnant woman's same sex partner, but exclude a claim by a pregnant woman's male partner. The EAT rejected that this was what was intended by the legislation, as the broader word *"persons"* was used throughout the Directive but not in this provision.

16. The EAT in **Kulikaoskas** refused to refer the matter to the ECJ. Although on further appeal the Court of Session took a different view and decided to make a reference to the ECJ for a preliminary ruling, the case settled before the ECJ was able to make a ruling.

What other routes are open to claimants?

17. While a claim for pregnancy and/or maternity discrimination is not possible under Section 13 EqA at all, and a claim by a man for associative discrimination is not possible under Section 18 EqA, can a male or female claimant bring his or her case within Section 13 EqA by claiming less favourable treatment because of sex?

18. The answer appears to be a little different depending on whether the claimant is male or female.

19. Section 18(7) EqA restricts claims by women for sex discrimination under Section 13 EqA based on certain facts relating to pregnancy and/or maternity:

> *"(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—*
>
> *(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or*
>
> *(b) it is for a reason mentioned in subsection (3) or (4).*

20. Essentially, whenever a claim can be brought by a woman under Section 18 EqA, then no right to claim sex discrimination arises on the same basis. But where the facts of the case fall outside the specific provisions of Section 18 EqA, it will remain open to a woman to pursue a claim of sex discrimination under Section 13 EqA.

21. In relation to claims by men, it is certainly arguable that men can bring claims for sex discrimination under Section 13 EqA based on facts relating to pregnancy and/or maternity. While I can find no appellate decision on this point, in **Gyenes v Highland Welcome (UK) Ltd** the Employment Tribunal rejected a man's claim for associative pregnancy discrimination under Section 18 EqA, but allowed his claim under Section 13 EqA.

Conclusion

22. There appears to be scope for claims by men of associative discrimination related to facts arising from pregnancy and/or maternity, but carefully framed as claims of sex discrimination under Section 13 EqA.

23. Where Sections 13 and Section 18 EqA differ, however, is that Section 13 refers to *"less favourable treatment"* as opposed to *"unfavourable treatment"*. As such, a comparator is needed in order to test whether the alleged treatment was less favourable because of a protected characteristic.

24. In practical terms, it would be prudent for both male and female claimants to bring claims in the alternative under both Sections 13 and 18 EqA, to ensure that the claim is not rejected on a technicality.

25. Respondents ought to analyse carefully whether or not the alleged acts of discrimination are because of sex or because of pregnancy or maternity, as only the former is protected by Section 13 EqA (although the two are clearly intertwined). The careful selection of a comparator is likely to be key to resisting such a claim.

Rob Golin

Case law update

Tom Emslie-Smith

Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27

These conjoined appeals concerned indirect discrimination under section 19 Equality Act 2010. Specifically, the questions in each case related to what the Claimant is required to show in terms of the *reason* for the particular disadvantage alleged.

The Essop case concerned an immigration officer employed by the Home Office. In order to be promoted, employees had to pass a Core Skills Assessment, in which the pass rate among Black and Minority Ethnic candidates and older candidates was much lower than among white and younger candidates. Nobody knew the reason for the disparity. Mr Essop alleged that the test put him at a particular disadvantage compared with white and younger employees. By contrast, the Respondent argued that an allegation of indirect discrimination could not stand if no reason could be given for the particular disadvantage alleged.

The Naeem case concerned an Imam employed by HM Prison Service as a prison chaplain. Until 2002, Muslim Chaplains were employed on a sessional basis because the Prison Service did not consider there to be enough Muslim inmates to justify a full-time Chaplain. Mr Naeem subsequently began to work on a salaried basis, but was paid less than his Christian colleagues because he had had less time to work his way up the pay scale. He claimed he was at a particular disadvantage compared with Christian chaplains. The argument against his claim for indirect discrimination was that, even though a disparate impact could be shown, the reason for it was not something peculiar to the protected characteristics in question (race and religion). The reason was simply the length of service.

In the Supreme Court, the leading judgment was given by Lady Hale. She considered the European Directives underlying the discrimination provisions, and held that no requirement to demonstrate a reason for disadvantage can be found in the Directives, nor in the various iterations of indirect discrimination in the Acts that preceded the Equality Act 2010. Furthermore, a number of salient features of indirect discrimination meant that no such reason is necessary or desirable. In contrast to direct discrimination, claims for *indirect* discrimination do not need to show a causal link between less favourable treatment and the protected characteristic. Nor is there any requirement that every member of the group sharing the protected characteristic is put at the same disadvantage.

Therefore, Mr Essop's case could succeed even though he was unable to explain the reason *why* the Core Skills Assessment disadvantaged BME and older candidates. In Mr Naeem's case, there was no requirement to show the disadvantage was peculiar to the protected characteristics in question.

Chesterton Global Ltd v Mohamed Nurmohamed [2017] EWCA Civ 314

The Court of Appeal gave guidance on how to apply the "public interest" test to a protected disclosure under the Employment Rights Act 1996.

Mr Nurmohamed was employed by Chesterton Global Ltd as an estate agent. In 2011 a new group of investors made changes to the commission that the company paid its employees. Mr Nurmohamed believed this had a serious adverse impact on his earnings. He began to monitor the company's internal accounts and raised concerns to the London director of the company that the accounts were being manipulated to the benefit of the shareholders. The Tribunal at first instance found that Mr Nurmohamed had reasonably believed that this affected the earnings of over 100 senior managers, and that the company was deliberately misstating some £2-£3 million of costs and liabilities. The Tribunal held that raising these concerns had amounted to a protected disclosure.

The Court of Appeal had to decide whether the Tribunal was entitled to find that the Claimant had made the disclosures in the reasonable belief that they were "in the public interest", notwithstanding that he had made them substantially out of concern for his own private interest. In submissions, the Court was presented with three different approaches to the question:

1) counsel for the Intervener (Public Concern At Work), said all that is required is for the disclosure to be in the interests of anyone else besides the worker making the disclosure;

2) on the other extreme, counsel for the Respondent submitted that mere multiplicity of workers is not enough. The interest must extend outside the workplace and further interests of persons other than the workers themselves;

3) counsel for the Claimant took a middle path, submitting that all the circumstances must be considered. A disclosure could be protected simply because of the number of employees involved, but this will not necessarily be enough in every situation.

The Court stated, as a preliminary point, that it did not intend to provide any general gloss on the phrase "in the public interest," given that Parliament had chosen not to define it, intending to leave it to Tribunals to apply "as a matter of educated impression."

The general approach for Tribunals applying the public interest test is to identify whether any feature of the disclosure would mean that it is in the public interest. This must be decided with reference to all the circumstances, but the Court stated that factors listed by counsel for the Claimant could serve as a "useful tool" in this analysis. They are:

1) the numbers in the group whose interests the disclosure serves;

2) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

3) the nature of the wrongdoing disclosed. Disclosure of deliberate wrongdoing is more likely to be in the public interest;

4) the identity of the wrongdoer. Disclosure about larger or more prominent wrongdoers are more likely to be in the public interest.

Hartley and others v King Edward VI College [2017] UKSC 39

The Appellants were teachers at a sixth form college. Following a day-long strike, the college made deductions from their pay at the rate of 1/260th of their annual pay. This was arrived at by subtracting weekends from the number of days in the year, and apportioning income accordingly. The Appellants argued that the appropriate deduction should be 1/365th of the annual salary, based upon section 2 of the Apportionment Act 1870. This provides: "*All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.*"

The Respondents argued that this section had no application to the teachers' contracts, because they impliedly provided that pay would be on a pro rata basis, accruing in respect of divisible obligations to perform work each day. "Accruing day to day" should be construed as accruing on weekdays, rather than equally on each day of the year. Alternatively, section 2 of the Act was excluded by the provisions of the teachers' contract, in accordance with section 7 of the Act.

Clarke LJ held that under the particular contract in question, the salary was deemed to accrue at the rate of 1/365th. This was because under the terms of their agreement, teachers had to perform duties such as marking and preparation outside normal directed hours. In a contract for professional services, where workers commit to providing services of satisfactory quality, it is not appropriate to confine the work under the contact to be carried out during directed working hours. As to whether section 2 had been excluded, it was held that section 7 required an "express stipulation" in the contract that no apportionment should take place. In this case there was no such provision.

The Government Legal Service v Ms T Brookes UKEAT/0302/16/RN

The Claimant, Ms Brookes, had Asperger's syndrome and brought a claim against the Government Legal Service (GLS) for indirect discrimination and for failure to make reasonable adjustments. Those who wish to join the GLS must pass a multiple-choice Situational Judgment Test (SJT). The Employment Tribunal found that Ms Brookes was disadvantaged in completing the test in a multiple-choice format. As to the justification, the ET found that the SJT

of achieving that aim were not proportionate. The GLS should have allowed candidates with Asperger's to answer in short narrative written answers.

On appeal it was argued that, as a general rule of practice, where a test of competency is inextricably linked with the competency itself, it should be treated as justified and should not require adjustment. The Appellant's evidence was that there was a continuous link between the answers given and the performance of the incumbents who gave the answers, such that the multiple-choice test allowed the employer to say for certain whether the candidate had demonstrated the competency being tested.

The EAT held that the Tribunal had rejected this argument without any error of law or flaw in its reasoning. It was found that the GLS could have tested the same competencies without fundamentally altering the SJT, by allowing a small number of candidates to answer in a different form. A balancing exercise needed to be performed that considered the need to effectively compare candidates' answers against the need to prevent disadvantage to candidates with Asperger's syndrome. The Tribunal properly performed this exercise, and found in favour of the Claimant. The appeal was dismissed.

J v (1) K (2) L UKEATPA/0661/16/MM

The EAT (HHJ Hand) refused to disapply or extend the time limit for bringing an appeal where the appeal notice and accompanying documents were received one hour after the deadline. The appellant was appealing against a costs order made against him in a discrimination claim. He started to send the notice of appeal shortly before 16.00 on the day of the deadline, but all the necessary documents did not reach the Tribunal because the files were too large to attach to one email. By the time the appellant had sent all of the documents, it was past 16.00. The appellant also raised a number of issues with his health that made it difficult to bring the appeal on time.

The Appellant sought to rely on Rule 39(1) of the Employment Tribunal Rules 2013, which states that failure to comply with any requirements of the rules shall not invalidate any proceedings unless the Tribunal directs otherwise. HHJ Hand held that Rule 39(1) pre-supposes that proceedings are already underway, and there are no proceedings until an appeal has been accepted as properly instituted.

The Appellant also asked the Tribunal to extend the time limit according to its discretion under Rule 37(1). HHJ Hand referred to the case of *Muschett v Hounslow London Borough Council* [2009] ICR 424, which stated *inter alia* that the discretion is to be exercised exceptionally and that there is no excuse, even for unrepresented litigants, for ignorance of time limits. Particularly in the absence of any patient-specific medical evidence, HHJ Hand did not consider that the Claimant had given a good enough reason for his failure to file the appeal in time.

The case serves as yet another cautionary tale on the need to observe time limits correctly, especially in the EAT.

Dudley Metropolitan Borough Council v Willetts UKEAT/0334/16/JOJ

The Claimants, who were the Respondents in this appeal, all worked under contracts which provided for set working hours, but regularly chose to perform overtime duties on an entirely voluntary basis. Their employers had no right to enforce their performance of these duties; they were carried out "almost entirely at the whim of the employee." The question was whether payments received in respect of the voluntary overtime should be treated as forming part of a worker's "normal remuneration" for calculating holiday pay under Regulation 13 of the Working Time Regulations 1998.

Regulation 13 gives every worker an entitlement to four weeks' annual leave. It implements Article 7 of the EU Working Time Directive. Therefore, to calculate the amount to be paid during the four weeks' leave, the EAT sought an interpretation of Regulation 13 that conforms with the meaning and effect of Article 7.

The EAT held that the overarching principle to be applied is that normal remuneration must be maintained during the four-week period of annual leave. This means that payments must correspond to the normal remuneration received by the worker while working. The purpose of this requirement is to ensure that the worker does not suffer a financial disadvantage by taking leave which would deter him from exercising the right to annual leave guaranteed by Article 7.

To qualify as "normal," pay must have been received over a sufficient period of time. This is a question of fact and degree. Exceptional items, or items that are not usually paid will not qualify as normal pay.

The EAT rejected the argument that there needed to be an intrinsic link between the payment and the performance of tasks required under the contract. Such an intrinsic link, if established, would be decisive as to the requirement that the pay be included in normal remuneration, but it is not the only decisive criterion. It followed from these principles that the voluntary hours undertaken by the workers in this case could be included in their "normal working hours". There was no error of law in the judge holding that they did.

Employment Law Group

Ian Ridd Shabbir Lakha Huw Davies Guy Watkins Matthew Hodson Emma Sole
David Roderick Tom Bourne-Arton Grant Goodlad James Rozier Changez Khan
Robert Golin Joshua Hedgman Joel McMillan Rajiv Bhatt

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Farrar's Building
Temple
London
EC4Y 7BD

T: +44 (0)20 7583 9241

Email: Chambers@Farrarsbuilding.co.uk

@FarrarsBuilding

FARRAR'S BUILDING