United Kingdom Employment Appeal Tribunal

Appeal No. UKEAT/0011/18/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 May 2018

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR B BEYNON

MR M WORTHINGTON

MS P BRADLEY — APPELLANT

LONDON SCHOOL OF ENGLISH
AND FOREIGN LANGUAGES LIMITED — RESPONDENT

Transcript of Proceedings

APPEARANCES

For the Appellant	MR ROBIN ROBISON (Representative) Free Representation Unit
For the Respondent	MR ANTHONY JOHNSTON (of Counsel) Instructed by: Irwin Mitchell LLP Imperial House 31 Temple Street Birmingham B2 5DB

SUMMARY

SEX DISCRIMINATION - Indirect

SEX DISCRIMINATION - Justification

In order to address the question of proportionality correctly, the ET was required to compare the impact of the PCP on the affected group as against the importance of the legitimate aim to the employer in order to decide whether the PCP was both an appropriate means of achieving the legitimate aim and no more than reasonably necessary to do so. The ET's Reasons did not show that it had approached the question of proportionality in this way. **Allonby v Accrington & Rossendale College** [2001] IRLR 364, **Hardys & Hansons plc v Lax** [2005] IRLR 726 and **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601 applied. Issue remitted to the same ET for fresh consideration.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Ms Paula Bradley ("the Claimant") against a Judgment of the Employment Tribunal sitting in London Central (Employment Judge Glennie, Mrs Ihnatowicz and Mr Soskin) dated 22 March 2017. By its Judgment the Employment Tribunal dismissed claims of indirect discrimination and victimisation which the Claimant brought against the London School of English UK Ltd ("the Respondent").

2. The appeal proceeds on amended grounds for which Kerr J gave permission at a hearing under Rule 3(10) on 20 December 2017. The grounds relate to the claim of indirect discrimination and to the Employment Tribunal's reasoning on the question of proportionality.

The Background Facts

3. The Respondent provides courses in English as a foreign language. One of its London sites is at Holland Park. There it provides group and one-to-one teaching aimed at professional people and senior managers in various fields. The Employment Tribunal described the service as "up-market". The Holland Park site offered a restaurant and opportunities for networking and social contact, as well as formal teaching. The charge for one-to-one tuition was £80 per hour, which the Employment Tribunal said was "relatively high within the industry" and reflected the nature of the service provided.

4. In order to supply its teaching the Respondent had 20 employed trainers and a pool of about 44

freelance trainers who were called upon as needed. The Claimant was a freelance trainer. She worked regularly from 2005 onwards. In 2009 she became a mother. She has at all material times been solely responsible for the care of her daughter. She continued to do a good deal of freelance work for the Respondent, except in the year after her daughter was born and for a period when she was a resident in Spain.

5. The Respondent advertised that its courses began at 9.00am. Typically, new clients would arrive to begin their courses on a Monday morning. They would meet at the restaurant for an introductory session. Trainers were expected to have arrived by 8.45am so that they were ready in good time, and this would be the normal pattern for the rest of the week. The courses were expected to begin at 9.00am, and trainers were expected to have arrived at 8.45am.

6. By 2015 the Claimant and her daughter were living in East London. Her daughter went to school in Islington. The Claimant would drive her daughter to school and then drive on to Holland Park for work. Anyone acquainted with driving in London will know that this is an arduous journey during the rush hour. The Claimant had difficulty in achieving even the 9.00am start time. As she said herself, when she was late, she would typically walk in and dash upstairs at 9.05am or 9.10am. There were rare occasions when she would be stuck in traffic and arrived later than this.

7. By late 2014 or early 2015, the Claimant's lateness was an acknowledged problem. The Respondent reminded her that arriving late did not make a good impression on clients, and the trainers were expected to be on site 15 minutes in advance of the start of classes. The Respondent particularly required this on Mondays when new clients would arrive, but it was prepared to allow the Claimant to agree a later start time with clients for subsequent days. The Claimant found that about half her clients would agree a later start time. There were therefore still many weeks when she was still expected to arrive all week in good time for a 9.00am start.

8. In July 2015 there was a complaint from a client that she had been 20 to 30 minutes late twice in a week. The Claimant acknowledged that the complaint was justified. She accepted that she was aware she had a problem with timekeeping. She said she found it unprofessional and personally distressing. She asked for a later start time. She was told that she could be scheduled for 9.30am, but given that tuition

typically started at 9.00am, this would mean she would receive less work. The Respondent maintained the position that she should arrive by 8.45am on the Monday and must work from 9.00am, subject to being able to negotiate a later start time with a client.

9. In September 2015 the Claimant told the Respondent that she would try to change her daughter's school and would let the Respondent know when she had done it. In January 2016 she told the Respondent that she had made arrangements for that change and for childcare to enable her to arrive at school on time. However, by "on time" she evidently meant by 9.00am and not by 8.45am. Her evidence to the Employment Tribunal was that her arrangements enabled her to arrive by public transport by 9.00am, but not by 8.45am. We are told, although the Employment Tribunal does not record this, that she could drop her child at school by 8.00am; but the walk to the station, the commute on the Central Line, and the walk at the other end, meant that she could not arrive until after 8.45am.

10. It was some time before the Claimant was offered any work. There had been a downturn in the number of the Respondent's clients. There was less work for freelancers. She complained; and there was a meeting. She said that starting at 09.30am would give her "breathing room". The Respondent maintained its position. It said that Monday morning induction and break times were key in introducing the various groups and individuals to each other and that it wished to have a clean, simple and consistent message for marketing purposes.

11. The Claimant was offered a week's work to commence on 11 July 2016 with a one-to-one client. By 8.45, she had neither arrived nor telephoned the Respondent. She arrived sometime between 8.52 and 8.55. The Respondent's manager was annoyed and conveyed that annoyance. There a short meeting just before 9.00am. The Claimant left. She knew when she left that there was cover available for the client. There was an exchange of emails. She said:

> **"For the record I did not have an issue with you asking me if there was a problem with the traffic but with the way you spoke to me on my arrival at LSE today. You were gunning for me the moment I walked through the door at 8.52am without even saying hello or good morning or in fact anything. You looked at the clock on the wall, looked at me and raised your eyebrows. You were clearly agitated and didn't even bother to take me to one side to give me your ticking off which was done in front of several colleagues. It has been clearly explained to you on more than one occasion that I am unable to get to the school for 8.45am due to my childcare commitments and I do not expect to have to reiterate that each time I arrive at the school." (ET Judgment, paragraph 53)**

<u>Statutory Provisions</u>

12. The Claimant, as a freelance worker, was an employee of the Respondent within the extended definition set out in section 83 of the **Equality Act 2010**; see section 83(2)(a). The Respondent was, therefore, prohibited from discriminating against the Claimant as to the terms on which it offered her employment or by not offering her employment; section 39(1)(b) and (c). The type of discrimination in issue is indirect discrimination. This is defined in section 19(1) and (2):

> **"(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."**

The Employment Tribunal Proceedings and Reasons

13. At a Preliminary Hearing the PCP which was said to have been applied by the Respondent was defined in the following terms: "*all staff were to arrive early for a 9.00am class at 8.45*". As we have seen, by 2016, the Claimant could arrive for 9.00am. This, perhaps, may explain why the PCP was defined in this way. At all events, at the final hearing, this was the PCP on which the Claimant relied. As we shall see, the Employment Tribunal observed in its Reasons that the 9.00am start time, as such, was not directly in issue, and that proposition has not been challenged on this appeal.

14. The hearing took place over five days in January 2017. The Claimant represented herself, and the Respondent was represented by counsel, Mr Anthony Johnston, as it is today. In its Reasons the Employment Tribunal set out its findings of fact on which we have already drawn in this Judgment.

15. The Employment Tribunal turned to the question of indirect discrimination in paragraphs 58 to 76 of its Reasons. The Employment Tribunal found that there was a PCP in the terms relied on by the Claimant and that it was applied to all freelancers; men as well as women. It found that the PCP did place women at a particular disadvantage compared to men; significantly more women than men are primarily

responsible for the care of their children, so their ability to work particular hours is substantially restricted by those childcare commitments, in contrast to that of men. It found the PCP placed the Claimant at that disadvantage. She was unable to arrive at 8.45am consistently, partly because of geography and partly because of her childcare responsibilities. This was sufficient to establish the requisite disadvantage. Thus far, there is no challenge to the Employment Tribunal's reasoning.

16. The Employment Tribunal then turned to the question of justification quote as posed in section 19(2)(d). It first said the following about the 9.00am start time:

> **"66. On this point the question of the 9.00am start as such has not been directly in issue. If, however, it requires consideration, the Tribunal would find that the Respondent has demonstrated that the requirement of a 9.00am start sessions was in itself a proportionate means of achieving a legitimate aim. The aim of the 9.00am start is perhaps the simple one of the furtherance or operation of the Respondents' business. The Respondents' evidence, which we accept, is that they found that a 9.00am start in the most acceptable to clients and is therefore the most beneficial for their business to offer. We bear in mind that it is not an unusual or extravagant start time. The justification for it is that it mirrors an ordinary start to the working day: it therefore fits with the participants' expectations and helps to present a professional image. Should it be necessary to do so, we find that it is a proportionate response to the aims of the business that the Respondents should in general start their classes at 9.00am."**

17. The Employment Tribunal noted, however, that the 9.00am start time was not directly in issue. The actual issue was the 8.45am arrival time. He found the Respondent had two aims underlying this PCP. The first was that there should be a prompt and organised start to the class at 9.00am, with sufficient time beforehand for the trainer to do last-minute organisation, check the room, and to collect himself or herself. The second was to allow time to arrange cover. The Employment Tribunal found that these were legitimate aims. Thus far, again, there is no challenge to the Employment Tribunal's reasoning.

18. The Employment Tribunal then turned to the question whether the PCP was a proportionate means of achieving those legitimate aims. The Employment Tribunal said that it had not found it a particularly easy question to resolve. We think it is important to set out the whole of the Employment Tribunal's reasoning on this issue:

> **"70. The Respondents' evidence is that it would be unprofessional to contact clients in advance and to ask whether they would be prepared to accept a variation from the advertised start time of their sessions. We had no difficulty in accepting that the Respondents could not be expected to make such an approach at the time of the original booking. This would usually be (but not invariably) months in advance of the proposed session and so it would not be possible at that stage to know who the trainer was likely to be. Therefore this would involve contacting every client to ask them as a matter of precaution whether they would be willing to accept a variation in the arrangement. We can readily see that, having advertised the start time of 9 o'clock, to then contact every client and ask whether they would accept a later time would be regarded as risky by the Respondents in terms of the appearance of the service they were offering.**

71. Equally, we can appreciate why in practical terms the Respondents might find it acceptable to raise this issue of a later start date with the individual client after they had attended on the first day and with the trainer having spent some time with them, although we should add that we noted that Mr Tallon and Ms Norton perhaps differed about this. The latter found that that was an acceptable practice. The former evidently was not very happy with even that idea.

72. The Claimant's suggestion in her submissions was to the effect that the Respondents could have contacted individual clients when they were potentially matched with her in order to see whether they would accept a later start. That was something that was not directly put to Ms Norton in terms of something that could have been done but, as we have noted, it was mentioned in the outcome letter at least in passing and it was referred to briefly by Ms Norton in her evidence.

73. We should say that we found some immediate attraction in this particular idea. However, Ms Norton's evidence was that even this approach would have carried some risk of seeming unprofessional. Bearing in mind the nature of the service being offered, its cost, and the general nature of the clients (professional people and managers), we can understand that concern on the part of the Respondents. It seems to us that a client approached in this way before they had arrived at the school might be dissatisfied with a proposed variation from the course times, and that even if the client felt that they should agree to it, while not actually cancelling, might consider that this reflected badly on the professionalism of the Respondents' organisation. That carries with it the risk that the individual client might share that opinion with others in his or her organisation and with other potential clients. We can therefore see that there is a genuine concern about that taking place.

74. We have reminded ourselves in this connection that the test that we have to apply is not whether the Respondents did everything that they could to assist the Claimant, or any similar formulation. What we have to ask is whether their approach to this situation was proportionate.

75. In considering the question of proportionality the Tribunal has reminded itself that the Respondents were offering a service that was intended to be at the top of the range in the relevant market, and which was priced accordingly. The Respondents would reasonably be concerned to maintain the "up-market" nature of the service.

76. Given the flexibility that was allowed once the client was on board in the sense of having arrived at the school, and the importance of a professional service and the appearance of a professional service to the Respondents as explained above, we find that their approach was a proportionate means of achieving both of the legitimate aims that have been identified. The complaint of indirect … discrimination fails."

Submissions

19. On behalf of the Claimant, Mr Robin Robison submits that the Employment Tribunal did not properly apply the proportionality test in section 19 of the **Equality Act**. The Employment Tribunal's task involved a comparison between the importance of the aim to the employer and the impact of the PCP on the affected group. It was essential for the Employment Tribunal to weigh in the balance the effect of the PCP on the lives of the Claimant and the relevant group against the business needs of the Respondent. Nowhere was there a balancing exercise of this kind. The Employment Tribunal did not mention the disadvantage to the Claimant and her daughter, or to the relevant group, when reaching its findings on proportionality.

20. Mr Robison submits that the Employment Tribunal did not have the correct test in mind. It said it found the actions of the Respondent to be proportionate, but proportionate to what? The needs of the

business were analysed, but they were not weighed against the disadvantage to the Claimant. He submitted that the Employment Tribunal had to be careful not to use a range of reasonable responses test when considering proportionality. A business decision may be reasonable for the business, but disproportionate when viewed against the disadvantage caused to the group with a protected characteristic.

21. On behalf of the Respondent, Mr Johnston submits that the Employment Tribunal plainly considered with care whether the measure adopted by the Respondent was proportionate. This is shown by its examination of the question in paragraphs 70 to 76, which ought to be read against its detailed and careful findings of fact. He accepted that while there is no explicit assessment of the extent of group and individual disadvantage in the paragraphs where the Employment Tribunal made its assessment, and no explicitly comparative approach, it is implicit in the Employment Tribunal's reasoning. Nor did the Employment Tribunal apply a "range of reasonable responses" test. Rather, it assessed whether the measure was reasonably necessary, which is the correct approach. It is important that a decision of the Employment Tribunal should be read in the round without adopting a hypercritical approach. This was a thoughtful decision of the Employment Tribunal which should be upheld.

22. The parties took us to important decisions on the question of objective justification and proportionality in the Supreme Court (**Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601, **Essop & Others v Home Office** [2017] IRLR 558, **Naeem v Secretary of State for Justice** [2017] UKSC 27) and in the Court of Appeal (**Allonby v Accrington & Rossendale College** [2001] IRLR 364 and **Hardys & Hansons plc v Lax** [2005] IRLR 726). We were also referred to **Mitchell v David Evans Agricultural Ltd** UKEAT/0083/06, a decision of this Employment Appeal Tribunal.

Discussion and Conclusions

23. In its thoughtful Reasons the Employment Tribunal said that it did not find the question of proportionality an easy one to resolve. We think that modern case law assists the Employment Tribunal to understand the task it had to undertake. The law can be traced back to the decision of the European Court in **Bilka-Kaufhaus GmbH v Weber von Hartz** [1987] ICR 110, but it is sufficient to cite recent UK authorities.

24. A good starting point is the speech of Lady Hale in **Homer**. She summarised the test which had to be applied in paragraph 20 of her judgment. She said:

> **"20. As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] IRLR 934, at [151]:**
>
> > **'… the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.'**
>
> **He went on, at [165], to commend the three-stage test for determining proportionality derived from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80:**
>
> > **'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?'**
>
> **As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726 [31], [32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."**

25. She went on to confirm that it is the PCP which has to be justified, not the discriminatory effect (see paragraph 23). The word "necessary" is to be understood as meaning "reasonably necessary" (see paragraph 22). The test requires a comparative exercise to be undertaken. Lady Hale said the following at paragraph 24:

> **"24. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer. That comparison was lacking, both in the ET and in the EAT. Mr Homer (and anyone else in his position, had there been someone) was not being sacked or downgraded for not having a law degree. He was merely being denied the additional benefits associated with being at the highest grade. The most important benefit in practice is likely to have been the impact upon in final salary and thus upon the retirement pension to which he became entitled. So it has to be asked whether it was reasonably necessary in order to achieve the legitimate aims of the scheme to deny those benefits to people in his position? The ET did not ask itself that question."**

26. The importance of this comparative approach was also stressed in a well-known passage in **Allonby**. Sedley LJ said:

> **"29. … Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter. There is no sign of this process in the tribunal's extended reasons. In particular, there is no recognition that if the aim of dismissal was itself discriminatory (as the applicant contended it was, since it was to deny part-time workers, a predominantly female group, benefits which Parliament had legislated to give them) it could never afford justification."**

27. Again in **Lax**, Pill LJ said that:

> **"33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* and in *Cadman*, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman*, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification."**

28. In this case the Employment Tribunal made no assessment of the seriousness of the disparate impact on the group in question. It was an essential part of the exercise that it should have done so. The disparate impact of a PCP may vary greatly. Some PCPs may have the effect of barring a group with a protected characteristic from the work place altogether or greatly limiting their access to it. Others may have a significant financial impact. Others, while putting a group to a particular disadvantage, may have a lesser impact. Making an assessment of the seriousness of the impact is a key part of the Employment Tribunal's decision making process.

29. In consequence the Employment Tribunal did not carry out the comparative exercise which is required. It is not entirely clear that the Employment Tribunal had the need for such an exercise in mind. For example, its reference in paragraph 66 to "a proportionate response to the aims of the business" is not on point. Nor did the Employment Tribunal explicitly apply the "reasonably necessary" test.

30. Even if we assume that Mr Johnston is right and that the Employment Tribunal had the correct approach in mind, we do not think that its reasoning was sufficient. The passages we have cited make it clear that the reasons of the Employment Tribunal should deal explicitly with the comparative approach (see also in **Allonby** Gage J at paragraphs 70 to 71).

31. It follows that the appeal must be allowed. It is now well established that it is not for the Employment Appeal Tribunal to make any factual assessment of its own when dealing with an appeal on a

question of law (see **Jafri v Lincoln College** [2014] ICR 920). The matter must be remitted for the Employment Tribunal to consider afresh the question of proportionality. The parties are agreed that remission should be to the same Employment Tribunal and we would, in any event, unhesitatingly have reached this conclusion. The Employment Tribunal's Reasons, in all other respects, were of a good standard; and it plainly considered the proportionality element with care. The authorities on this question were not cited to it, and in the process of finding facts it is sometimes possible for an important legal element to be overlooked. The Employment Tribunal's task will be to look afresh at the question of proportionality in the light of the authorities we have cited. We are confident that it will be able to do so. Applying the overriding objective and the criteria in **Sinclair Roche & Temperley v Heard & Another** [2004] IRLR 763, we remit to the same Employment Tribunal.

32. We will make one further point as we remit the matter. The Claimant's case was that, until she changed school, the impact of the PCP on her was severe, and even after she changed school it would require her to make further adjustments to her routine and perhaps engage further childcare if she was to arrive by 8.45am for a 9.00am start. The Employment Tribunal is entitled to bear this in mind, but it will need to be careful not to approach the case on the basis that an exception to that rule should have been paid for her particular case.

33. The reasons for are explained in **Homer** at paragraphs 25 and 34 to 36. It is the PCP which must be justified, and so the Employment Tribunal must primarily concentrate on the question of group disadvantage when it carries out the relevant exercise. This does not mean the disadvantage to the Claimant is irrelevant; it does mean that care has to be taken not to approach the case on the basis that an exception to the rule should have been made for her. On any possible view the Claimant's circumstances before her daughter changed school were very unusual; she was committed in effect to a double journey by car during the height of the rush hour. Her circumstances after the change of school may be more typical of the extent of group disadvantage. These, however, in the end, are all matters for the Employment Tribunal, so long as it applies the correct legal test.