

sm



THE EMPLOYMENT TRIBUNAL

SITTING AT:

LONDON SOUTH

BEFORE:

EMPLOYMENT JUDGE STACEY (sitting alone)

BETWEEN:

Sharon Coleman

Claimant

AND

(1) EBR Attridge Law LLP (formerly
Attridge Law)

(2) Mr Steve Law

Respondent

ON: 30 September 2008

APPEARANCES:

For the Claimant:

Mr P Michell (Counsel) instructed by
Bates Wells and Braithwaite London LLP

For the Respondent:

No appearance (written representations received)

JUDGEMENT ON A PRE-HEARING REVIEW

The judgment of the Tribunal is that the Tribunal has jurisdiction to consider both the Claimant's complaint of direct disability discrimination contrary to s3A(5) Disability Discrimination Act 1995 (DDA 1995) on grounds of the disability of her son, and to consider her complaint of harassment contrary to s3B DDA 1995 for a reason relating to the disability of her son.

The parties are directed to seek to agree the issues – both legal and principal factual issues, directions and the time estimate for Hearing together with any dates to avoid, and to inform the Tribunal within 14 days of the date that this Judgment is sent to the parties, failing which the case will be listed for a Case Management Discussion.

sm

REASONS

1. This case came before me to consider whether the DDA 1995 can be read in such a way as to accord with European Law. If so, the Claimant may establish a valid cause of action and the claim shall proceed to a full Hearing. If not, her claim will be dismissed without further consideration: whether or not the UK Government has failed properly to implement an EU Directive would need to be determined elsewhere.
2. In this case Ms Coleman, the Claimant, is not herself disabled within the meaning of DDA 1995. Her complaints of unlawful direct disability discrimination contrary to s3A(5) DDA 1995 and harassment contrary to s3B DDA 1995 are advanced on the grounds that she is the carer of, and associated with, a disabled person, her son. Her complaint spans the period 2002 until her departure from the Respondent firm of solicitors on 4 March 2005.
3. The question of whether discrimination or harassment by way of association with a disabled person, commonly referred to as associative discrimination, is prohibited by the Equal Treatment Framework Directive (2007/78/EC) was referred by me to the Court of Justice of the European Union (ECJ) for a preliminary ruling on 23 May 2006 ("the 23 May 2006 Judgment"). It now falls to me to consider whether, in light of the judgment of the ECJ of 29 July 2008 [2008] IRLR 722, the DDA 1995 can be read consistently with European Law.
4. I did not consider the interpretation of domestic legislation other than in the context of whether to refer the case to the ECJ at all in the 23 May 2006 Judgment. I therefore approach this matter afresh.

European Law

5. Directive 2000/78 establishes a general framework for equal treatment in employment and occupation (the Directive). Article 1 of the Directive provides that:

"The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation with a view to putting into effect in the member states the principle of equal treatment."

Article 2, headed "Concept of discrimination" provides that:

"1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been, or would be

sm

treated in a comparable situation, on any of the grounds referred to in Article 1;

.....

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conducted related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the member states."

6. The ECJ held in the reference in this case, that the provisions of the Directive are not limited to people who themselves have a disability within the meaning of the Directive:

"On the contrary, the purpose of the Directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the Directive in that area applies not to a particular category of person but by reference to the grounds mentioned in article 1" (paragraph 38).

7. The ECJ further held that the objectives of the Directive and its effectiveness:

"would be undermined if an employee in the Claimant's situation could not rely on the prohibition of direct discrimination laid down by article 2 (2)(a) of the Directive where it has been established that he has been treated less favourably than another employee is, or has been or would be treated in a comparable situation on the grounds of his child's disability, and this is the case even though that employee is not himself disabled" (paragraph 48).

"Although, in a situation such as that in the present case, the person who is subject to direct discrimination on grounds of disability is not herself disabled, the fact remains that it is the disability which, according to Ms Coleman, is the ground for the less favourable treatment which she claims to have suffered. As is apparent from paragraph 38 of this judgment, Directive 2000/78, which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation, applies not to a particular category of person but by reference to the grounds mentioned in article 1.

"Where it is established that an employee such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that Directive of an important part of its effectiveness and to reduce the protection which it is intended to guarantee." (paras 50 & 51)

sm

8. In relation to harassment, the ECJ held that:

"Since, under article 2(3) of the Directive 2000/78 harassment is deemed to be a form of discrimination within the meaning of article 2(1), it must be held that, for the same reasons as those set out in paragraphs 34 – 51 of this judgment, that Directive, and in particular, Articles 1 and 2(1) and (3) thereof must be interpreted as not being limited to the prohibition of harassment of people who are themselves disabled.

"Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the principle of equal treatment enshrined in Directive 2000/78 and, in particular, to the prohibition of harassment laid down by article 2(3) thereof.

"In that regard, it must nevertheless be borne in mind that, according to the actual wording of article 2(3) of the Directive, the concept of harassment may be defined in accordance with the national laws and practice of the member states." (paras 58-60)

The domestic legislation

9. The definition of discrimination and harassment contained in the DDA 1995 was amended by regulations in 2003 brought in under the authority of s2(2) European Communities Act 1972 specifically in order to comply with the UK's EU treaty obligations under the Community Treaties to which s2 of the 1972 Act applies. The 2003 regulations introduced ss3A, 3B and 4 DDA 1995. The 2003 regulations were intended fully and comprehensively to implement the Directive. They were passed with the manifest and express purpose of producing full compliance with the United Kingdom's EU treaty obligations as was set out in the explanatory notes to the 2003 regulations:

"These regulations implement (in Great Britain) provisions of Council Directive 2000/78 EC ... establishing a general framework for equal treatment in employment and occupation ("the Framework Directive"), so far as it relates to disability discrimination. For this purpose they amend the Disability Discrimination Act 1995 (C50) ("the Act") and to make minor or consequential amendments to other legislation."

10. In so far as is relevant DDA 1995 provides:

"3A Meaning of "discrimination"

"(5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities are the same as, or not materially different, from those of the disabled person

sm

"3B Meaning of "harassment"

"(1) for the purposes of this part [Employment Field] a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of:

- (a) violating the disabled person's dignity or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him."

11. Section 4 headed Employers: Discrimination and Harassment provides that:

"4(1) It is unlawful for an employer to discriminate against a disabled person -

- (a) in the arrangements which he makes for the purpose of determining to whom he should offer employment;
- (b) in the terms on which he offers that person employment; or
- (c) by refusing to offer, or deliberately not offering him, employment.

"(2) It is unlawful for an employer to discriminate against a disabled person, whom he employs -

- (a) in the terms of employment which he affords him;
- (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit;
- (c) by refusing to afford him, or deliberately not affording him, any such opportunity; or
- (d) by dismissing him or subjecting him to any other detriment.

"(3) It is also unlawful for an employer, in relation to employment by him, to subject to harassment -

- (a) a disabled person whom he employs; or
- (b) a disabled person or who has applied to him for employment"

Interpretation of the UK law in light of EU law

12. It is my duty in this case to seek to interpret domestic law in such a way as to achieve a consistent outcome with EC law. The question is, how far does that

sm

duty extend? The obligation has been defined in a number of ways and the principles expressed in a number of cases by the ECJ. In *Marleasing v L A Comercial Internationale de Alimentacionsa* [1990] ECR 1-4135 it was held that "in applying national law.... the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter".

13. In *Centrosteeel v Adipol GmbH* [2000] all ER(D) 973 it was held "when applying national law whether adopted before or after the directive, the national court that has to interpret the law must do so as far as possible, in the light of the wording and purpose of the directive so as to achieve the result it has in view" (paragraph 16) then again at paragraph 17 "the national court..... must therefore interpret that law in such a way that it is applied in conformity with the aims of the directive". More recently in *Pfeiffer and others v Deutsches Rottes Kreuz, Kreisverband Waldshut eV* [2005] IRLR 135 the ECJ held:

"Where it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national law is bound to interpret national law, so far as possible, in the light of wording and the purpose of the Directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of article 249 EC"

14. When the question has been considered in the UK courts, the duty as laid down by the ECJ set out above has been reiterated repeatedly and that such a duty applies a fortiori where the domestic provisions in question have been introduced by secondary legislation and where the legislative obligation arises under one of the Community Treaties to which s2 of the European Communities Act 1972 applies, as in this case.
15. The duty goes beyond resolving any ambiguity in favour an interpretation consistent with EC Law, the "words must be construed purposively in order to give effect to the manifest broad intention of the maker of the regulations and of parliament (*Pickstone v Freemans Plc* [1988] IRLR 357 paragraph 359 per Lord Keith). The principle was reiterated by Lord Oliyer at p365: "Those regulations having been passed with the manifest and express purpose of producing a full compliance with the United Kingdom's obligations are therefore, to be construed accordingly." He went on to describe the obligation - in that case set out in the Equal Pay Act 1970 - to be construed, "if they are reasonably capable of bearing such a meaning, as intended to carry out the obligations, and not to be inconsistent with it."

Claimant's submissions

16. Mr Michell for the Claimant in a helpful and thorough submission, relied on further examples. In *Litster and others v Forth Dry Dock and Engineering Co Ltd and another* [1989] 1 AllER1134 the House of Lords held that Regulation 5(3) of the Transfer of Undertakings (Protection of Employment) Regulations 1981 which ostensibly applied to "a person....employed immediately before a transfer" could and ought to be read as if after the words "immediately before

sm

the transfer" the words "or would have been so employed if he had not been unfairly dismissed in the circumstances described in Regulation 8(1)" were added in. He noted that "the strict and literal construction of the section does indeed involve the conclusion that the Regulations, although purporting to give full effect to the UK's obligations under Article 119, were in fact in breach of those obligations...I am satisfied that the words of s.1(2)(c) [Equal Pay Act 1970], whilst on the face of them unequivocal, are reasonably capable of bearing a meaning which will not put the United Kingdom in breach of its treaty obligations. This conclusion is justified, in my judgment, by the manifest purpose of the legislation, by its history, and by the compulsive provision of s.2(4) of the [European Communities] Act 1972." It is well established that in appropriate circumstances words may be interpolated into the legislation in order to achieve the purpose and effect of a directive.

17. Mr Michell further relied on a line of authorities under the Human Rights Act 1998 (HRA 1998). HRA 1998 provides in s3(1) that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with convention [European Convention of Human Rights] rights." Mr Michell sought to use the case law from HRA as to what it is "possible" to read into domestic legislation to give effect to Convention rights, to this Tribunal as a guide to the interpretative duty in EC law. Indeed in *Ghaidan v Godin-Mendoza* [2004] 3 All ER 411 it was observed by Lord Steyn that "the undoubted strength" of the "interpretative obligation" under EC law was "a significant signpost to the meaning of s.3(1) HRA 1998. In that case, drawing on EU law, the task of interpreting legislation consistently with Convention rights was described by Lord Rodger. He distinguished between the impermissible process of amending legislation and the duty to interpret legislation in accordance with Convention rights. The starting point is a careful consideration of the essential principles and scope of the legislation being interpreted. "When the court spells out words that are to be implied, it may look as if it is "amending" the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation.
18. It is the effect of the implication of words into a domestic statute, not the form, or the precise number of words used, that should be the focus of attention.

Respondents' submissions

19. For the Respondents it was submitted that the DDA 1995 cannot be interpreted to accord with the Directive without distorting its meaning and intention for a number of reasons. Firstly the DDA is clear and unambiguous and intentionally restricted to disabled people only. The government consciously and specifically excluded associative discrimination, notwithstanding the representations of the DRC (As then was) to the contrary. That remained the UK government position before the ECJ in these

sm

proceedings.

20. The Respondents further submitted that the final date for the UK's enactment of the Directive post dated the Claimant's claims in this case and the Directive could not be relied on retrospectively (see *Lloyd-Brigden v Worthing College* UKEAT/0065/07).
21. Finally it was submitted by the Respondent that a court or tribunal may only interpret national legislation in accordance with a directive so far as is possible without distorting its true meaning. To interpolate words as suggested by the Claimant to include a class of claimant specifically excluded in the drafting of the domestic legislation would be to introduce something very different and to disport entirely an objective reading of the Act. They noted that the OED definition of "interpolate" is to "introduce something different...to give a false impression."

Conclusions

22. I am satisfied that the intent of the 2003 Regulations and the purpose of the amendments to the DDA 1995 effected by those Regulations was, without reservation, to put the Directive into full effect in the United Kingdom. The "manifest broad intention" of Parliament was correctly and comprehensively to implement the Directive. It is not only my presumption but was made clear in the explanatory memorandum to the regulations that the "manifest and express purpose" of the 2003 Regulations was to produce full compliance with the UK's obligations to implement the Directive.
23. The regulations came into force with effect from 1 October 2004. Under the Directive member states were required to adopt laws, regulations and administrative provisions necessary to comply with the directive by 2 December 2003. However, member states were permitted, if necessary, an additional 3 years to implement the provisions concerning disability discrimination, subject to informing the Commission forthwith and annual reporting. There was no suggestion that the UK government availed itself of the potential extension beyond 1 October 2004. In any event, I dealt with this in paragraph 22 of the judgment of 23 May 2006, a conclusion which was not disturbed by the EAT.
24. I therefore agree with the Respondents' submissions only insofar as allegations of discrimination pre-date 1 October 2004, but the bulk of the allegations are said to have taken place on or after 1 October 2004, and so the matter does not end there.
25. Is it possible, by interpolation or other interpretive or implicative device to construe DDA 1995 as prohibiting associative discrimination in the context of direct disability discrimination and harassment from 1 October 2004?
26. It is now abundantly clear that the Directive prohibits associative discrimination and that such form of discrimination is central to the concept of discrimination and offends the principle of equal treatment, autonomy, human

sm

dignity and self-respect.¹ The DDA 1995 as amended must in the absence of express and unambiguous indication to the contrary share that purpose. The mere omission of a reference to a category of claimant of those who associate with a disabled person or people is not, in my view, sufficient to amount to an unambiguous indication to the contrary.

27. The intent and purpose of the amendments contained in the 2003 Regulations was to put the Directive into effect in the United Kingdom legislation.
28. It is therefore my duty to interpret the domestic legislation insofar as possible to achieve that effect. I find the examples given by Lord Rodger in *Ghaidon* of the various ways in which this may be done to be instructive and helpful. He refers to "a particular phrase which causes difficulty and to read words in that modify it so as to remove the incompatibility", or a court may "read in words that qualify the provision as a whole", or to "read down the provision so that it falls to be given effect in a way that is compatible with the rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights." The OED definition of "interpolate" helpfully provided by the Respondents is consistent with the exercises described.
29. In other words, a court or tribunal in a situation as here, is called upon, as far as possible, to achieve a result that accords with the meaning of the Directive or Convention right as the case may be, insofar as that is possible. So when it was observed and accepted by everyone – myself, HHJ Clark, Mr Moretto, Mr Allen QC, Mr Michell and most recently in the Respondents' written submissions that "it is quite clear that on a literal interpretation, associative discrimination is not covered by the DDA 1995," it is to ask oneself the wrong question.
30. Is Mr Michell's interpretation Mission Impossible, as submitted by the Respondents? In light of the extent of my duty, and the absence of an express and unambiguous indication to the contrary, the answer has to be that it is not. It is therefore possible to interpret DDA 1995 so as to accord with the Directive, by adopting a purposive, non-literal approach, which is what I am required to do. The principle applies to both direct discrimination and harassment. The ultimate sentence in the clause 2.3 of the Directive entitling member states to define the concept of harassment in accordance with national laws and practice, does not enable a members state to derogate from the principle of associative harassment.
31. In terms of the method or form to be adopted to achieve such a result, the interpolations suggested in annex 1 of the skeleton argument of Mr Michell, fit the bill. The insertion of "or a person associated with a disabled person" in the appropriate places in ss.3A(5) 3B and 4, can be described in a number of ways, as articulated by Lord Rodger. It could be expressed as reading in words that modify so as to remove the incompatibility, or perhaps qualifying the provision as a whole – both of which are techniques approved by Lord Rodger.

¹ See paras 8-14 AG Poiares Maduro opinion in this case before the ECJ

sm

32. It therefore follows that the DDA is capable of interpretation, consistent with the interpretation of the Directive set out by the ECJ so as to include associative discrimination without distorting the words of the statute and consistent with the domestic courts' responsibility to arrive at a construction which ensures that the Directive is fully effective, as Parliament intended when passing the 2003 Regulations.
33. Those interpolations are set out in the following form of words, the underlined words being those interpolated into sections 3A(5), 3B and 4 DDA 1995 :

s.3A Meaning of "discrimination"

"s.3A(5) "A person directly discriminates against a disabled person or a person associated with a disabled person if, on the ground of the disabled person's disability, he treats the disabled person or a person associated with the disabled person less favourably than he treats or would treat a person not having that particular disability or association (as the case may be) whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person or the person associated with the disabled person."

s3B Meaning of "harassment"

"(1) a person subjects a disabled person or a person associated with a disabled person to harassment, where for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –

- (a) violating the disabled person's dignity or the dignity of a person associated with a disabled person,
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

"(2) Conduct shall be regarded as having the effect specified in (a) or (b) sub-section (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person or (as the case may be) a person associated with the disabled person it should reasonably be considered as having that effect."

4. Employers: Discrimination and Harassment Employers: Discrimination and Harassment

"4(1) it is unlawful for an employer to discriminate against a disabled person or a person associated with a disabled person -

- (a) in the arrangements which he makes for the purpose of determining to whom he should offer employment;
- (b) by refusing to offer, or deliberately not offering him, employment.

sm

(2) It is unlawful for an employer to discriminate against the disabled person, or a person associated with a disabled person, whom he employs –

(3) It is also unlawful for an employer, in relation to employment by him, to subject to harassment –

(a) a disabled person or a person associated with a disabled person whom he employs, or

(b) a disabled person or a person associated with a disabled person who has applied to him for employment”

34. For the sake of completeness I should mention that Mr Michell had a second formulation of the interpolations required which was set out at annex 2 of his skeleton which go beyond what would be required for the purposes of this case. For the purposes of the decision before me, namely whether DDA 1995 as amended by the 2003 Regulations can be interpreted consistent with the Directive so that Mrs Coleman establishes a valid cause of action, it is only necessary for me to interpolate the words set out above which I do.

35. In conclusion, therefore the Tribunal has jurisdiction to consider Mrs Coleman's complaint insofar as it concerns complaints from 1 October 2004 (matters prior to that date may be considered as background evidentiary material only) and the matter will proceed to a full Hearing.

Mary Stacey

EMPLOYMENT JUDGE STACEY

Date: 25th November 2008

Reasons sent to the parties and entered in the Register on: 26 : November 2008

K. S.

for Secretary of the Tribunals

