Appeal No. UKEAT/0337/19/JOJ (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 1 December 2020
Judgment handed down on
22 January 2021

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MS TANYA CUMMING — APPELLANT

BRITISH AIRWAYS PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SPENCER KEEN (of Counsel) Instructed by: OH Parsons LLP Third Floor Churchill House Chalvey Road East Slough SL1 2LS
For the Respondent	MS TALIA BARSAM (of Counsel) Instructed by: Harrison Clark Rickerbys Solicitors Overross House Ross Park Ross-On-Wye HR9 7US

A **SUMMARY**

The Claimant was a female member of British Airways (BA's) Eurofleet aircrew. BA had a policy (accepted as being a PCP) that members of crew who took parental leave under the **Maternity and Parental Leave etc Regulations 1999** would have one paid rest day removed for each three days' parental leave taken in any monthly roster. She claimed that this policy involved indirect discrimination on grounds of sex because a higher proportion of women took parental leave than men and that the policy therefore put women at a "particular disadvantage". It was common ground that the appropriate "pool" for comparison was all crew members (both male and female) who had childcare responsibilities. The Employment Tribunal (ET) rejected the claim on the basis that all crew members (whether male or female) who took parental leave would lose the paid rest day(s). This was an error of law since not all crew members with childcare responsibilities would necessarily take parental leave and the proper comparison was between the impact of the policy on women with childcare responsibilities and the impact on men with childcare responsibilities. The Claimant's appeal was allowed.

BA cross-appealed on the basis that the ET was wrong to find that the policy involved any "disadvantage" at all. The ET had decided in effect that it was self-evident that this was so but did not consider BA's arguments that it did not represent a "disadvantage" but was in effect a function of the rostering system. BA's arguments were worthy of consideration and the ET therefore made an error of law in failing to consider them; BA's cross-appeal was therefore allowed.

The "particular disadvantage" and "disadvantage" issues were remitted to a fresh ET to be considered again on the same evidence along with the issue of justification which remained outstanding.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is a case about indirect discrimination. Section 19 of the **Equality Act 2010** provides:

> "
>
> **(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.**
>
> **(3) The relevant protected characteristics are—**
>
> **…**
>
> **sex**
>
> **…"**

Section 23(1) provides:

> **"On a comparison of cases for the purposes of section … 19 there must be no material difference between the circumstances relating to each case."**

2. Ms Cumming, who works in the British Airways "Eurofleet" air crew, claimed that BA indirectly discriminated against her on the basis of her sex by applying to her a policy of removing one paid rest day from her monthly roster for every three (unpaid) days of "parental leave" taken. There was no issue that this policy was a "PCP" for the purposes of section 19 which applied equally to men and women but the Employment Tribunal in Watford (EJ Smail, Mr R Leslie and Mr S Bury) found that it did not put women at a "particular disadvantage" when compared with

men and therefore dismissed her claim without needing to consider whether the policy was a proportionate means of achieving a legitimate aim.

3. Ms Cumming appeals against the finding on "particular disadvantage". BA cross-appeals on the basis that the Tribunal was wrong to find that the policy involved any "disadvantage" at all.

Factual background

4. In a normal working month, full-time air crew in the Eurofleet are rostered with ten paid rest days and 20 or 21 work days depending on the month (or 9:19 in February). Under Part III of the **Maternity and Parental Leave etc Regulations 1999** and BA policy (EG404) staff with parental responsibilities are also entitled to take unpaid "parental leave" in certain circumstances if they wish.

5. In 2010 a policy was introduced by BA whereby one paid rest day was removed from the roster for every three parental leave days taken in a month. The policy was designed to avoid a possible perceived unfairness which could result, for example, from an employee being able to take three weeks' parental leave in a month and having the remaining ten days in the month rostered as paid rest days. Surprisingly, there was no evidence of any written record of this policy and it was (and remains) a moot point whether it was agreed with the relevant union. Exactly how it works out in practice and whether its effects are fair and proportionate are issues which remain to be considered.

6. Ms Cumming actually worked part-time (75%) but the parties were agreed this was immaterial. She had two daughters under the age of 18 and she arranged to take parental leave on 2, 3 and 4 July 2017. In accordance with the policy she was rostered with one less paid rest

day in July 2017 than would otherwise have been the case; she replaced it with an accrued day's paid leave in lieu.

7. Ms Cumming claimed that this put her at a disadvantage which involved indirect discrimination. In support of her case she relied on various statistics. The Eurofleet air crew workforce was 2,500. Of these, 1725 (69%) were women and 775 (31%) were men. Those who took parental leave over a certain period (I was not told what it was) were 417 women compared to 92 men, that is a ratio of 82:18. It followed as a matter of mathematics that 24.2% of the women in the crew (i.e. 417/1725) took parental leave but only 11.9% of the men (i.e. 92/775) did so; it appears that this particular statistic, which seems to me the most relevant one, was not expressly drawn to the Tribunal's attention.

Appeal: "particular disadvantage"

8. The law in relation to indirect discrimination was considered comprehensively by the Supreme Court in **Essop v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice** [2017] UKSC 27. Lady Hale (with whom all the remaining SCJs agreed) identified six salient features of indirect discrimination, of which five may be relevant in this case:

> **"[24] The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation why a particular PCP puts one group at a disadvantage when compared with others …**
>
> **…**
>
> **[26] A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men …**
>
> **…**
>
> **[27] A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage …**
>
> **…**
>
> **[28] A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence …**

…

> **[29] A final salient feature is that it is always open to the respondent to show that the PCP is justified – in other words, that there is a good reason for the particular … requirement … The requirement to justify a PCP should not be seen as placing an unreasonable burden on respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question …"**

At paragraphs [40] and [41] Lady Hale considered the law in relation to the group or "pool" from which the comparison is made for the purposes of section 19(2)(b). She referred to remarks of Sedley LJ to the effect that the pool chosen should be that which suitably tests the particular discrimination complained of and that identifying the pool was not a matter of discretion or fact-finding but of logic. She quoted a further remark of Sedley LJ's when he gave leave to appeal in that case:

> **"There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition."**

At paragraph [41] she quoted from the relevant **Equality and Human Rights Commission Code of Practice** which states:

> **"In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively."**

She concluded:

> **"In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it … There is no warrant for including only some of the persons affected by the PCP for comparison purposes …"**

9. In this case the Employment Tribunal recorded that it was common ground that the appropriate pool for comparison was one containing the female members of the Eurofleet air crew with childcare responsibilities and the male members with such responsibilities (see paragraphs 18 and 23): it has not been suggested that this was inaccurate or that such a pool would be

inappropriate. The Tribunal then went on to decide (in effect) that since both 100% of the women and 100% of the men who actually took parental leave suffered the disadvantage of having rostered rest day(s) removed there was no "particular disadvantage" to women (see paragraphs 18 and 24). It seems to me that there is an obvious problem with the Tribunal's reasoning here in that not all those with childcare responsibilities necessarily apply for and take parental leave, so the proportion of men and women respectively in the identified pool who are put to a disadvantage arising from the PCP are not necessarily, as the Tribunal would have it, 100% all round.

10. Ms Cumming's case as put to the Employment Appeal Tribunal (EAT) by Mr Keen is that the PCP put women at a particular disadvantage because women bear the bulk of childcare responsibilities and they were therefore "more likely to apply to take parental leave" and thus to be put to a disadvantage by the PCP (see paragraph 13 Notice of Appeal). This proposition was sufficiently established, he said, by the statistics I refer to above along with Lady Hale's observation in the **Essop** case at paragraph [26] (repeated in another context at paragraph [39]) that women tend to "bear the greater responsibility for caring for the home and family than … men". In summary Ms Barsam for BA says in response (a) that this was not the case put to the Employment Tribunal and (b) that the evidence presented was not sufficient in any event to establish such a case.

11. On (a), it is suggested that the case now raised involves an expansion of the pool to comprise the entire cabin crew (see paragraph 26 of BA's skeleton argument); I reject that argument: the pool relied on is the one that the Tribunal recorded as being common ground, i.e. a pool comprising "cabin crew with childcare responsibilities". In exploring issue (a) I was referred to Ms Cumming's skeleton argument for the hearing before the Tribunal (prepared by

Ms Baumgart who represented her below) to see exactly how the case was put to the Tribunal. It would be fair to say that the case set out at paragraph 39 of the skeleton (see: p116 of EAT bundle) is not put as clearly as it might be and there is no reference to what I regard as the most relevant statistic; but nevertheless I consider that the basic point is sufficiently made there. I reject the notion that the case being put by Mr Keen in the EAT is a new one.

12. On (b), Ms Barsam says that the statistics only showed that a greater number of women applied for parental leave than men (see paragraph 18 of skeleton argument) and that there was no evidence that female cabin crew bear the bulk of childcare responsibilities as compared with male cabin crew (see paragraph 20 of skeleton argument). In the light of Lady Hale's observations referred to above, I do not think that there was any need for evidence to show that female cabin crew (like any other group of females) bear the bulk of childcare responsibilities; and in any event the *explanation* for a higher proportion of women applying for parental leave was not necessary in order to establish indirect discrimination. As to the statistics, it was plain as a matter of mathematics that a far greater proportion of *all* the female members of the crew took parental leave than the proportion of *all* male crew. However, as far as I can see, what was missing was specific evidence as to the numbers of crew (female and male respectively) who had children of the relevant age (and thus childcare responsibilities); this was the pool that the ET was invited to consider and the relevant one for the purposes of the case she was seeking to put. It seems to me that this gap in the evidence may have been fatal to Ms Cumming's case, but not necessarily; there may be an argument that Lady Hale's general proposition was sufficient to establish the case along with the statistics relating to the whole of the crew or that in any event there was no reason to think that the proportion of men in the crew with childcare responsibilities differed materially from the proportion of females with such responsibilities. Such arguments would be for consideration by the Employment Tribunal.

13. I therefore consider that Ms Cummings has established that there was an error of law in relation to the reasoning of the Tribunal on "particular disadvantage" and that they failed properly to consider the case she was putting. The matter should therefore be remitted for further consideration, although in fairness no further evidence should be allowed to be presented.

Cross-appeal: "disadvantage"

14. At paragraph 25 of the Judgment the Tribunal appears to have regarded it as self-evident that the application of the PCP involved a "disadvantage", "namely the loss of a paid rest day". BA had maintained that this was not the case and that there was in fact no disadvantage because all that the policy did was to deem periods of unpaid parental leave to include rest days in the usual proportion of one out of three (see BA's skeleton argument dated 6 May 2019 at paragraphs 3 and 15). Mr Keen says that this point is a bad one but it seems to me that it was at least deserving of consideration by the Tribunal. On this ground alone it seems to me that the cross-appeal should be allowed and the issue remitted to the Tribunal.

Disposal

15. I therefore allow both appeal and cross-appeal. The case will have to be remitted to the Employment Tribunal to consider whether BA's policy of removing one paid rest day from the monthly roster for every three (unpaid) days of "parental leave" taken:

(a) put (or would put) anyone in the Eurofleet crew with childcare responsibilities at a "disadvantage";

(b) put (or would) put women in that group at a "particular disadvantage" when compared with men in that group; and (if necessary)

(c) was a proportionate means of achieving a legitimate end.

Subject to any submissions the parties wish to make, I consider that the case should be remitted to a fresh Tribunal. As I have already indicated, fairness requires that the parties are not at liberty to present any additional evidence and they will have to make their respective cases as best they can based on the evidence already produced.