Case Number: 1303317/2017

EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
v	
Mr A Britliff	**Birmingham City Council (1)** **Ms S Manzie (2)**

PRELIMINARY HEARING

Heard at: **Birmingham** **On: 13 July 2018**

Before: **Employment Judge Woffenden**

Appearances
For the Claimant: In Person
For the Respondent: Mr. J Meichen of Counsel

RESERVED JUDGMENT

1. The No.1181 (Definition of Treaties) United Nations Convention on Rights of Persons with Disabilities Order 2009 is not of direct effect and does not incorporate the Convention into UK law and does not provide the claimant with a route to claim for disability discrimination outside of the Equality Act 2010.

REASONS

1. By a claim form presented on 9 October 2017 the claimant (a social worker employed by the respondent between 1 December 2008 and 15 May 2017) brought claims of unfair dismissal and disability discrimination.

2. A preliminary hearing (for case management purposes) took place on 23 February 2018 before Employment Judge Self. He decided there should be an open preliminary hearing (listed for one day) to determine whether or not the No. 1181 EC (Definition of Treaties) United Nations Convention on Rights of Persons with Disabilities Order 2009 ('the CRPD Order') is of direct effect and thereby incorporates the Convention into UK law and provides the Claimant with a route to claim for disability discrimination outside of the Equality Act 2010 (EqA). He also gave some directions to enable the parties to prepare for that Preliminary Hearing.

3. Following correspondence from the claimant in which he raised concerns that insufficient reasonable adjustments were being made to enable him to present his case effectively there was a preliminary hearing (to consider reasonable adjustments to the tribunal proceedings) on 11 June 2018 before Acting Regional Employment Judge Findlay. By the time of that hearing it had been accepted by the respondent that the claimant has a disability within the meaning of section 6 of the EqA in relation to the conditions on which the claimant relies for that purpose (sleep apnoea; anxiety and depression). Acting Regional Employment Judge Findlay gave some further directions in relation to the Open Preliminary Hearing and also provided details of reasonable adjustments to be made for the claimant in relation to hearings generally.

4. At the commencement of this hearing I asked the claimant how he was and he told me he was feeling stressed and tired and had had only 3 hours sleep. I discussed with him any further reasonable adjustments needed. He remained content to request breaks as and when he needed them and confirmed he preferred to make his submission first. He did mention (and I said I would note this for the purpose of any final hearing) that although he does not object to the presence of people in the tribunal room he would find noise made by them (such as typing) a problem.

5. The respondent had prepared a bundle of documents for use at today's hearing (508 pages). I read only those documents contained in it to which I was referred by the parties during the hearing. The respondent had also prepared a bundle of authorities (18 in all - 435 pages). The claimant's written submission was 10 pages (supplemented by oral submissions). The respondent's written submission was 6 pages (also supplemented by oral submissions). The volume of material and length of the hearing meant I could not give judgment on the day.

The Claimant's Submissions

6 I summarise the claimant's submissions as follows:

6.1 The United Nations Convention on the Rights of Persons with Disabilities ("the UN Convention") has been incorporated by UK domestic statute, has direct effect and has to be permitted in an employment tribunal as it has precedence over "most domestic law."

6.2 Under Council Decision 2010/48/EC 26 November 2009 the European Union ("EU") acceded to the UN Convention.

6.3 The CRPD Order (a draft of which had been laid before and approved by resolution of each House of Parliament) specified the UN Convention as a treaty under the European Communities Act 1972 ("the EC Act"). It was made on 13 May 2009.

6.4 He relied on paragraphs 17 and 60 of the decision of the Supreme Court in **Miller and another v Secretary of State for Exiting the European Union [2017] UKSC 5** . They read as follows:

"17*… By contrast, "ancillary" treaties covered of the treaties entered into by the European Union or by the United Kingdom as a treaty ancillary to the EU Treaties. By virtue of section1 (3), even such an ancillary treaty did not take effect in UK law unless and until it was declared to do so by an Order in*

Council which had first to be "approved" in draft form "by resolution of each House of Parliament"…

60. Many statutes give effect to treaties by prescribing the content of domestic law in the areas covered by them. The 1972 Act does this, but it does considerably more as well. It authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation),EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes."

6.5 He submitted that the UN Convention must be complied with as it has "direct effect" under the EC Act.

6.6 He submitted claims for discrimination at work have to be made in the employment tribunal **(R v Secretary of State for Employment, Ex parte Seymour Smith)**.

6.7 He also relied on **P v Commissioner of Police of the Metropolis [2017] UKSC 65** in which Lord Reed said at:

"*27 In a case where directly effective EU rights are in issue, EU law must be the starting point of the analysis. It may also be the finishing point, since it takes priority over domestic law in accordance with the provisions of the European Communities Act 1972*."

He went on to say:

"*28.The Framework Directive confers on all persons, including police officers, a directly effective right to be treated in accordance with the principle of equal treatment in relation to employment and working conditions, including dismissals: article 3 (1) (c) …The United Kingdom is obliged, under article 9 (1), to ensure that judicial and or administrative procedures are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them. Under article 17, sanctions which are effective, proportionate and dissuades it must be applied. The procedures under national law must also comply with the general principles of effectiveness and equivalence, and with the right to an effective remedy under article 47 of the Charter of Fundamental Rights of the European Union.*

29. The principle of equivalence entails that police officers must have the right to bring claims of treatment contrary to the Directive before Employment Tribunals, since those tribunals are the specialist forum for analogous claims of discriminatory treatment under domestic law. They are expert in the assessment of claims of discriminatory treatment.. They therefore fulfil the requirements of the principal of effectiveness. To leave police officers with only a right of appeal to the Police Appeals Tribunal would not comply either with the principle of equivalence, since analogous complaints under domestic law can be made to an Employment Tribunal, nor with the principle of effectiveness, since (for example) the Police Appeals Tribunal cannot grant any remedy in cases where the discriminatory conduct is not such as to vitiate the decision of the misconduct panel.

30. There can be no question of the United Kingdom being entitled to deny police officers and effective and equivalent remedy, where their rights under the Directive have been infringed, as a matter falling within a national margin of appreciation. Nor, indeed, is it suggested that there could be. On the contrary, the right not to be discriminated against on grounds including disability is a fundamental right in EU law, protected by article 21 (1) of the Charter."

(I note that this case did not concern the UN Convention but the Framework Directive for Equal Treatment in Employment and Occupation which lays down a framework for combatting discrimination on grounds of religion belief disability age or sexual orientation ("the Framework Directive")).

6.8 He also relied on **Walker v Innospec Limited [2017] UKSC 47 i**n which the Supreme Court held that an employment tribunal was correct in disapplying paragraph 18 of Schedule 9 EqA because it was incompatible with the principle of non-discrimination on grounds of sexual orientation in the Framework Directive.

6.9 He also relied on **Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v Jarah [2017] UKSC 62** (in which the Supreme Court held that certain sections of the State Immunity Act 1978 were not consistent with the European Convention on Human Rights and the European Union Charter of Fundamental Rights and did not therefore apply to claims derived from EU law (in this case discrimination, harassment and breach of the Working Time Regulations 1998).

6.10 He reminded me that the Employment Tribunal was bound by rulings of the Court of Justice of the European Union ("CJEU"). He referred me to the case of **Mohamed Daouidi v Bootes Plus SL, (Case C-395/15)** in which CJEU held that the EU having approved the UN Convention its provisions were an "*integral part*" of the EU legal order and the Framework Directive was one of the EU acts relating to matters governed by it. It followed that the UN Convention "*may be relied on for the purposes of interpreting*" that Directive which must "*as far as possible, be interpreted in a manner that is consistent with that convention* (paragraph 41)."

6.11 He submits that an employment tribunal is required by domestic statute to rule on claims of discrimination and unfair dismissal ensuring it implements and rules on EU "law rights", as required under the European Union Charter of Fundamental Rights Article 47 (I note for the sale of completeness that Article 47 concerns the right to an effective remedy and a fair trial). The CJEU has also ruled that member states must allow citizens to enforce EU law in a similar way to domestic law, applying general EU principles of equivalence and effectiveness. He contrasts the respondent stance in his case with its position in **Abdulla and Others v Birmingham City Council [2010] EWHC** in which claims for equal pay were brought in the High Court but not the tribunal and the respondent had applied to strike them out on the basis they could more conveniently be disposed of in the employment tribunal (from which I infer the claimant is of the opinion that the respondent is seeking to limit the claims he can make before an employment tribunal).

6.12 He submitted that CJEU had ruled the principle of effective judicial protection of individuals' rights under EU law was a general principle of EU law. As a human rights treaty the UN Convention must be complied with and national law must conform with EU law and national courts are required take into account the "*whole body of national law*" to achieve that principle.

6.13 He referred me in particular to articles 4 and 5 of the UN Convention submitting the UN Convention required it be complied with by the respondent and

the tribunal. The respondent was trying to prejudice his rights under the Convention in the tribunal and were in violation of it and article 26 of "*the Vienna Convention*" (which provides treaties must be binding and performed in good faith)

6.14 Finally, he relied on **Judgement Number 8, Permanent Court of International Justice-Case concerning the factory at Chorzow - Germany v Poland (1927)** which he said held that it was a principle of international law that a breach involved an obligation to make reparation

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6.15 I asked the claimant to identify for me the rights afforded to him under the UN Convention which were not provided by EqA. He told me they were the right to the highest attainable standard of health, the right to rehabilitation, the right to work and that there were no time limits within which claims have to be brought.

The Respondent's Submissions

7 I summarise the respondent's submissions as follows:

7.1 The respondent submitted the employment tribunal had no jurisdiction to consider a claim founded on the UN Convention.

7.2 The employment tribunal is a creature of statute and jurisdiction can only be conferred on it by either an Act of Parliament or an order made by an 'appropriate minister' in relation to contractual claims.

7.3 The effect of the CRPD Order (on which the claimant relied) was not to create a free standing right in domestic law outside the EqA.It did not confer jurisdiction on the employment tribunal to hear claims brought under the UN Convention.

7.4 The employment tribunal has no jurisdiction to hear free standing claims based on EU law .It must apply EU law (including the UN Convention in claims falling within its jurisdiction (ie claims under the EqA) and disapply domestic law insofar as it is incompatible with EU law.

7.5 Mr Meichen submitted that though employment tribunals do not have jurisdiction to hear claims brought under the UN Convention directly that did not prevent the claimant arguing some aspect of the EqA was incompatible with EU law. He said that in **Seymour Smith** for example Lord Hoffmann had agreed with the submission made on behalf of the employer that a person claiming to be entitled as a matter of private law to compensation for unfair dismissal should ordinarily bring proceedings in the industrial tribunal (as employment tribunals were then called), even if they would raise an issue of incompatibility between domestic and community law.

7.6 Mr. Meichen pondered whether there was some confusion had arisen because of the idea of '*free standing claims*.' He referred me to the case of **Biggs v Somerset County Council [1995] ICR 811** in which the expression was discussed. In that case Mummery J (as he then was) said "*In our view, an industrial tribunal only has jurisdiction to apply and enforce Community law in the context of a claim brought under one of the statutes, such as the Act of 1978, the equal pay act 1970 or the Sex Discrimination Act 1975, which confer jurisdiction*

on an industrial tribunal. An industrial tribunal does not have any inherent or general jurisdiction to hear cases under community law (or any other law). Its jurisdiction is entirely derived from specific domestic statutes. It does not derive its jurisdiction from the European Communities Act 1972, as such, though it is bound to apply relevant community law to cases arising within its jurisdiction. With respect, we are of the view that an industrial tribunal has no jurisdiction to entertain claims for infringement of "free-standing" rights outside the scope of the specific statutes which confer and define jurisdiction." Mummery J went on to summarise the interaction between Community law, domestic law and the jurisdiction of industrial tribunals. He said the position was in summary as follows: *"(a) the Industrial tribunal has no inherent jurisdiction. If statutory jurisdiction is confined to complaints that may be made to it under specific statutes, such as the Employment Protection (Consolidation) act 1978, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Equal Pay Act 1970 and any other relevant statute. We are not able to identify the legal source of any jurisdiction in the tribunal to hear and determine disputes about Community law generally.*
(b) In the exercise of its jurisdiction the tribunal may apply Community law. The application of Community law may have the effect of displacing provisions in domestic law statutes which preclude a remedy claimed by the applicant. In the present case the remedy claimed by the applicant is unfair dismissal. That is a right conferred on an employee by the Act of 1978 an earlier legislation. If a particular applicant finds that the Act contains a barrier which prevents the claim from succeeding but that barrier is incompatible with Community law, it is displaced in consequence of superior and directly effective Community rights.
(c) In applying Community law the tribunal is not assuming or exercising jurisdiction in relation to a "freestanding" Community right separate from rights under domestic law. In our view, some confusion is inherent in or caused by the mesmeric metaphor, "free-standing." "Free-standing" means not supported by a structural framework, not attached or connected to another structure. This is not a correct description of the claim asserted by the applicant. She is not complaining of an infringement of a "free-standing" right in the sense of an independent right of action created by community law, unsupported by any legal framework will not attached or connected to any other legal structure. Her claim is within the structural framework of the employment protection legislation, subject to the differential application of the threshold qualifying provisions in accordance with the E.O.C case [1994].C.R 317. So far as her right is subject to domestic law time limits, she can only have those removed by the application of Community law if, as explained above, time limits are themselves incompatible with Community law." He went on to say "*The imprecision in the expression "freestanding claims" has, in our view, created a misunderstanding. The claims are "free- standing" in the sense that they derive, ultimately, from a legal order recognised as superior in force to United Kingdom domestic law. It does not follow, however, that the two legal orders are independent or that Community rights are independent rights. Indeed, in most cases the reverse is the truth*."

7.7 Mr. Meichen concluded by submitting the CRPD Order did not give the claimant an independent right which he could enforce outside of the EqA .

8 The claimant responded by describing **Walker** as a 'free-standing" claim to the employment tribunal which the EqA had banned and **Biggs** was an old case. He described **P v Commissioner of Police of the Metropolis** as an example of a

free-standing claim .Normally domestic law would ban the claim but because of Article 9 (1), of the Framework Directive and article 47 of the Charter of Fundamental Rights of the European Union which 'overruled' domestic law the claim was remitted to the employment tribunal to interpret under EU law. Mr. Meichen had failed to address in his submissions whether the UN Convention was binding or the principles of effectiveness and equivalence.

Conclusions

9 The EU has implemented most of its equality issues by way of Directives e.g. the Framework Directive.

10 In the United Kingdom domestic legislation is enacted or amended to comply with its obligation to transpose Directives into domestic law.

11 One such piece of domestic legislation is the EqA which prohibits discrimination on grounds of protected characteristics (which include disability).It confers jurisdiction to the employment tribunal to determine complaints relating to a contravention of Part 5 of the Act (work) and a contravention of section 108 (relationships that have ended), section 111 (instructing, causing or inducing contraventions) and section 112 (aiding contraventions) that relates to Part 5.

12 If there is a conflict between a provision of EU law and a provision of domestic law ,EU law takes precedence .Individuals may ,in certain circumstances rely directly on a provision of EU law as giving rise to rights which are enforceable before domestic courts (the principle of ' direct effect').However such a provision would only have direct effect if it was sufficiently clear and precise ,unconditional and left no room for discretion in its implementation by the EU or member states and the deadline for implementation must have expired. In this case the claimant was unable to identify with precision the rights to which he says the UN Convention gives rise and on which he wishes to rely.

13 However be that as it may I am not concerned with whether the claimant can rely on directly on a directive or for that matter the European Convention on Human Rights or the European Union Charter of Fundamental Rights. I am concerned with the CRPD Order 2009. It does no more than specify the UN Convention as a community treaty for the purposes of the EC Act. The UK has ratified the UN Convention but has not incorporated it into domestic law. The Explanatory Memorandum to the CRPD Order 2009 states clearly at paragraph 7.1:
'*The UN Convention builds on existing international human rights instruments in order to explicitly reaffirm the human rights of disabled people .The UN Convention does not aim to establish new human rights for disabled people but sets out with greater charity the obligation on States to promote, protect, and ensure the human rights that disabled people already have, so that they are treated on an equal basis with other people*.'

14 The approach taken to the effect of the UN Convention in domestic courts is illustrated in **R (Davey) v Oxfordshire County Council 2017 EWHC 354** in which Lord Justice Bean agreed with the conclusion of Morris J in the court below who had held that the UN Convention *'is an unincorporated*

international treaty which, absent incorporation, creates no direct obligations in UK domestic law. But by ratifying a convention a State undertakes that wherever possible its laws will conform to the laws and values that the convention enshrines. A domestic UK statute must be interpreted in a way that is consistent with the obligations undertaken by the UK under any relevant international conventions. Words of a UK statute passed after the date of the treaty and dealing with the same subject matter are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it: see A v SSHD [2005] UKHL 71.'

15 Lord Justice Bean went on to say there was a strong presumption in favour of interpreting an English statute in a way that did not place the UK in breach of its international obligations, and accordingly the UN Convention could be resorted to as a construction of a particular provision in case of ambiguity or uncertainty. However, he warned great care must be taken in deploying provisions of a convention or treaty which set out broad and basic principles as determinative tools for the interpretation of a concrete measure such as a particular provision of a UK statute. Provisions which are aspirational could not qualify the clear language of primary legislation.

16 Thus the UN Convention may be used by the claimant as an interpretive aid to construction but it is not ,as submitted by the claimant, a source of substantive domestic legal rights. There are no 'free standing 'rights under the UN Convention. The CRDP Order 2009 is not of direct effect. It does not incorporate the UN Convention into UK law. The CRDP Order 2009 does not provide the claimant with a route to claim for disability discrimination outside of the EqA 2010.

Discussion about Reasonable Adjustments

17 At the end of the hearing I suggested to Mr. Meichen that both parties might benefit if he were to continue to represent the respondent in future hearings before the Employment Tribunal.

18 I asked the claimant for feedback about the adjustments for today's hearing. Although he had not hitherto raised any such concern with me he said the respondent had given him papers just before the hearing began which he had not had the opportunity to read. He reminded the respondent he was a litigant in person and said if he had had more time he could have gone back to case law to quote his sources.

19 I said that if the respondent had any other documentation which it wants to provide to the claimant after it receives from him the document on 21 September 2018 it must be sent to him no later to arrive no later than **4 pm on 25 September 2018**.If the claimant feels he needs more time to consider its contents he should ask the Employment Judge conducting the hearing for additional time on the day. That hearing will start at **10.00 am** and if he is not able to attend on time he should endeavor to update the tribunal with his anticipated time of arrival.

Employment Judge Woffenden

10 September 2018