Case Number: 3303135/2024

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Astin	v	Brunel University London

Heard at: Watford, via CVP **On**: 13 December 2024

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: In person
For the respondent: Ms Dee Masters, of counsel

JUDGMENT STRIKING OUT PART OF THE CLAIMANT'S CASE

1. The claimant's claim of indirect discrimination because of sex, contrary to sections 19 and 39(2)(b) of the Equality Act 2010 is struck out.

2. The claimant's claim for equal pay within the meaning of Chapter 3 of Part 5 of that Act continues.

REASONS

Introduction

1 On 13 December 2024, I heard submissions from both parties, having listed the hearing of that day on 30 August 2024 at a preliminary hearing of the sort which is routinely listed for claims of breaches of the Equality Act 2010 ("EqA 2010"). The submissions were in relation to the question whether the claimant's claim of indirect discrimination within the meaning of section 19 of the EqA 2010 had no reasonable prospect of success. The respondent had applied to strike out the claimant's claim of indirect discrimination on the basis that it had no reasonable prospect of success within the meaning rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, and I had myself at the hearing of 30 August 2024 raised the question whether the claim was viable. I

stated why I had done so in my record of that hearing, referring to the decision of the Court of Appeal in *Lord Chancellor v Coker* [2002] ICR 321 as the basis for doing so.

2 Both parties' submissions were advanced with courtesy and skill, and I am grateful to both the claimant and Miss Masters for that. We agreed that the claimant, despite being a solicitor, should be treated as a litigant in person, because her expertise is not in the law of employment, and in any event she was acting on her own behalf. As a result, I did my best to see how her claim might be advanced in a way which had enough of a chance to succeed for me to be unable to conclude that it had no reasonable prospect of success. However, for the reasons to which I now turn, I came to the clear view that the claim of indirect discrimination had no reasonable prospect of success. That was not the end of the claimant's case, as she had a perfectly viable claim for equal pay on the basis that her work was either like work or work of equal value to that of her comparators, and that claim continues.

The manner in which the claim of indirect discrimination was advanced

3 The claimant's claim of indirect discrimination was made in relation to the appointment to two part-time posts of Professor of persons who were already working for the respondent, but in voluntary capacities.

4 In preparation for the hearing of 13 December 2024, the claimant prepared what she called a "supplementary statement" and in it, she stated her claim of indirect discrimination in the following manner (at page 53, i.e. page 53 of the hearing bundle).

> "2. The Claim for indirect sex discrimination is based on the following:
>
> a. Two male solicitors were appointed as Professors of Professional Legal Practice by the Respondent, without any proper recruitment process being undertaken and in breach of the University's published Recruitment policies. The first appointment was announced to staff within the Law School on 1 September 2022; the second appointment was announced to staff within the Law School on 6 November 2023.
>
> b. I did not have the opportunity to apply for the posts as they were not advertised in the usual way, or in accordance with the University's stated policy and practice. Staff within the Law School were not made aware of the new posts by email, as is the usual practice when posts are being advertised. The first notice the Claimant had of the appointments was when they were announced by email in September 2022 and November 2023 respectively.

c. Further, the role/job description for the first post was clearly designed to reflect work the 1st appointee was already undertaking on a voluntary basis within the Law School. The role/job description for the second post was, in part, copied from that of the first post.

d. The posts were effectively created for two individuals known to senior staff at the University and/or the posts were designed and advertised in such a way as to ensure that two individuals known to senior staff at the University would be appointed."

5 On the following page, the claimant said that

"3. The way the posts were created and advertised was in clear breach of the University's Recruitment Policies and Procedures. ...

5. I understand the issue raised by Employment Judge Hyams to be whether the actions taken by the Respondent are capable of amounting to indirect discrimination.

6. My allegation is that these posts were created specifically for individuals known to senior staff within the University."

6 The claimant stated in paragraph 8 of her statement, at page 55, that she relied on a provision, criterion or practice ("PCP") within the meaning of section 19(2) of the EqA 2010 in the following form:

"The practice of creating posts for specific individuals known personally to those responsible for the creation of the posts without following a proper, open and transparent recruitment process, as set out in the Respondent's published policies (set out below at Para 18)."

7 The statement continued:

"**The particular disadvantage**

9. In the field of Professional Legal Practice men are more likely to be in senior positions, and more likely to be perceived as eminent legal professionals, such as to justify the creation of posts for their employment, than women.

10. To breach or manipulate a recruitment process so as to ensure the appointment at Professor level of men known through informal networks and perceived by academic staff as eminent in their field, such as to justify an appointment outside of the University's published policy, puts female legal professionals at a particular disadvantage; the process is entirely subjective and women are less

likely to be perceived as eminent so as to justify appointment outside the usual recruitment processes used by the University for senior appointments.

11. The impact of such a practice within the University is already apparent [and the claimant set out some statistics.]"

8 I could see that the claimant might have been able to say, if there had been a complaint that the respondent had invited applications from external candidates, that the proportion of women candidates who were eligible to apply for the posts was significantly smaller than the proportion of male candidates who were eligible to apply for the posts, and that therefore there was indirect discrimination within the meaning of section 19 of the EqA 2010, but that was not the claimant's case. Rather, as she confirmed when I asked her about it, it was as she stated in paragraphs 2(d), 6 and 8 of her statement, which I have set out above, namely that the respondent had created posts specifically for the two persons who were in fact appointed to them.

9 In fact, those posts had been advertised internally and for relatively short periods, so the claimant could have applied for them if she had seen the advertisements, but that was not relevant here. She did not see them, and did not apply for them.

The relevant case law

10 The judgment of the Court of Appeal in *Coker* in my view showed (and by the end of the submissions and discussions which I had with the claimant and Miss Masters, I had no doubt about this) that the claimant's claim of indirect discrimination had no reasonable prospect of success. That case was about the appointment of a special adviser to the Lord Chancellor. The factual background and the aim of the claimants in that case were stated succinctly and clearly by Lord Phillips MR in paragraphs 1-8 of the judgment which he gave, which was the judgment of the court. I found the following passage of particular significance in that it showed what was the aim of the claims in that case.

"*The object of the exercise*

6 The applicants have devoted very considerable time and resources to these proceedings. The hearing before the tribunal was preceded by a protracted interlocutory stage. In the course of this the applicants sought to obtain from the Lord Chancellor's Department answers to questions which the tribunal rightly described as oppressive. The Lord Chancellor protested that the proceedings were political. At the hearing 1,500 documents were put in evidence. The hearing lasted five days. The costs incurred must have been enormous. Neither applicant alleged that she should have been

appointed the Lord Chancellor's special adviser. Each simply alleged that she should have had the opportunity of being considered for the post. How and why has so much money and energy been devoted to seeking to establish that right?

7 At the outset of the hearing Mr Allen, on behalf of both applicants, provided the answer to these questions. These proceedings are supported by both the Equal Opportunities Commission and the Commission for Racial Equality. They deny any political motivation. Nor are they supporting the proceedings simply to attack the manner of appointing special advisers, objectionable though they say that is. The object of these proceedings is to challenge the practice of closed, or internal, recruitment.

8 The applicants and the two Commissions attack the practice of appointing employees from a circle of family, friends or acquaintances that is not balanced in race and gender—unless there is some special justification for so doing. They bring and support these proceedings in order to demonstrate that such practice is unlawful. They contend that if those that are known to an employer do not have a balanced mix of race and gender, the employer must cast his net wider, by advertisement or other means, before selecting an employee. Mr Allen made it plain that this contention extends beyond the practice of substantial commercial undertakings and of the white racial majority in this country. It extends to every small business where staff are recruited from family, friends or acquaintances that share a common racial grouping. If the applicants are correct, the implications of these proceedings are wide ranging."

11 In paragraphs 38-43 of the court's judgment, this was said.

"38 The test of indirect discrimination focuses on the effect that the requirement objected to has on the pool of potential candidates. It can only have a discriminatory effect within the two statutes if a significant proportion of the pool are able to satisfy the requirement. Only in that situation will it be possible for the requirement to have a disproportionate effect on the men and the women, or the racial groups, which form the pool. Where the requirement excludes almost the entirety of the pool it cannot constitute indirect discrimination within the statutes.

39 For this reason, making an appointment from within a circle of family, friends and personal acquaintances is seldom likely to constitute indirect discrimination. Those known to the employer are likely to represent a minute proportion of those who would otherwise be qualified to fill the post. The requirement of personal knowledge will

exclude the vast proportion of the pool, be they men, women, white or another racial group.

40 If the above proposition will be true in most cases of appointments made on the basis of personal acquaintanceship, it was certainly true of the appointment of Mr Hart by the Lord Chancellor. This was because those members of the elite pool who were personally known to the Lord Chancellor were, on the unchallenged evidence, reduced to a single man. However many other persons there may have been who were potential candidates, whatever the proportions of men and women or racial groups in the pool, the requirement excluded the lot of them, except Mr Hart. Plainly it can have had no disproportionate effect on the different groupings within the pool.

41 This conclusion accords with the submissions made to us by Sir Sydney Kentridge on behalf of the Lord Chancellor. Those submissions were accepted by the appeal tribunal, although the majority of that tribunal have not expressed their conclusions in precisely the manner that we have adopted.

42 Counsel for the applicants argued that there can be circumstances where a statistical approach to the test of disproportionate impact is not required. They referred us to *Briggs v North Eastern Education and Library Board* [1990] IRLR 181, *Hampson v Department of Education and Science* [1989] ICR 179 and *Commission for Racial Equality v Dutton* [1989] QB 783 in support of this submission. These were indeed cases where it was possible to conclude that a particular requirement would impact disproportionately on the pool of candidates, without the need to identify the precise composition of the pool. They have no relevance, however, to the facts of the present case. The present case is one in which it is possible to reach the conclusion that a requirement had no disproportionate impact, without the need to identify the precise composition of the pool on which the requirement impacted.

43 This conclusion disposes of the appeal."

12 I could see no material difference between the claim as it was advanced in *Coker* and the claim as it was advanced in this case.

13 The claimant pointed to what the Court of Appeal said in paragraphs 21-24 of its judgment and said that the fact that the court there said that

13.1 it was willing to proceed as 'as if the Lord Chancellor's Department had advertised the post of special adviser to the Lord Chancellor subject to the condition that "only those personally known to the Lord Chancellor will be

considered" and as if each applicant had desisted from applying for the post because of that condition', and that on that basis

13.2 "we think that it could properly be said that the Lord Chancellor's Department applied the condition to each applicant",

meant that I should not strike out the claim of indirect discrimination, not least because it was fact-sensitive and only after disclosure could the true position be known.

14 I found what was said in the whole of paragraphs 21-24 of the judgment in *Coker* to be helpful and informative. It was as follows.

'*Does section 1(1)(b) of each Act apply at all?*

21 Section 1(1)(b) of each Act provides that a person discriminates against another if he applies to that other a requirement or condition. Can it be said that the Lord Chancellor applied to either applicant, or indeed to anyone else, a requirement or condition? They did not apply for the post of special adviser to the Lord Chancellor. They were not aware that such a post was to be created. Had they known, they would have wished to apply for it. Had they applied, their applications would not have been considered because they were not personally known to the Lord Chancellor. Mr Allen argued that in these circumstances the Lord Chancellor "applied to" the Q applicants, and indeed to all others who were excluded from potential consideration for the post because they were not personally known to the Lord Chancellor, the "requirement or condition" that they should be personally known to the Lord Chancellor.

22 Sometimes an employer will create a post in order to employ a specific individual. The most common example is the husband who employs his wife as a part-time secretary. In such circumstances no "vacancy" ever exists, no selection for a post ever occurs and there is no question of any requirement or condition being applied to anyone else. We were inclined to wonder whether this was not the position in the present case. May it not have been that the Lord Chancellor decided to appoint a special adviser only because he thought that Mr Hart would be of value to him in that role?

23 Where an employer appoints an employee from within his circle of friends and acquaintances to fill a vacancy, can it properly be said that he has "applied" to those outside that circle the "requirement or condition" that they should be known to him "in the arrangements that he has made for the purpose of determining who should be offered that employment"? The reality is that he has applied no requirements or conditions to anyone. He has simply offered

someone known to him a job. We have great difficulty in seeing on the facts of this case how it can be said that the Lord Chancellor applied any requirement or condition to either of the applicants.

24 This is not, however, a point that was taken before either tribunal and, as will become apparent, it is not one that we have to resolve in order to decide this appeal. The employment tribunal approached the case on the basis that a vacancy had existed for the post of special adviser to the Lord Chancellor and that the Lord Chancellor's Department made arrangements for the purpose of determining who should be offered that employment. On the evidence, there is no basis upon which it can be suggested that that finding was perverse. Accordingly, we shall proceed as if the Lord Chancellor's Department had advertised the post of special adviser to the Lord Chancellor subject to the condition that "only those personally known to the Lord Chancellor will be considered" and as if each applicant had desisted from applying for the post because of that condition. On that premise we think that it could properly be said that the Lord Chancellor's Department applied the condition to each applicant.'

15 That did not in my view help the claimant, if only because the Court of Appeal nevertheless dismissed the appeal and decided that the claims should have been dismissed by the employment tribunal in that case, for reasons which were in my view wholly applicable to the facts of this case given that the complaint of the claimant was that each of the two posts in question was created with one individual in mind for them. I add that the fact that the same thing happened twice did not affect that conclusion. On each occasion, the "vast proportion of the pool" (using the words of paragraph 39 of the Court of Appeal's judgment in *Coker*) was excluded from consideration for the post.

16 For those reasons, I concluded that the claimant's claim of indirect discrimination within the meaning of section 19 of the EqA 2010 had no reasonable prospect of success and had to be dismissed.

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Employment Judge Hyams
Date: 16 December 2024

Sent to the parties on: 15/1/2025

N Gotecha
For Secretary of the Tribunals