Can a one-off decision amount to a PCP? Generally not, unless it can be shown that the decision, act or omission relied upon would be the same in a similar situation, says the Court of Appeal in Ishola v Transport for London [2020] EWCA Civ 112

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Background facts

Mr Ishola was employed by the respondent (TfL) as a customer services administrator. He was at all material times a disabled person suffering with depression and migraines. He raised a grievance about the conduct of a colleague in April 2015 which was not upheld, shortly after which he went on long-term sick leave. The sickness absence was managed by the respondent through a process of referrals to occupational health doctors and management review meetings. Ms Bhaimia was appointed as the "People Management Adviser" (or PMA) responsible for dealing with the claimant. The task of managing his absence on sick leave was given to Mr Walters.

In March 2016, following unsuccessful efforts to arrange a second absence review meeting with the claimant, he was referred again to occupational health by Mr Walters, who was seeking clarification on whether the claimant was still unable to return to his substantive role and whether he could take up a position in a less stressful area of the business. The claimant made various complaints about Mr Walters' behaviour and referred to the bullying and harassment policy but confirmed he did not wish to raise a grievance.

However the occupational health appointment did not take place as planned. Mr Walters wrote to the claimant in April 2016 confirming that he had asked for a further, final appointment to be arranged. This appointment did not ultimately take place, because the claimant said he was too unwell to attend. Further complaints were raised about Mr Walter's

behaviour (such as the use of red writing in an email). Mr Walters responded to the issues, albeit not to the claimant's satisfaction (the "April grievance").

On 10 May 2016 Mr Walters wrote inviting the claimant to a further sickness absence review meeting on 8 June 2016. By letter dated 30 May 2016, the claimant raised a further grievance, the letter being headed "*Bullying, disability related harassment and discrimination arising from disability complaints against Sophia Bhaimia (PMA)*". Ms Bhaimia was removed from the case and another PMA (Ms Ademolu) was appointed in her place. Ms Oduwole did not conclude her investigation or provide an outcome within the 28-day period identified as usual in the TfL's grievance policy. The outcome was dated 22 July 2016. It rejected the claimant's complaints.

Meanwhile the meeting of 8 June 2016 took place. The claimant did not attend or send a representative and nor did he make written representations. Ultimately Mr Walters concluded that the claimant had been unable to perform his role for more than 12 months and that there was no prospect of a return to work in the foreseeable future and terminated the claimant's employment on the ground of medical incapacity.

Proceedings

The claimant issued three separate claims, the appeal being concerned with his last claim for, inter alia, failure to make reasonable adjustments. The basis of this claim was that TfL had applied a PCP of requiring him to return to work without concluding a proper and fair investigation into his grievances.

ET and EAT

At first instance the claim was dismissed on the basis that there was no PCP operated by TfL because the alleged requirement was "a one-off act in the course of dealings with one individual". This decision was upheld by the EAT, Kerr J holding that:

"… It was, in my judgment, open to the tribunal to decide, without error of law, that the failure to resolve the April and May 2016 complaints before dismissal was not a PCP. It did not deal with any other individual apart from the claimant. Although a one-off act can sometimes be a practice, it is not necessarily one. I therefore dismiss that first remaining ground of appeal."

The claimant appealed, contending that an ongoing requirement or expectation that a person should behave in a certain manner (here, to return to work despite the outstanding grievances) is a "practice" within the meaning of s.20(3) Equality Act 2010. He relied upon

the case of British Airways Plc v Starmer [2005] IRLR 862 in which the EAT held that the tribunal was entitled to find that BA's decision in relation to a refusal to allow the claimant to work 50% of her hours *was* a requirement or a condition or a provision to work at 75% part-time at least in order to work part-time. This was notwithstanding that it was a discretionary management decision not applying to others.

The claimant contended that the approach of the EAT in Nottingham City Transport Ltd v Harvey UKEAT/0032/12 was wrong. That case involved a flaw in a disciplinary process, in which it was held that:

"there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustments, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

It was submitted by the claimant that if an employer takes any decision or action with effects or impacts capable of remedy by making a reasonable adjustment, it qualifies as a PCP. There is no need for any element of repetition given the availability of a hypothetical comparator in respect of whom every action or decision can be assumed to be applied. Accordingly, the argument goes so far as to submit that *all* one-off acts or decisions qualify as PCPs.

Court of Appeal

The Court of Appeal disagreed with this submission, finding that it distorts the purpose of the PCP in the context of failure to make reasonable adjustments and indirect discrimination claims. Whilst it was acknowledged that the words were not to be too narrowly construed, it was significant that Parliament had chosen the specific words that they had. If the legislation were to apply to all one-off acts or omissions, it was queried what the use of the word "practice" was, as opposed to merely use of words such as "act" or "decision".

At paragraph 36, Lady Justice Simler said of PCPs that:

"The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply."

She went on to find that "*all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again…Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.*" She distinguished the Starmer case on the basis that it was "*readily understandable as a decision that would have been applied in future to similarly situated employees".*

As such, the Court of Appeal found that the Employment Tribunal was entitled to conclude that the failure to investigate the 30 May 2016 grievance until after the dismissal was not a practice of requiring the claimant to return to work without a proper and fair investigation into his grievances. There was no evidence or finding of an expectation or assumption that the claimant should return to work notwithstanding the lack of a proper and fair investigation of his complaints. Nor was there any evidence or finding of such a state of affairs or of this being the way in which things were generally done in practice or to indicate that it was the way in which things would be done in future.

Commentary

The Court of Appeal reaffirms previous EAT decisions [such as Carphone Warehouse v Martin [2013] EqLR 481 in which it was held that *'lack of competence in relation to a*

particular transaction' was not a PCP] which made it clear that a one-off act, decision or omission which applied specifically to one individual does not come under the umbrella of a PCP, and thus provides helpful clarity in this area. The whole point of the legislation in respect of indirect discrimination/reasonable adjustments is to tackle the problem of organisation-wide policies or procedures which may inadvertently place disabled people at a disadvantage *in comparison* to non-disabled persons. One-off decisions applying to one individual clearly would not fall within this, unless of course the organisation made clear that they *would* treat others in exactly the same way if the same situation arose again. For instance in Pendleton v Derbyshire County Council [2016] IRLR 580 a teacher was dismissed for staying married to her husband following his conviction for making indecent images of children. This was an indirect discrimination case on the ground of religion, but the case centred around the issue as to whether or not there could be said to be a valid PCP when this was a situation which had never arisen previously and so the same test applies. The school made it clear that they would treat anyone else in the same way, albeit that the situation had not arisen before. That clearly took the case out of the 'one-off' incident category as the school were making it clear that they were proceeding on the basis of a policy which would have widespread application, albeit that it was a situation which was unlikely to arise again. This is an entirely different situation to the facts in the present case, as it was not being suggested by TfL that they would always make decisions on termination of employment before determining a grievance which had arisen during capability proceedings. Rather this was simply the chronology which took place in this specific case.

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