Pregnant then screwed? Treasury justified with its income support scheme

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Introduction

1. This is an appeal from the High Court decision R (On the application of Motherhood Plan & Anor) v HM Treasury & Anor [2021] EWHC 309 (Admin). The background to the appeal and a summary first instance decision can be found in the March edition of this newsletter, **here**.

2. In short, the Claimants brought a challenge to the Self-Employed Income Support Scheme ("SEISS" or "the Scheme"), introduced by the Chancellor at the start of the Covid pandemic. They argued that the Scheme indirectly discriminated against women who had recently taken a period of maternity leave (as it relied on average earnings in the past three years which were disproportionately low for this group), pursuant to Article 14 ECHR (non-discrimination) together with Article 1 of the First Protocol ECHR (right to protection of property). They further argued that the Scheme was in breach of the public sector equality duty (s149 EqA 2010). They lost both claims at first instance. In relation to the claim for discrimination under the ECHR, the judge concluded that there had been no prima facie breach, but if this was incorrect, in any event any breach would be justified as a proportionate means of achieving a legitimate aim.

3. Only the discrimination claim was the subject of the appeal to the Court of Appeal. The grounds of appeal were:

   (a) The judge misapplied the test for indirect discrimination under Article 14, namely whether there had been a disproportionate effect on this class of applicant, not whether there were "hidden barriers" to entry to the scheme;

   (b) The judge erred in failing to consider whether there was a failure to treat differently persons whose situations are significantly different (so-called "Thlimmenos" discrimination);

   (c) The judge erred in her approach to justification.

Decision (Underhill and Baker LLJ)

Indirect discrimination (Article 14 ECHR)

4. The Court of Appeal highlighted that there are key differences between indirect discrimination in the context of Article 14 and indirect discrimination in EU law (which underpins domestic law). EU law proscribes only discrimination against persons or groups with specified protected characteristics, whereas under the ECHR discrimination may be on the basis of "other status" as well. Furthermore, ECtHR jurisprudence defined indirect discrimination more generally **[54]**.

5. The High Court had relied on the decision in *Barry v Midland Bank* [1999] 1 WLR 1465 (among others), in which it was held that it was not indirect discrimination for the lower final earnings as a part-time employee to be used to calculate a termination payment. An analogy was drawn with the lower average trading profits of a recent mother used to calculate the Scheme payments, leading to the conclusion that this also was not indirect discrimination.

6. The Court of Appeal considered this reasoning to be flawed. It summarised the ratio of Barry to be that: *"It is essential to a claim of indirect discrimination that the group to which the claimant belongs should be differently treated from persons not in that group. In deciding whether there has been such a difference of treatment it is necessary to identify the true substance of the measure which gives rise to the claim, and that may involve a consideration of its purpose"* **[84]**. On this basis, it considered that it was not an appropriate analogy to the present case. The purpose of the Scheme was to compensate self-employed persons for their loss of profits as a result of the pandemic. The calculation using past profits was supposed to represent, in a rough-and-ready manner, their likely hypothetical no-Covid profits. In the case of new mothers, it produced results which were disproportionately unrepresentative of those profits. This put them at a particular disadvantage compared to others. By contrast, Mrs Barry's previous (whole-career) earnings were irrelevant to the earnings that she would have received but for her dismissal **[87]**.

7. The same reasoning applied to the High Court's reliance on *R (Adiatu) v HM Treasury* [2020] EWHC 1554 (Admin). In this case, it was argued that the rate of statutory sick pay ("SSP") under the Coronavirus Job Retention Scheme indirectly discriminated against women and some ethnic minorities because they are disproportionately represented in the lowest earning groups, and would therefore be least likely to be able to manage on a low rate of SSP. This argument was rejected on the basis that it was not the low rate of SSP that led to this disadvantage. By contrast, in the present case, the lower average earnings

of new mothers was central to the question of how much they could claim under the Scheme. As such, it was the formulation of the Scheme that placed this group at a disadvantage **[89-95]**.

'Thlimmenos' discrimination

8. Article 14 may impose a positive duty to treat individuals differently in certain situations and a failure to do so is a type of discrimination, often referred to as *"Thlimmenos discrimination"*. The judge at first instance rejected this claim for similar reasons to the claim for indirect discrimination. For the same reasons, therefore, the Court of Appeal considered this reasoning was flawed. However, given the decision on indirect discrimination, it did not consider it necessary to have a definitive view on the point **[96-98]**.

Proportionality

9. On proportionality, the Court of Appeal agreed with the High Court that the Treasury was justified in introducing the Scheme in the way that it did – given the need for speed and simplicity **[124-134]**.

10. As such, despite prima facie indirect discrimination being made out, the appeal was dismissed.

Conclusion

11. This decision has been heralded a success by the organisations that brought the claim. While it will not lead to any compensation or backpay for those affected, it does demonstrate that care must be taken not to discriminate when creating schemes that rely on factors which may be affected by periods of maternity (and other) leave. Nevertheless, it is another example of the courts affording the executive significant leeway when it comes to decisions taken quickly at the outset of the pandemic.

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