TOP DISCRIMINATION DECISIONS OF 2022: five cases education lawyers should know

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Introduction

1. Discrimination law is a complex and constantly evolving area of practice. Cases this year have provided clarification, enforcement and development of the legal principles underpinning claims under the Equality Act 2010 ('EqA').
2. Education practitioners will appreciate that the lion's share of such case law comes from discrimination cases in the context of employment law. Insofar as decisions relate to the provisions of the EqA, they will be of relevance to cases arising in education. However, it is important to acknowledge, that stepping away from legal principles, discrimination cases are notoriously fact sensitive and thus susceptible to being distinguished. Accordingly, an air of caution in approach will always need to be applied to meet the specific circumstances of a particular set of facts particularly in the education sector.
3. There are very many more than 5 cases from 2022 that practitioners will need to keep abreast of; I have chosen cases in this article based on interest and relevance.
4. For detailed updates throughout the year, I recommend that you consider registering to receive our Education and Employment & Discrimination Teams updates on our website: Articles Archive | 3PB Barristers (and select "subscribe").

Case 1:

The correct pool for comparison in indirect discrimination cases – *Allen v Primark Stores Limited [2022] EAT 57*

The Facts

5. A was employed as a store manager for P in Bury and was subject to a contractual requirement that managers were required to guarantee their availability to work late shifts. After a period of maternity leave, A applied for flexible working on the basis of childcare and concerns that she would not be able to guarantee her availability to work late shifts. There were 8 store managers employed in the Bury store and their contracts stipulated that they were required to work 1 of 4 shifts each day over a 5-day period which included one running from 10:30 to 20:30, the "late shift".

6. P did not grant A's flexible working application because there was insufficient flexibility on a Thursday to cover the late shift. P made a proposal to A but this still required her to work a Thursday late shift on occasion. A resigned and brought a claim in the Employment Tribunal, including for indirect sex discrimination.

7. The Provision, Criterion or Practice ('PCP') initially relied on was *"the requirement for department managers to guarantee availability to work late shifts"*. A argued that this PCP put women who were (a) department managers at that workplace or (b) department managers in the wider workforce at a particular disadvantage compared to men. The particular disadvantage was the difficulty or impossibility of working evenings while having childcare responsibilities.

8. P agreed that it had applied that PCP but denied it put women to a particular disadvantage (arguing objective justification in the alternative).

9. At the final hearing, A clarified that given P's proposal regarding the Thursday late shift that her complaint related to the more specific PCP of **being required to guarantee her availability to work the Thursday late shift**.

Legal summary

10. Pursuant to s.19 EqA', indirect discrimination takes place when:

    (a) A person (A) applies to another (B) a provision, criterion or practice (PCP) to persons with whom B does not share the relevant protected characteristic.

(b) The PCP 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 the characteristic.

(c) The PCP puts, or would put B at that disadvantage.

(d) A cannot show that the PCP is a proportionate means of achieving a legitimate aim i.e. objective justification.

11. The burden is on a claimant to establish the first 3 elements of the statutory test (Dziedziak v Future Electronics Ltd EAT 0271/11 and Essop and ors v Home Office (UK Border Agency) and another case 2017 ICR 640, SC).

12. The second element of the statutory test includes a requirement for a pool comparison exercise. The correct pool must be identified and this can is a notoriously difficult aspect of establishing indirect discrimination.

13. Those who are in the pool should be those who are affected by the PCP and whose circumstances are not materially different. As explained in Essop v Home Office (UK Border Agency); Naem v Secretary of State for Justice [2017] UKSC 27:

"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. This makes sense. It also matches the language of s.19(2)(b) which requires that "it" – i.e. the PCP in question - puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

14. The pool chosen must suitably test the particular discrimination complained of (Grundy v British Airways plc [2007] EWCA Civ 1020). This does not necessarily mean that only one pool is permissible, but the one chosen must realistically and effectively test the particular allegation before them. Indeed, there may be a range of logical options as Cox J considered in Ministry of Defence v DeBique [2010] IRLR 471, EAT:
"In reaching their decision as to the appropriate pool in a particular case, a tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them."

Identifying the pool for comparison in the ET

15. The Employment Tribunal ('ET') concluded that the pool should be of the departmental managers and trainee managers who potentially have to work the Thursday [late] shifts, however convenient or inconvenient to them it was. The ET focused on the Bury store only and after discounting certain managers concluded on a pool of 4 + A. Two of the male managers in that pool had informal flexible arrangements due to childcare and did not work the late shift on a Thursday (unless on a voluntary basis).

16. The ET concluded that in the pool it had identified, of the proportion of men and women in that pool who were disadvantaged by the PCP, two were men and one was a women (A), it therefore concluded that *"women were not at a particular disadvantage and therefore group disadvantage is not made out"*.

17. A appealed that decision, arguing that the pool was not correctly identified and that the ET's reasons for rejecting a wider pool were not adequate. A argued that the appropriate pool was the entire workforce subject to P's standard terms and conditions. A argued that the 2 male colleagues who had informal flexible arrangements should not have been included because they only worked the late shift on a Thursday on a voluntary basis opposed to having to work it. Further P's evidence was that there was a consideration that the 2 male colleagues working arrangements were pursuant to an implied term that had developed over time.

18. A's position was that as the PCP relied on was the requirement to **guarantee availability** to work Thursday late shifts the pool ought to have only consisted of those who were or who P considered were contractually obliged to work the Thursday late shift.

The correct pool – Employment Appeal Tribunal (EAT)

19. HHJ Eady (President) considered the case and the applicable legal provisions (as summarised above) and opined that if the choice of pool has a logical basis, i.e. it allowed the alleged discrimination to be tested there was no requirement to consider a different pool.

20. However, HHJ Eady did not agree with the pool identified by the ET and expressed that there was a material difference between the position of A and the 2 male colleagues. This was that A was required to guarantee her availability to work some Thursday late shifts but the two male staff were not required to do so (and would only do so voluntarily). The ET should have considered if there was an element of compulsion in making such a

request to the two male staff and therefore the pool identified by the ET did not suitably test the particular discrimination complained of.

21. The case was therefore remitted for a re-hearing. HHJ Eady did not express a view on whether the UK-wide pool was appropriate instead of a store specific pool.

Discussion

22. This is a useful reminder of the importance attached to identifying the correct PCP and comparative pool. In the present case, the PCP hinges on the difference between being "asked" and "required" to work a late shift on a Thursday. The pool must suitably test the particular discrimination complained of and an analysis of any material differences between the claimant and those in it. It is also likely to be necessary for the parties to advance alternative pools for comparison before the Tribunal.

Case 2:
Time limit extensions and the merit of claims – *Kumari v Greater Manchester Mental Health NHS Trust [2022] EAT 132*

The facts

23. K was unrepresented and presented complaints of direct race discrimination and/or harassment to the Employment Tribunal. The last act relied on took place on 8 October 2019. A grievance was raised on that date but did not refer to race. ACAS Early Conciliation took place on 16 January 2020 and therefore was beyond the three month time limit which applies to claims before an employment tribunal under s.123 EqA.

24. K later applied to amend her claim to include later events including one arising from a grievance investigation outcome letter from the Trust dated 9 December 2019 but in doing so he made no link between this letter and her race.

25. A preliminary hearing was listed to determine the time limit and amendment issues.

The legal principles

26. This was an employment case and thus the applicable time limits are contained in s.123 EqA. The relevant provisions relates to the discretion of the employment tribunal to extend time if it considers that it is "just and equitable" to do so pursuant to s.123(1)(b) EqA.

27. The onus to persuade the Tribunal that it is just and equitable to extend time is on the claimant.

28. Discretion to extend on the just and equitable basis is broad (Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA). However, it does not follow that exercise of the discretion is a foregone conclusion and the following questions should be answered:

    "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

29. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA;

    'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.' (para 25)

30. The Tribunal should assess all factors in a particular case it considers to be relevant including in particular the length of, and reasons for delay (Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23, CA).

The ET decision

31. The ET concluded that all of the acts complained of were out of time and considered whether to extend time on a just and equitable basis. There was a short delay, but the ET considered that K's claims were very weak stating:

    "Even on the claimant's case, it is difficult to discern anything which links the treatment received to the protected characteristic of race…In contrast, there are various points where Miss Kumari describes other staff at the respondent as being in the habit of acting in a particular way (e.g. sharing personal details) which would be detrimental to a range of staff and was not targeted at Miss Kumari (or others) on racial grounds."

32. In relation to the amendment application in respect of the letter received on 9 December, the tribunal refused the application:

    "Applying the balance of hardship, I have determined that the amendment should not be allowed. If granted, Miss Kumari would win the right to bring a claim, but it would not be the claim with which she is primarily concerned. It would also appear to me that it is a

weak claim. The respondent would face the cost and inconvenience of dealing with these proceedings in circumstances where, absent the amendment, all other matters have fallen away. In those circumstances, it appears to me that the balance of hardship is clearly against allowing the claim to proceed."

33. K appealed arguing that it was wrong for the ET to take into account the merits in a situation in which it was not said that the claims were so weak that they had no reasonable prospects of success.

The EAT decision

34. The EAT decided that it was not wrong in principle to consider the merits, over and above a conclusion that there were no reasonable prospect of success. It was held to be wrong to import the no reasonable prospect of success test into the just and equitable extension of time test as it does not form part of s.123 EqA and there is not any rule of procedure to that effect.
35. However, the EAT did recognise that assessing the merits of a prospective claim that caution is needed given that the judge will not have all of the evidence. this does not make it impossible in every case to make a fair assessment.

Discussion

36. Whilst a six-month time limit applies to education claims in the County Court and First-tier Tribunal, the just and equitable extension still applies to County Court cases under s.118(1)(b) EqA (and, if applicable, as extended by s.118(2)-(3) EqA).
37. Thus, there is potentially some scope for merits of the claims to be taken into consideration when determining time limits subject to a careful and cautionary approach as advocated by HHJ Auerbach. Quite often claims are misconceived or clearly do not grapple with the necessary aspects of the relevant statutory tests and this may therefore be good grounding for arguing that it would not be just and equitable to extend time.

Case 3:
Long covid found to be a disability – *Burke v Turning Point Scotland ET Case No. 4112457/2021*

The facts

38. B brought claims for unfair dismissal, disability discrimination, age discrimination and redundancy payment. B was dismissed for his continuing absence from work between November 2020 and his dismissal 13 August 2021. A preliminary hearing was listed to determine the issue of disability.

39. B relied on a physical impairment as "post-viral fatigue 10 syndrome" or "long Covid". This was diagnosed by a GP following a positive Covid test in November 2020. B's symptoms were varied such as severe headaches, fatigue and exhaustion when standing for long periods, walking, showering and dressing which meant that he would need to rest, he ceased to do activities such as cooking meals, ironing and shopping. He had joint pain in his arms, legs and shoulders and loss of appetite, and he did not feel well enough to socialise because of fatigue and headaches. Although his condition had gradually improved by April 2022 (joint pain and headaches resolved), he still had some fatigue and his sleep pattern was disrupted.

The legal principles

40. Section 6 EqA provides a definition of "disability" as follows:

    6(1) A person (P) has a disability if:

    (i) P has a physical or mental impairment; and

    (ii) The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

41. Section 212(1) EqA provides that "substantial" means more than minor or trivial.

42. Schedule 1 of the EqA gives further detail on the determination of a disability. For example, Schedule 1, paragraph (1)(i) provides that the effect of an impairment is long-term if it "has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected".

43. Part 2(ii) of Schedule 1 EqA provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In that context, "likely to" has been determined by the House of Lords as "could

well happen" rather than "more likely than not" (per *SCA Packaging Limited v Boyle* [2009] UKHL 37).

44. Paragraph 5 of Schedule 1 EqA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect.

45. The Tribunal must take into account the statutory guidance on the Definition of Disability (2011 as updated). The Guidance provides that day to day activities are things people do on a regular daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities.

The Employment Tribunal's decision

46. The Employment Tribunal concluded that:

    (a) Long covid does exist.

    (b) B had not exaggerated his symptoms.

    (c) The effect of the symptoms as evidenced by B (and his daughter) as summarised above, was an adverse effect on his ability to carry out normal day-to-day activities, with fatigue being the main issue latterly.

    (d) That due to the nature of long covid it is very difficult to predict when it will be resolved. In this case though, Turning Point Scotland had dismissed B stating that there was no foreseeable date upon which he was likely to return to work to full duties. The ET then concluded that *"it could well happen that the condition and its substantial effects would have lasted until end November 2021 thus complying with the condition that the substantial adverse effect was "long-term".*

Discussion

47. This appears to be the first case determining whether long-covid is a disability for the purposes of s.6(1) EqA. It is unlikely to be the last. However, it is important to remember that this is not a decision that anyone diagnosed with that condition automatically meets the definition of disability under s.6(1) EqA. The condition appears to be variable both as to symptoms and duration. The key for claimants is likely to be around the quality of evidence as to symptoms, impact and duration both from witnesses and treating physicians. Further, in this case the Employment Tribunal was referred to and appears

to have held weight in the TUC report entitled "Workers experiencing long COVID" which included a finding that 29 per cent of those who reported to the survey experienced symptoms for 12+ months, a summary of the symptoms and that they could vary over time (sometimes becoming worse on some days). The education sector is inevitably going to need to navigate around employees, students etc. with long Covid and this case is a sharp warning not to dismiss the potential severity of the condition.

Case 4: One off events vs conduct extending over a period – *Parr v MSR Partners LLP [2022] EWCA Civ 24*

The facts

48. P was an equity partner and a Membership Agreement specified for equity partners and others stated:

"Subject to the approval of the partnership committee, the Managing Partner may extend the Normal Retirement Date of an individual Member in circumstances where that Member indicates he wishes to continue as a Member or if the Managing Partner asks the Member to continue as a Member. The Managing Partner may only agree to such an extension where he objectively considers that there is a valid business case for so doing, having reference to the on-going contribution to the LLP Business by the Member concerned and the matters set out at clause 29.5. Any agreed extension shall be for a specific period of time, the conclusion of which will represent the Member's Normal Retirement Date and shall be on such terms as to remuneration and otherwise the Managing Partner may determine. The Managing Partner may alternatively agree that any retired Member may be employed by the LLP on such terms as the Managing Partner shall determine." [Clause 29]

49. The discretion within Clause 29 was used on at least 3 prior instances and on those occasions the decision was made to permit equity partners to continue beyond their normal retirement date as equity partners. P's normal retirement date was 30 April 2018 and prior to that date he proposed to MSR that he should continue. The Managing Partner recommended to the Partnership Committee that P should be permitted to do so but not as an equity partner and the Committee accepted that recommendation. The parties then entered into a "De-equitisation Agreement" on 13 October 2017. It stated P would not retire on 30 April 2018 and would continue as an ordinary (and not equity) partner.

50. A few months later MSR was transferred to another entity and certain parts were sold to other buyers. P stated had he remained an equity partner he would have been in receipt of around £3 million upon sale of the business.

51. P brought a claim of direct age discrimination in January 2019 and a preliminary hearing was listed to determine whether or not the acts complained of amounted to conduct extending over a period and whether the claim had been issued in time. The Employment Tribunal concluded that Clause 29 was a "rule" and whilst that continued there was a continuing act and a continuing state of affairs which resulted in less favorable treatment of C given that he had reached the age of 60.

52. MSR appealed arguing that it was a one-off decision and the claim was out of time. HHJ Mathew Gullick KC considered the matter before the EAT and upheld the appeal agreeing that it was a one-off decision (Moore Stephens LLP and Others v Parr UKEAT/0238/20/OO). The EAT's decision provides a detailed and helpful summary of the relevant legal principles in relation to one off acts and conduct extending over a period that practitioners may find particularly useful in considering this issue.

The Court of Appeal

53. The Court agreed with the EAT, it was a one-off act and dismissed the appeal. The clause could only be applied once to a person and that was 30 April 2018 in respect of P. The claim was therefore out of time. The demotion was compared to a dismissal which taken effect on a particular date but gives rise to continuing losses.

54. The case was remitted to the Employment Tribunal to consider whether it was just and equitable to extend time.

Discussion

55. The EAT and Court of Appeal decisions in this case provide a very helpful overview of the relevant legal principles. Anyone dealing with this issue will find those decisions to be particularly helpful. Cases on continuing acts or one-off decisions are fact specific but this case law is of invaluable assistance to practitioners.

Case 5:
Misunderstanding medical jargon and credibility – *Mr. A. Rehman v DHL Services Limited [2022] EAT 90*

The facts

56. R brought disability discrimination claims and relied on 3 conditions (1) keratoconus (eye condition); (2) temporomandibular joint disfunction (TJD) and a mental health impairment (stress/anxiety/depression). The issue in relation to disability was whether during the material time the impairments had a substantial and long-term adverse effect on R's ability to undertake normal day to day activities.

Relevant legal principles

57. The definition of disability is considered above.

The Employment Tribunal

58. The ET concluded that in relation to keratoconus R had, on different occasions, given accounts of his difficulties that were not entirely consistent. The Tribunal considered it significant that R's evidence that he finds it difficult to drive at night was not supported by medical evidence even though the condition was discussed in medical reports. In relation to TJD the ET concluded that R had exaggerated some of his symptoms and in doing so relied on a medical report, concluding that exaggeration;

    "is supported by Dr Misra [183.9.3] who identified a probable link between the claimant's pain tolerance, level of behavioural activity and mood variability as they made contribute to "unconscious magnification of symptoms."

59. Regarding the third impairment, the Tribunal concluded that it had doubts as to R's account generally. As a result the Tribunal concluded that no weight could be given to his evidence in so far as it was not supported elsewhere. It concluded that R's account on impact on day to day activities "was not to be believed" and concluded that he was not disabled at the material time.

60. R made two reconsideration applications. Within that a letter was provided from Dr. Mistra qualifying comments about unconscious magnification of symptoms:

"With regards to unconscious magnification of symptoms – this refers to the potential impact of psychological distress on physical symptoms. Specifically, it describes the maintaining and magnifying effect of increased psychological stress on pre-existing pain."

61. The ET accepted that the above clarification did not support its finding that C was exaggerating and inconsistent. However, notwithstanding that relied on its other credibility findings which it concluded spread across the "breadth and depth" of R's account and reached the same conclusion.

The EAT

62. The EAT concluded that the decision could not stand because the Employment Judge had misunderstood what "unconscious magnification of symptoms" meant. The Judge had clearly understood it to be evidence of exaggeration opposed to an explanation for a psychological distress worsening pre-existing pain.

Discussion

63. Quite often medical terminology can be unclear and confusing. This is particularly the case in disability discrimination and other SEN cases where conditions and diagnoses are complex. It is incumbent on the parties to ensure that any such matters are sufficiently clear but ultimately on the Tribunal to ensure that findings are made on a correct understanding. Conclusions reached on the basis of misunderstanding the medical evidence are thus highly likely to result in unsafe (and thus appealable) conclusions.

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