

SUMMARY

2016/54 Dismissing a Christian teacher for refusing to separate from her husband following conviction for sex offences was indirect religious discrimination (UK)

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Background

There are a number of component parts to the definition of indirect discrimination which are set out in section 19 of the Equality Act 2010. First, there must be a provision, criterion or practice (a 'PCP') which is applied to everyone. Second, the application of the PCP must put a group of people who all share a protected characteristic at a particular disadvantage when compared with the effect of the application of the PCP to people who do not have that protected characteristic. Third, the person complaining of the indirect discrimination must actually be put at a disadvantage. Fourth, if the above can be established, then whoever is applying the PCP has a potential defence if they can show that the PCP is a proportionate means of achieving a legitimate aim. If they cannot show this, then indirect discrimination will have occurred.

Facts

Ms Pendleton (the 'Claimant') was a committed Christian. She had been employed as a teacher at Glebe Junior School from September 2001. There were no concerns in respect of safeguarding at any time during her career and she had an unblemished disciplinary record. Nearly 12 years later in January 2013 the Claimant's husband (who was the head teacher of a nearby junior school) was arrested on suspicion of voyeurism and downloading indecent images of children. In July 2013 he was sentenced to a ten month term of imprisonment.

The Claimant was absent from work on sick leave from late January 2013. The situation was discussed at two Lead Authority Designated Officer meetings in January and March 2013 respectively. At the first meeting, it was concluded that the Claimant had no knowledge of her husband's activities. At the second meeting it was recorded that it "would not be appropriate to return to post if an employee's partner had been convicted of offences and they continue to support them but should she decide to leave [her husband] she would be supported."

At a meeting in April 2014 the Claimant confirmed that she would stay with her husband due to her belief in the sanctity of her marriage vows (which stemmed from her religious faith). In response, the charge of gross misconduct was put to the Claimant, being "the extent to which the trust and confidence, which others would have in your ability to carry out the safeguarding responsibilities of your role as Teacher [...] would be eroded whilst maintaining a relationship with your husband." At this meeting the Claimant asked if she had been invited to choose between her marriage vows and her career.

The Claimant reiterated that she would not end her marriage to the investigating officer at a further meeting in May. The Claimant was suspended on 20 August. At the disciplinary hearing on 12 September the Claimant was summarily dismissed on the grounds that she had "chosen to maintain a relationship with [her] partner who has been convicted of making

indecent images of children and voyeurism. This has led the panel to believe that [her] suitability to carry out the safeguarding responsibilities of [her] role [...] have been eroded. Furthermore the choices [she had] made in [her] personal life are in direct contravention to the ethos of [...] the [...] School.”

Judgment

The Claimant complained to the Employment Tribunal claiming unfair dismissal, wrongful dismissal and indirect religion or belief discrimination. Her claims of unfair dismissal and wrongful dismissal were upheld. On the claim of indirect discrimination on grounds of religion or belief, the Employment Tribunal held that the school had applied a PCP which was: “The practice of regarding as gross misconduct/SOSR [some other substantial reason for dismissal] a choice not to end a relationship with a person convicted of making indecent images of children and voyeurism” (the “PCP”).

The Tribunal accepted that Claimant had a protected characteristic (her religious belief). However, it found that the Claimant would have been dismissed irrespective of her belief. The Tribunal compared the application of the PCP to her (which resulted in her dismissal) with the application of that PCP to people who do not have that protected characteristic. It found that people who did not share that religious belief but otherwise chose to maintain a long term relationship in these circumstances would also have been dismissed. As such, the Claimant suffered no particular disadvantage and the Tribunal dismissed the claim of indirect discrimination on grounds of religion or belief.

The Tribunal did, however, find that if the Claimant’s group had been put at a particular disadvantage, there was no justification (a dismissal in these circumstances not being a proportionate means of achieving a legitimate aim).

The Claimant appealed about the finding that there had been no particular disadvantage. The Respondents then cross-appealed on (i) the finding that there had been a PCP; and (ii) that the dismissal would not have been justified as a proportionate means of achieving a legitimate aim.

The Employment Appeal Tribunal (‘EAT’) held that the comparative exercise to assess whether the PCP put the Claimant’s group at a particular disadvantage was incorrectly carried out because it focussed on the disadvantage of the actual dismissal.

The EAT found that instead the Tribunal should have compared the disadvantage suffered by both groups in being forced to choose between the sanctity of their marriage vows and their continued employment. It was the fact of being forced to choose that put the Claimant’s group

at a particular disadvantage.

The EAT found that although this was the first time these facts had arisen, this did not prevent the finding that a PCP was being applied. The EAT found that the Respondents did not need to have applied the PCP previously for the Tribunal to have been entitled to conclude that this is how they would usually respond in these circumstances and that therefore this was a PCP. The EAT held that there was no evidence to show that the dismissal was a proportionate means of achieving the legitimate aim and so this element of the cross appeal was also dismissed. The appeal was therefore allowed and the claim of indirect discrimination based on religion succeeded.

Commentary

The EAT's finding in respect of comparator groups is of interest. Once it had concluded that the Tribunal had considered the question incorrectly (and that the correct question was regarding the choice presented to the Claimant) the EAT found that it was one of those cases (recognised by the ECHR Code of Practice) where the PCP was intrinsically liable to disadvantage a group with a particular protected characteristic.

This case therefore demonstrates that although a PCP may subject everyone to a general disadvantage, it does not prevent that PCP from subjecting those with a protected characteristic to a particular disadvantage.

The decision is also interesting in its handling of when a 'one-off' incident may still be held to be a PCP. In order to succeed, the claimant had to identify a provision, criterion or practice that the employer had applied, or would apply, to everyone. The Tribunal had found that there was a 'policy' (which the EAT found meant a practice). This situation had never before arisen, so it could not be proved from previous examples that the employer had a 'practice' of dismissing people in these circumstances. However, the EAT found that the Tribunal was entitled to conclude (on the employer's own evidence) that this is how they would treat anyone in the same circumstances and so it amounted to a practice.

Comments from other jurisdictions

Finland (Kaj Swanjung and Janne Nurminen, Roschier Attorneys Ltd): In Finland, an employee's family members' political, religious or even criminal activities may not, as a rule, have an impact on the assessment of an employee's suitability to carry out his or her duties. Further, an employee may not be treated to his or her disadvantage because of political or religious beliefs. Religious beliefs are directly relevant under legislation concerning church employees, where priests may be suspended or dismissed if they do not hold the religious

conviction that the church represents. A similar conviction is also considered necessary for other church employees who participate in religious services or teaching.

However, the case subject to the judgment of the Employment Appeal Tribunal seems quite different, as the reason for the dismissal was the employee's commitment to her religion, which resulted in her refusing to divorce her husband. It was her husband who had committed a crime. If this situation was tried before a Finnish court, it is likely that it would issue a similar judgment. The dismissal would not be considered lawful in Finland unless the employee had contributed to the crime committed by his or her spouse. For example, if the employee was found to have participated in a crime or was guilty of incitement, then there may be legal grounds for termination, depending on the nature of the crime and whether having committed it might have an impact on the employee's duties.

Subject: Indirect discrimination

Parties: Ms S Pendleton (Appellant) – v – Derbyshire County Council and the Governing Body of Glebe Junior School (Respondents)

Court: Employment Appeal Tribunal

Date: 29 March 2016

Case number: UKEAT/0238/15/LA

Creator: Employment Appeal Tribunal

Verdict at: 2016-03-29

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