EMPLOYMENT TRIBUNALS

Claimant: XA

Respondent: The Royal Navy - Ministry of Defence

PRELIMINARY HEARING

Heard at: **Bristol**

On: **9 October 2019, 24 February 2020 and in Chambers**

Before: Employment Judge Midgley

Representation
Claimant: XA, in person
Respondent: Mr John-Paul Waite

JUDGMENT

1. Paragraph 18(2) of Schedule 9 of the Equality Act 2010 is incompatible with Articles 1 and 2(a) of the Framework Directive 2000/78 ("The Framework Directive") and Article 21 of the Charter of Fundamental Rights of the European Union ("The Charter").

2. It is not possible to interpret Paragraph 18(2) in a way that could be compatible with the Framework Directive or the Charter. Paragraph 18 must therefore be dis-applied by the Tribunal.

3. The Respondent's application for the claims to be dismissed pursuant to Rule 37 is dismissed. The claim does not have no reasonable prospect of success as a consequence of Paragraph 18(2) of Schedule 9 of the Equality Act 2010.

REASONS

1. This is my decision following two Preliminary Hearings to determine whether the claimant's claims of indirect discrimination should be struck out pursuant to Rule 37 on the grounds that Paragraph 18(2) of Schedule 9 of the Equality

Act 2010 provides a complete defence to the claim, irrespective of its factual merits, because it excludes any claim of indirect discrimination on the grounds of sexual orientation in respect of access to a benefit, facility or service provided to the exclusion of all others to married person or civil partners.

The Claim

2. By a claim form dated 1 March 2018 the claimant, who is a serving member of the Royal Navy and is gay, brought claims of sexual orientation discrimination contrary to section 19 of the Equality Act 2010 against the respondent.

3. The claims arose out of the claimant's assignment to the Ministry of Defence premises at Abbey Wood in July 2017. As no military accommodation was available at that site, the claimant was eligible for the provision of accommodation by the respondent, as detailed in the respondent's policy 'JSP 446 Tri-Service Accommodation Regulations' ('the Regulations').

4. The Regulations provide for two types of accommodation in those circumstances: Substitute Service Single Accommodation ("SSSA") and Substitute Service Family Accommodation ("SSFA"). SSFA permits those in marriages or civil partnerships who are living with their spouse or civil partner, a choice of two properties. SSSA however offers a single choice of accommodation to those who are single, or married or in a civil partnership but not living with their spouse or civil partner.

5. The claimant claims that the respondent's application of those Regulations to him constituted indirect discrimination contrary to section 19 of the Equality Act 2010. In particular, the claimant complains that the decision to reduce the number of choices of property for Substitute Service Single Accommodation ("SSSA") from two to one, whilst maintaining two choices for Substitute Service Family Accommodation ("SSFA") created a Provision, Criterion or Practice which placed members of the LGBTQIA community at a substantial disadvantage, since (when compared to members of the heterosexual community) a greater proportion of that community are not married or in civil partnerships, and those that are, are unlikely to be live with their spouse or civil partner in service accommodation, and thus will be ineligible for the greater choice of substitute accommodation available through the SSFA. He argues that it placed him at a disadvantage because he was not offered the choice of accommodation. He argued that there was no objective justification for such indirect discrimination.

The procedural history

6. Simultaneous with his presentation of the claim to the Tribunal, the claimant sought resolution of the issues through the respondent's Service Complaints system.

7. In consequence, on the 6 March 2018, Acting Regional Employment Judge Harper invited the Respondent's comments on a proposed stay of the proceedings and directed that the respondent should not enter a response at that stage.

8. On 26 March 2018, the respondent confirmed its agreement to a six-month stay of the proceedings until the 30 September 2018. The claimant consented to that stay on 26 March 2018. Consequently, on 29 March 2018 the proceedings were stayed until 30 September 2018.

9. The respondent subsequently sought a further stay of six months to enable its determination of the Service Compliant to be completed. The claimant objected to that application but agreed to a stay of three months. On 29 October 2018 Employment Judge Harper extended the stay for 3 months until 3 January 2019.

10. On 18 December 2018 the respondent applied for an extension of the stay until 3 April 2019. The claimant consented to that extension in circumstances where the Service Complaints Ombudsman, acting in accordance with her powers under the Armed Forces (Service Complaints and Financial Assistance) Act 2015, had found that there was undue delay in the conclusion of the Service Complaint and that the claimant had suffered injustice as a result.

11. The stay was extended to 12 April 2019, and the parties were directed to update the Tribunal as to progress with the Service Complaint by 12 April 2019.

12. On the 11 February 2019 the respondent applied to lift the stay and sought an order that the claim be struck out in its entirety under rule 37 on the grounds that it had no reasonable prospect of success on a 'preliminary issue of law' because paragraph 18(2) of Schedule 9 of the Equality Act 2010 explicitly excluded any claim of indirect discrimination in respect of a benefit provided to married/civil partners personnel due to their marital status.

13. On 24 February 2019, the claimant set out the grounds on which he resisted that application. In particular he relied upon the phrase "to the exclusion of all others within paragraph 18(2)", arguing that the respondent could not rely on paragraph 18(2) because other categories of service personnel, for example those who are married but have dependent children receive the benefit in question.

14. On 10 April 2019 the respondent applied for a preliminary hearing in person to determine its claim for strike out on the ground of jurisdiction, on the basis that the claims were caught by the statutory exclusion set out within Schedule 9. It identified the issue to be determined as follows,

> "*Taking the facts set out in the claim form at the highest, does paragraph 18(2) of Schedule 9 to the Equality Act 2010 mean that the claim must fail?*"

15. In addition, the respondent sought a further stay until 30th June 2019 to allow the Service Complaint and any appeal to conclude. The claimant agreed to a further stay for three months.

16. On 16 April 2019 Employment Judge Livesey extended the stay until 30 June 2019. That stay was extended by agreement until 15 July 2019 to enable the appeal against the Service Complaint to be concluded.

17. The Decision Body and the Appeal Body concluded that there had been a breach of the statutory provisions and that the respondent had failed to conduct equality analysis in relation to the Regulations. However, the Appeal Body did not conclude that indirect discrimination had taken place because of the exemption in Schedule 9 Paragraph 18(2).

18. By email dated 15 July 2019 the claimant raised the argument that Paragraph 18(2) ("The Exemption") was incompatible with the EU Framework Directive (Article 2), incompatible with the European Convention on Human Rights (Article 14, engaged by Article 8) and incompatible with the EU Charter of Fundamental Rights (Article 21); and it was therefore necessary for the Tribunal to disapply the Exemption because of that incompatibility.

19. On 31 July 2019, the claimant applied for an anonymity order pursuant to rule 50 of the Employment Tribunal Rules. The respondent resisted that application.

20. In consequence the matter was listed 9 October 2019 for a one-day preliminary hearing to determine the respondent's application, having regard to the issues identified by the claimant, and the claimant's Rule 50 application.

The preliminary Hearing on the 9 October 2019

21. On the 9 October 2019, for reasons that were given orally to the parties at the time, I granted the claimant's application for a Restricted Reporting Order. In addition, I heard argument from each of the parties in relation to the respondent's application.

22. There was, however, insufficient time to hear the respondent's oral submissions addressing the claimant's arguments relating to the compatibility of the Exemption within Equality Act 2010 with the Framework Directive, the ECHR or the Charter of Fundamental Rights, or any reply from the claimant. Those arguments were not addressed in the skeleton argument that the respondent had prepared for the Preliminary Hearing.

23. Consequently, I adjourned the hearing to 19 December 2019 and directed that further skeleton arguments relating to that issue should be filed and exchanged.

24. Regrettably on 17 December 2019, the respondent's counsel was admitted to A&E as an inpatient following an accident and was unable to attend the listed hearing. The hearing was therefore adjourned to 24 February 2020. In addition, I directed the parties by 13 December 2019 to address in further written submissions whether:

> "the provision of accommodation by the respondent consequent to the PStat amounted to "pay" within the meaning of Article 157(2) EC on the ground that it was "any consideration, whether in cash or in-kind, which the worker receives directly or indirectly, in respect of his employment from his employer."

25. The respondent's counsel had not sufficiently recovered from his injuries in order to comply with that direction, seeking an extension until 27 January 2020. The matter was therefore relisted for the 24 February 2020.

    The hearing on the 24 February 2020.

26. The parties provided further submissions on the 27th and 28th January 2020 respectively. In consequence, at the outset of the hearing I raised the potential impact of the lines authorities and the decisions of the CJEU epitomized by Cresco Investigation GMBH v Achatzi; Kukukdeveci v Sweden and R (Chester) v Secretary of State for Foreign and Commonwealth Affairs with the parties.

27. The respondent's counsel was not able to address the impact or effect of those authorities in relation to its application, and both parties sought permission to file further submissions addressing that line of authority. Accordingly, with some frustration, I permitted the parties to serve further submissions sequentially on 9 March 2020 (respondent) and 17 March 2020 (claimant).

28. On 2 March 2020, the respondent sought permission to vary the orders so that it could take instructions from the Joint Services Committee and the Government Equality Office. The claimant objected to that proposal, but Employment Judge Harper MBE granted the extension in the terms requested.

29. The respondent submitted a further 46 paragraph skeleton argument with 133 pages of authorities on 30 March 2020. The claimant submitted his further submissions running to 17 pages on 9 April 2020.

30. Unfortunately, the Covid-19 pandemic then intervened and the file was not referred to me but to other judges in the Bristol Employment Tribunal and matters were delayed as directions were made in relation to the production of an agreed schedule of facts relating to the Claimant's application to amend the claims (which is addressed in a separate case management order). Consequently, on 20 May 2020 I sought clarity as to whether the parties would agree, in the context of the pandemic, to my determining the preliminary issue of strike out on the basis of the written submissions.

31. Regrettably, further confusion affected the progress of the file as a misunderstanding occurred as to whether the respondent's request for further time to confirm whether it consented to a decision on the papers was incorrectly understood to relate to the primary issue of strike out, rather than the issue of amendment, to which it in fact related. In consequence, no action was taken on the file until 26 June 2020 (when the respondent had indicated that it would be in a position to indicate whether a hearing was required).

32. Due to the impact of the pandemic, the file was not referred back to me until 28 August 2020; in the event I did not see the file until after my return from annual leave at the beginning of September. I apologise to the parties for the further delay between September and the date of this judgment, when I have sought to find time to address the substantive issue and the complex law involved.

33. It seemed to me, in the context of the case, that it was of little or no benefit to the parties to limit the Judgment solely to the issue of whether the claim had no reasonable prospect of success on the grounds that paragraph 18(2) was a complete defence to the claim, without providing a definitive Judgment addressing whether it is compatible with the Equal Treatment Directive and the Charter of Fundamental Rights of the European Union. The advantage of the latter course is that it enables the parties to appeal the legal issue which is at the heart of the claim should they wish, without having to wait until after the final hearing to do so.

34. Nevertheless, the protracted history of these proceedings indicates that with the benefit of hindsight the respondent's better course may have been to wait to the final hearing to argue the factual issue of whether there was indirect discrimination rather and the pure legal point simultaneously. However, it is very easy to be wise after the event.

The Issues

35. The issues for me at this preliminary hearing are as follows:

    35.1. Should the claim be struck out either on the ground that it has no reasonable prospect of success because of the exemption in Paragraph 18(2) of Schedule 9 EQA 2010 ("the Exemption")? In relation to which the following issues arise:-

        35.1.1. Is the Exemption compatible with the prohibition of discrimination under Articles 1, 2(1) and 3(1)(c) of Council Directive 2000/78/EC insofar as it precludes the claimant's claim for sexual orientation discrimination in respect of the provision of accommodation to service personnel in accordance with P Stat 2?

        35.1.2. If not, should paragraph 18 be disapplied in the present proceedings?

The Law

National Law

36. The national legislation is contained in the Equality Act 2010, and in particular in sections 4 (identifying sexual orientation as a protected characteristic) and section 19 which prohibits indirect discrimination, and which provides in so far as is relevant:

    (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

    (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

        a) A applies, or would apply, it to persons with whom B does not share the characteristic,

b) it 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 it,

c) it puts, would put, B at that disadvantage, and

d) A cannot show it to be a proportionate means of achieving a legitimate aim.

37. Schedule 9 EQA 2010 contains the Exemption at paragraph 18(2) which provides as follows:

Benefits dependent on marital status, etc

(2) a person does not contravene this Part of this Act, so far as relating to sexual orientation, by providing married persons and civil partners (to the exclusion of all other persons) with access to a benefit, facility or service.

38. The provision does not oust the Tribunal's jurisdiction, rather it provides a defence to an otherwise valid claim under the Equality Act. Necessarily, it will require determination of the evidence as to whether access to the benefit, facility or service is 'to the exclusion of all other persons,' and may involve mixed questions of fact and law as to what is meant by 'access to' in the context of this case.

<u>European Law</u>

39. The national law was intended to ensure that the United Kingdom complied with its obligations arising from its membership of the European Union as set out below.

40. From 1 January 1973, the date on which the European Communities Act 1972 ("The 1972 Act") came into force in the UK, until 31 January 2020, the date on which the European Union Withdrawal Act 1998 ("The Withdrawal Act") came into force, the UK ceded its sovereignty over certain areas, including employment and discrimination law, to the EU.

41. It was trite law (until 31 January 2020) that EU law had supremacy over domestic law in areas where the EU had legislative competence under the Treaties (see <u>Van Gend en Loos v Nederlandse Administratie der Belastingen</u> [1963] ECR 1, ECJ). That supremacy was underlined by section 3(2) of the 1972 Act, which required Courts and Tribunals to take judicial notice of the European Treaties, European legislation and decisions of the Court of Justice of the European Union ("CJUE") in deciding cases before them.

42. The 1972 Act was repealed by the Withdrawal Act. However, the supremacy of EU law and the jurisdiction of the CJEU during the transition period is preserved by section 1A of the Withdrawal Act. The transition period ends on 31 December 2020 ("IP Implementation Day" defined in s.39 of the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act")).

43. The obligation for the meaning of any retained EU law (post transition) to be decided "in accordance with any retained case law of the CJEU and domestic

courts and any retained general principle of EU law" is provided for in section 6 (particularly 6(3) and (7)) of the Withdrawal Act.

44. It follows that for the purpose of this claim the effect of the existing decisions of the CJEU and the impact of the Treaties, Directives and other EU jurisprudence remains as described below.

The Treaties

45. In so far as is relevant, the Treaties with which the Tribunal is concerned in the present instance include:

45.1. The Treaty establishing the European Community ("TEC"), which was incorporated into the Treaty on the Functioning of the European Union ("TFEU").

45.2. The Treaty on European Union ("TEU")

45.3. The Treaty on the Functioning of the European Union, which was signed on 13 December 2007 and entered into force on in the UK on 1 December 2009. Article 10 of the TFEU identifies that "the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability age or sexual orientation."

46. Article 19(1) of TFEU, which incorporated Article 13(1) TEC, provides for the general principle of non-discrimination:

> "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it on the Community, the Council … may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

47. The following Directives were established under the enabling Articles of the Treaties, such as Article 19(1) above:

47.1. The EU Equal Treatment Framework Directive (number 2000/78) ("the Framework Directive"), which sets out a general framework for eliminating employment or occupational inequalities based on age, disability, religion or belief, and of relevance here, sexual orientation.

47.2. The Recast EU Equal Treatment Directive (no.2006/54) ("the Recast Directive"), which relates to 'the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'. It covers sex, pregnancy and maternity, marriage and civil partnership, and gender reassignment.

The Charter of Fundamental Rights of the European Union

48. The TFEU introduced the Charter of Fundamental Rights of the European Union into European primary law ("The Charter"). The Charter was given the same legal values as the Treaties from 7 December 2007, following the Treaty of Lisbon, with the effect that it acquired the definitive status of primary law within the legal order of the European Union, in accordance with Article

6(1) EU (see Kucukdeveci v Swedex GmbH & Co KG (KC-555/07) [2010] All ER (EC) 867 paragraph 22; 27).

49. Article 21 of the Charter provides as follows:

> *"Non-discrimination*
>
> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political any other opinion, membership of any national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> (Emphasis added)

50. Article 21 has direct effect with the consequence that where national legislation conflicts with the Charter rights, a national court must set aside the discriminatory provision of national law to guarantee individuals the legal protection afforded under Article 21 and guarantee the full effect of that Article (see Cresco Investigation GmbH v Achatzi C-193/17 [2019] IRLR 380 at paragraphs 77-78 and 80).

51. That means that, by virtue of the commitment of fundamental rights laid down in Article 51(1) of the Charter, legislative acts adopted by the European Union institutions in this sphere must be assessed by reference to that provision and the Member States are bound by it in so far as they implement European Union Law (see Kucukdeveci at paragraphs 45 - 48).

The Framework Directive

52. The Framework Directive was the enabling provision by which the Fundamental Right of non-discrimination was extended beyond equal treatment on the basis of sex, nationality and race to include age, disability, religion and belief and sexual orientation.

53. The deadline for transposing the Framework Directive into domestic law was the 2 December 2003 and the UK did this initially by way of Regulations (the Employment Equality (Sexual Orientation) Regulations 2003), and subsequently in the primary legislation now incorporated into the Equality Act 2010. The relevant parts of the Framework Directive are set out above.

54. Recital (4) of the Framework Directive establishes "the right of all persons to equality before the law and protection against discrimination," recognising that as a universal right included within the European Convention for the protection of Human Rights and Fundamental Freedoms.

55. Recital (11) identifies that discrimination based on religion or belief, disability, age or sexual orientation undermines the achievement of the objectives of the EC Treaty. Recital (12) provides that discrimination based on "sexual orientation" as regards the areas covered by the Framework Directive should be prohibited throughout the Community.

56. Recital (22) provides "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon."

57. Article 1 identifies the purpose of the Framework Directive as creating "a framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect on the Member States the principle of equal treatment."

58. Article 2 identifies that the "'principle of equal treatment' shall mean that there should be no direct or indirect discrimination whatsoever on the grounds referred to in Article 1."

59. Article 3(1)(c) provides that "Within the limits of the areas of competence conferred on the Community, this directive shall apply to all persons… In relation to… Employment and working conditions, including dismissals and pay".

60. Article 16 provides:

"Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended."

The general principle of non-discrimination

61. If the context of the claim before the court falls within the legislative competence of EU law, the general principle of non-discrimination will apply (see R (Chester) v Secretary of State for Justice [2014] AC 271 per Lord Mance JSC at paragraph 61-62, Mangold v Helm (C-144/04) [2005] ECR I-9991 para 75, Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH (Case C-427/06) [2008] ECR I-7245 para 25, and Kücükdeveci para 23, Römer v Freie und Hansestadt Hamburg (Case C-147/08) [2011] ECR I-3591 para 60).

62. In consequence, where there is "a conflict between EU law and English Domestic law [it] must be resolved in favour of the former, and the latter must be disapplied" (see Mangold at [77]; and see the comments of Sumption JSC in Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62, [2018] IRLR 123 at 789E - 790A, approving Chester; Kucukdeveci at paragraphs 50 - 51; 53-54 and Romer at paragraph 61).

63. The fact that a treaty or the Framework Directive contains specific provision preserving the discretion of Member States in relation to aspects of national law (see for example Article 17 TFEU and recital 22 of the Framework Directive) does not mean that a difference in treatment under the national legislation is excluded from the scope of the Framework directive, nor that the determination of whether such difference in treatment is compatible with that directive is not subject to effective judicial review (see Cresco at para 31).

64. Where an article or recital to the Framework Directive establishes an exception to the principle prohibiting discrimination it must be interpreted strictly (see Prigge v Deutsche Lufthansa AG (C-447/09) EU:C:2011:573 at [56]).

Pay

65. Article 157 EC (formerly 141 TEC) provides that "pay" means "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer."

66. In British Airways plc v Williams and others [2012] 1 CMLR 23, Advocate General Trstenjak noted at paragraph 69 that that definition is consistent with the standards of international employment law, its drafting history making it clear that it is based on Article 1(8) of ILO Convention C100 Equal Remuneration Convention 1951, which reads:

> "the term 'remuneration' includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment."

67. It makes no difference in this regard whether the payment is received under a contract of employment, by virtue of legislative provision or on a voluntary basis (see North Western Health Board v McKenna (Case C-191/03) [2006] ICR 477). The relevant criterion is the function of remuneration as consideration from the employer for work undertaken by the employee; "any other consideration" would have to mean any monetary benefit which constitutes such consideration in the broad sense of the term, not exclusively on other grounds (e.g. increased productivity, improved working conditions of employment, promotion of health) - see Williams at AG75.

68. In Williams the Advocate General noted, in reaching her conclusion that the supplements paid to airline pilots constituted pay within the meaning of Article 141 EC and therefore "normal remuneration" for the purposes the Working Time Directive, that any payment or emolument ultimately linked to a pilot's readiness to make himself available for work for as long as the employer occurs considers it necessary, would fall into the category of pay - see para AG78.

69. In that context, the CJEU has found the following matters constitute pay for the purposes of article 141 EC:

    69.1. Concessionary travel permits for use after an employee retires. (Garland v British Rail Engineering Ltd [1998] C-12/81 [1982] 1 C.M.L.R. 696) The CJEU held at [10], "The argument that the facilities are not related to a contractual obligation is immaterial. The legal nature of the facilities is not important for the purposes of the application of Article 119 provided that they are granted in respect of the employment." (Emphasis added).

69.2. An entitlement for a partner of an employee to receive survivor pension benefits on the employee's death (Maruko v Versorgungsanstalt der Deutschen Buhnen (C-267/06) [2008] 2 C.M.L.R. 32)

69.3. The financial assistance given to German federal public servants if they became ill. In addition, 50-80% of the health care expenses incurred by the public servant or specific family members. (Germany v Dittrich (C-124/11, C-125/11 & C-143/11) [2013] 2 C.M.L.R. 12).

69.4. A national agreement granting paid leave days and a marriage bonus (Hay v Crédit Agricole mutuel de Charente-Maritime et des Deux-Sèvres (C-26712) [2014] 2 C.M.L.R. 32)

69.5. An award for unfair dismissal compensation (R v Secretary of State for Employment Ex p. Seymour-Smith (C-167/97) [1999] 2 C.M.L.R. 273)

69.6. Compensation for an employee to attend training (Arbeiterwohlfahrt der Stadt Berlin e.V. v Bötel (C-360/90) [1992] 3 C.M.L.R. 446)

69.7. Contractual and voluntarily paid bonuses (Lewen v Denda (C-333/97) [2000] 2 C.M.L.R. 38). The CJEU held at [20], "For the purposes of Article 119, the reason for which an employer pays a benefit is of little importance provided that the benefit is granted in connection with employment. It follows that a Christmas bonus of the kind at issue in the main proceedings, even if paid on a voluntary basis and even if paid mainly or exclusively as an incentive for future work or loyalty to the undertaking or both, constitutes pay within the meaning of Article 119 of the Treaty." (Emphasis added).

Prior judicial consideration of Recital 22 of the Framework Directive and Paragraph 18 Sch 9 EQA 2010

70. In Maruko v Versorgungsansalt der Deutschen Buhnen (C-267/06), [2008] 2 CMLR 32, the CJEU considered the application of the Framework Directive to German law in relation to a claim by Mr Maruko, who was surviving life partner in a life partnership made in accordance with German national law. The pension provider had rejected his application for a widow's pension on the grounds that its regulations did not provide for such an entitlement for surviving life partners. Mr Maruko claimed that the refusal to provide him with a widower's pension infringed the principle of equal treatment on the basis that to deny a person whose life partner had died was discrimination on grounds of that person's sexual orientation.

71. Amongst the findings of the CJEU in that case were the following:

71.1. When assessing whether a matter fell within the scope of Article 141 EC, one criterion which might prove decisive was whether the benefit in question was paid to the worker by reason of the employment relationship between him and his former employer (see paragraphs 46 to 48). In that context, reliance was placed upon the decision of the CJEU in Garland v British Rail Engineering Limited (12/81) [1982] ECR 359 above)

71.2. A survivor's pension provided for under an occupational pension scheme fell within the scope of Article 141 EC (see para 45).

71.3. Recital 22 of the preamble to Framework Directive stated that the Directive was without prejudice to national laws on marital status and the dependent benefits dependent thereon. Admittedly, civil status and the benefits flowing therefrom are matters which fell within the competence of the Member States and Community law did not attract that competence. However, in the exercise of that competence the Member States had to comply with community law and in particular with the provisions relating to the principle of non-discrimination (see paragraphs 58 to 59).

71.4. Since a survivor's benefit such as that in issue was 'pay' within the meaning of Article 141 EC and fell within scope of the Framework Directive, Recital 22 of the preamble to the Framework Directive could not affect the application of Framework Directive (see paragraph 60).

72. Against that background, the compatibility of Paragraph 18 of Schedule 9 of the Equality Act 2010 with the Framework Directive and the Charter rights was considered by the Supreme Court in the case of Innospec Limited v Walker [2017] ICR 1077. It is worthy of note that in that case, given that the claimant had begun employment in 1980 and retired in March 2003, a central issue in dispute between the parties was connected to the fact that the pension in question was based almost entirely on periods of service completed before the coming into force of the Framework Directive. The question of whether or not the national rule was compatible with the Framework Directive, whilst in issue, was not the focal point of the appeal to the Supreme Court.

73. In particular, in Innospec, the Supreme Court held that:

73.1. if Paragraph 18 was, on its face, incompatible with the Framework Directive, it was not open to the courts to interpret that provision in a way that rendered it compatible. The plain purpose of the Paragraph was to create an exception. To nullify that exception would run directly contrary to the "grain" of the legislation, applying Ghaidan - see para 10;

73.2. Schedule 9 of the Equality Act is incompatible with the Framework Directive. In particular, paragraph 18(1)(b) which authorises a restriction of payments of benefits based on periods of service before 5 December 2005 could not be reconciled with the plain effect of the Framework Directive (per Lord Kerr JSC at paragraph 72);

73.3. In so far as paragraph 18 to Schedule 9 permits discrimination on the grounds of sexual orientation, it must be disapplied following the principles articulated in Kucukdeveci and Chester above (see para 74).

The respondent's arguments

74. Firstly, the respondent argues that a distinction can properly be drawn in the case between the provision of service accommodation per se, and the choice of such service accommodation, which the respondent argues is the true issue in the case. The choice of accommodation, it argues, is not pay for the

purposes of Article 157 EC because it is not given "by way of reward or consideration for work which they have performed."

75. Secondly, if contrary to its primary argument, the provision or choice of provision of accommodation is pay for the purposes of Article 157 EC, it argues that paragraph 18(2) is not directly or indirectly discriminatory under EU Law, relying on the Member's State's competence enshrined in recital 22 to the preamble.

76. The respondent also relied upon arguments that if its actions were found to be indirectly discriminatory, they were objectively justified. The fact that the respondent relies upon such an argument in relation to an application for strike out at a preliminary hearing belies its lack of focus on the nature of the test to be applied, and the extent to which its application has strayed into matters which can only be issues for the final hearing.

Conclusions

77. I address each of those arguments in turn, considering the more detailed grounds in the respondent's skeleton argument.

Is the provision of accommodation pay for the purposes of Article 157 EC?

78. The respondent suggests that the subject matter of the claimant's complaint is not pay for the purposes of Article 157 EC on the grounds that the matter in issue is the *choice* of accommodation provided, rather than the provision of accommodation itself.

79. That, in my judgement, is to conflate the nature of the benefit, which here is accommodation, with the treatment which is said to be less favourable, being the choice afforded to differing groups in respect of that accommodation. The context of the issue before me is whether the EU has competence in respect of a matter which is subject of these proceedings. The EU's competence is identified in the Treaties in relation to specific areas and subject matters, such as employment and freedom of movement, not the manner in which those subject matters are made available. There is no support for the respondent's contention in any of the authorities referred above, and it is entirely inconsistent with the broad drafting of Article 157 and its background in Article 1(8) of ILO Convention C100 Equal Remuneration Convention 1951.

80. Rather, the question to be asked initially is whether the provision of accommodation in relation to employment is pay within the meaning of Article 157 EC. That requires me to focus on the nature of the benefit provided, and not the mechanism by which it was made available. I therefore reject the respondent's primary argument in relation to this point. I go on to consider whether the provision of accommodation is a consideration in cash or in-kind in respect of the claimant's employment.

81. The respondent's secondary line of argument is that the provision of accommodation is not payment of consideration "in cash or in kind" within the terms of Article 157 EC, and furthermore that the provision of accommodation is not linked (effectively or at all) to the work that an individual does.

82. In my judgement, neither argument is well-founded. As was made clear in the Advocate General's decision in Williams at paragraphs 75 and 78, the

relevant criterion is the function of remuneration as consideration from the employer for work undertaken by the employee, in that context "any other consideration" must include any monetary benefit which constitutes such consideration in the broad sense of the term (e.g. one related to increased productivity, such as by improving the working conditions, or promoting health). That consideration needs only be in connection with or related to the employment (see Garland and Lewen v Denda).

83. The respondent also argues that the choice of accommodation is of itself no financial value. However, I reject that argument on the grounds that the nature of the benefit in question is the provision of accommodation, rather than the choice, for the reasons that I have given above. Clearly, the provision of accommodation has financial value. In that context, there is force in the claimant's arguments that a finite value for the provision of the accommodation can be identified because (a) the respondent is charged a fee in respect of each SSFA or SSSA property by the contractor who sources it and (b) the respondent subsidies the cost of the accommodation when it is found. Although it is, on the basis of my conclusion, unnecessary to consider whether a choice has a financial value, I can see the force in the claimant's argument that a choice can have a value, using the example of a choice of seats in a stadium, theatre or airplane.

84. The respondent finally argues that in order for a benefit to amount to pay for the purposes of Article 157, "it must be by way of consideration for work which the employee has done." I reject that argument - again, as Garland, Lewen and Williams make clear, it is sufficient that there is a link between the benefit and work which the employee *will do,* as opposed to *has done*. Thus, in Williams the supplements paid to airline pilots constituted pay because they were linked to the pilots' readiness to make themselves available for work, rather than to work which they had actually done. In Lewen it was enough that the benefit sought to future loyalty.

85. Here, the provision of accommodation which enabled the claimant to undertake work at the site at which the respondent wished to deploy him, necessarily must be connected to the claimant's readiness to make himself available for work for so long as the employer considered it necessary at that location, and applying Williams (at AG 78) and Lewen, would amount to pay within the meaning of Article 157.

Is paragraph 18 (2) directly or indirectly discriminatory under EU law?

86. This question must be determined in the context, as I found it, namely that the provision of accommodation in the circumstances of this case is within the competence of the EU. Consequently, the principle of non-discrimination applies (see Kucucdeveci, confirmed in R (Chester)).

87. The respondent relies upon the case of Parris v Trinity College Dublin and others [2017] 2 CMLR and Maruko (supra) to establish the principle that to make a benefit conditional upon entering into a marriage or civil-partnership is non-discriminatory on the grounds of sexual orientation.

88. It is helpful to identify the decisions in those cases in the chronology of the jurisprudence of the CJEU.

89. Maruko was a decision in 2008, taken shortly after the Charter acquired the definitive status of primary law within the European Union. In that case the United Kingdom argued that Recital 22 to the Framework Directive enshrined a "clear, general exclusion" to the principle of non-discrimination.

90. In rejecting that argument in Maruko, the CJEU held that the fact that the Recital stated that the Framework Directive was without prejudice to national laws on marital status and the benefits dependent thereon, which were matters which fell within the competence of the Member States, did not detract from the competence of Community law. Moreover, in exercising the national competence, member states had to comply with community law in particular with the provisions relating to the principle of non-discrimination (see paragraphs 58 to 59). In consequence Recital 22 could not affect the application of the Framework Directive. The CJEU concluded that if the referring court were to decide that surviving spouses and surviving life partners were in a comparable situation so far as concerned the provision of survivors benefit, then the pension regulations would constitute direct discrimination on the grounds of sexual orientation contrary to Articles 1 and 2(2)(a) of the Framework Directive, as they precluded legislation under which a surviving partner did not receive a survivors benefit equivalent to that granted to a surviving spouse (see paragraphs 72 and 73).

91. The respondent seeks to suggest that the implicit effect of the judgement in Maruko was that had Germany not created a form of civil partnership for same-sex couples which was equivalent to marriage, it would not have been discriminatory under EU law to make payment of the benefit conditional upon entering into a marriage in which only opposites sex couples could participate. I can find no basis in the judgement which supports that premise. The ratio of the case is that Recital 22 did not oust the competence of community law, and therefore member states have to comply with the principle of non-discrimination in the manner in which they exercise their national competence in applying legislation made pursuant to the Recital.

92. Secondly, the respondent relies upon the decision in Parris. That was a decision handed down on 24 November 2016, prior to the decision of the Supreme Court in Benkabouche (18 October 2017) and the CJEU in Cresco (2019) by which it was held that where there was a conflict between EU law and domestic law, it must be resolved in favour of the former and the latter must be dis-applied.

93. In Parris, the claimant sought a preliminary ruling as to whether the refusal by Trinity College Dublin ("The College") to grant his life partner, on Mr Parris's death, the survivor's pension provided for by the occupational benefit scheme of which he was a member was contrary to the principle of non-discrimination. The relevant national legislation was the Pensions Act 1990, as amended by section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004. Section 72 of that act, at subsection 2 provided that:

It shall not constitute a breach of the principle of equal pension treatment on the marital or family status ground for a scheme to provide more favourable occupational benefits where those more favourable benefits are in respect of any person in respect of whom, under the rules of the scheme, a benefit is payable on the death of the member, provided that this does not result in a breach of the said principle on the gender ground.

94. Section 99 of the Civil Partnership Act provided that a "benefit under a pension scheme that is provided for the spouse of a person is deemed to provide equally for the civil partner of a person". On 21 December 2005 it became possible to enter into a civil partnership in the United Kingdom in accordance with the Civil Partnership Act 2004. Mr Parris registered his civil partnership in the United Kingdom on 21 April 2009, when he was 63. On 15 November 2010, Mr Parris's request that, on his death, his civil partner should receive a survivor's pension was rejected by the College.

95. The Higher Education Authority upheld the decision of the College on the grounds that Mr Parris had retired before the recognition of his civil partnership by Ireland, and furthermore that the rules of the College excluded the payment of a survivors benefit where the member married or entered into a civil partnership after the age of 60. As stated, Mr Parris had been 63 at the time that his civil partnership was recognised.

96. Mr Parris brought proceedings against the College, the Higher Education Authority and others (who were then responsible for the administration of his pension), arguing that he had been directly or indirectly discriminated against by reason of his age and sexual orientation.

97. The CJEU found, insofar as is relevant to the current case, that:

97.1. civil partners were not treated less favourably than surviving spouses in relation to the survivor's benefit, and therefore the national rule did not give rise to direct discrimination on the grounds of sexual orientation.

97.2. marital status and the benefits flowing therefrom are matters which fall within the competence of the Member States and that EU law does not detract from that competence. However, in the exercise of that competence the Member States must comply with EU law, in particular the provisions relating to the principle of non-discrimination.

97.3. The Framework Directive did not require Ireland to provide before 1 January 2011 for marriage or a form of civil partnership for same-sex couples, nor give to retrospective effect to the Civil Partnership Act and the provisions adopted pursuant to that act, nor, as regards the survivor's benefit at issue in the main proceedings, to lay down transitional measures for the same-sex couples in which the member of the scheme had already reached the age of 60 on the date of entry into force of the act, and the national rule did not therefore constitute indirect discrimination.

97.4. The concept of intersectionality in discrimination (i.e. a combination of the protected grounds of age and sexual orientation) was not a valid form of discrimination.

98. There is nothing within the judgment, in my view, that has any or any significant bearing on the issue before me, namely whether Paragraph 18(2) is compatible with the principle of non-discrimination within the Charter or the Framework Directive. The judgement was confined to its very specific and unique set of facts, involving the effects of provisions which were alleged to be discriminatory either on the basis of sexual orientation, or age, or their combined effect.

The issue in the current proceedings

99. The essential nature of the claimant's claims in the current proceedings is that the respondent's policy of offering a choice of two substitute accommodation premises to those in marriages or civil partnerships who were living with their spouse or civil partner, whilst offering a single choice of accommodation to those who are single, or married or in a civil partnership but not living with their spouse or civil partner, is indirectly discriminatory, because homosexuals are far less likely, statistically, to be married or to enter into a civil partnerships, and further far less likely still to live with their spouse or civil partner in service accommodation.

100. It will be necessary for the claimant to establish both a group disadvantage, applying the principles in Essop v Home Office [2017] 1 WLR 1343, and that he was individually disadvantaged. Those are questions of fact to be determined after the evidence is heard at a final hearing, and are not susceptible to determination at a preliminary hearing.

101. If the claimant succeeds in establishing those matters, it will be open to the respondent to rely on the defence of justification. Again, the determination of that matter is one of fact for the final hearing.

102. If the respondent fails to prove its justification defence, then the status of paragraph 18(2) of the Equality Act 2010, falls to be considered.

103. In that context, as indicated above, in my view it is prudent to have provided a substantive judgment on that issue, given there are reasonable arguments on those issues as:

103.1. The Decision of the Appeal Body concluded that there had been a breach of the statutory provisions and that the respondent had failed to conduct a quality analysis in relation to the Regulations when in 2015 it determined that it should not reduce SSFA choice from two to one properties to align the policy with that for SSSA. However, it rejected the claimant's allegations of indirect discrimination on the grounds of the exemption in Paragraph 18(2).

103.2. The claimant identified in his submissions a considerable body of statistics drawn from the Office of National Statistics identifying the respective proportions of the LGBTQIA community and the UK population as a whole who were single and unmarried or not in civil partnership.

104. The provision of accommodation under the Regulations is 'pay' for the purposes of Article 157 EC. The principle of non-discrimination therefore applies. Paragraph 18(2), being the legislation through which the UK chose to exercise its national competence in respect of Recital 22 to the Preamble of the Framework Directive, must therefore be (a) interpreted strictly since it seeks to establish an exception the general principle of non-discrimination (Prigge v Deutsche Lufthansa) and (b) to the extent it is non-compatible with that principle or the Framework Directive must be disapplied (Cresco).

105. Paragraph 18(2) expressly provides that a PCP which contravenes the prohibition on non-discrimination on the grounds of sexual orientation is not to be treated as discrimination. It is therefore incompatible with Articles 1 and 2(a) of the Directive and Article 21 of the Charter. It is not possible for Paragraph 18(2) to be interpreted in a way that could be compatible with the Framework Directive or the Charter (Innospec). Paragraph 18 must therefore be dis-applied by the Tribunal should the claimant establish that the application of the Regulations constitutes indirect discrimination.

106. I therefore reject the respondent's argument that the claimant's claim has no reasonable prospect of success on the grounds that Paragraph 18(2) provides a complete defence to the claim, and dismiss the respondent's application for the claim to be struck out pursuant to Rule 37.

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Employment Judge Midgley

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Date 8 November 2020