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# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Rev. J Gould

AND Trustees of St John's Downshire Hill

HELD AT: London Central

ON: 17 March 2017

EMPLOYMENT JUDGE: Miss A M Lewzey (Sitting Alone)

## *Representation*

For Claimant: Mr A Henderson of Counsel

For Respondent: Mr T Cordrey of Counsel

**JUDGMENT** having been sent to the parties on 22 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction

1. This is an application by the Respondent to strike out the Claimant's claims of direct and indirect discrimination on grounds of marriage on the grounds that they have no reasonable prospects of success.

2. The power to strike out on the ground that there is no reasonable prospects of success is contained in 37 (1) of the Employment Tribunal Rules of Procedure 2013.

## Submissions

3. I have skeleton arguments from both Counsel which they have supplemented orally.

4. Mr Cordrey has drawn attention to the decision of Langstaff J in **Chandhok v Tirkey [2015] ICR 527** that there is no blanket ban to a strike out, but it must be stressed that discrimination cases should rarely be struck out.

5. Mr Henderson has referred me to the decision in **Anyanwu v South Bank Students' Union [2001] UKHL 14** in which Lord Hope stated that as a general rule discrimination cases should only be struck out after hearing evidence. However, at paragraph 39 of the judgment he said:

“Nevertheless I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail”.

6. Mr Henderson has also referred me to **Eszias v North Glamorgan NHS Trust [2007] ICR 1126** which held that only in an exceptional case will a claim be struck out when the central facts are in dispute.

7. I have also been referred numerous times to the decision of Underhill J, as he then was, in **Hawkins v Atex Group Limited [2012] IRLR 807** in relation to this matter. At paragraph 25 Underhill J states:

“Judges should not be shy of making robust decisions in a case where there is realistically only one possible outcome, even if the issue is formally one of fact.”

8. Mr Cordrey invites me, for the purposes of this application, to assume that the Claimant will establish all the facts pleaded. He says that I should not shy away from a strike out if that is the only possible outcome.

9. There are two aspects to the application. The first is in relation to the claim of direct discrimination. The second relates to indirect discrimination. As far as the first is concerned, in summary Mr Cordrey argues that the claim relates to the Claimant's marriage difficulties and therefore does not engage the protected characteristic of marriage and, even if it does, the claim does not amount to one of less favourable treatment because of marriage. Mr Henderson's arguments are based on **Jones v Eastleigh Borough Council [1990] 2 AC 751 HL** that even if the treatment is not explicitly because of a protected characteristic, it is so inseparably linked so that it is inherently discriminatory or a protected characteristic based criterion and therefore a marriage based criterion would amount to direct discrimination. In addition, he relies on Schedule 9 to the Equality Act as showing that Parliament intended to encompass the breakdown of a marriage because of the exception in relation to religious organisations contained in Schedule 9.

## Conclusion on Direct Discrimination

10. I deal first with my conclusions on the direct discrimination part of this case. Mr Cordrey points to the reason for the protection from discrimination because of marriage. Prior to the Sex Discrimination Act it was not uncommon for women to be dismissed because they were married. He refers me to the claim form, in particular to the following:

“2. C’s marriage had had difficulties for some time and on 19 May 2015 his wife announced she was going to leave the marital home.

....

75. In this case the real reason for the C’s dismissal all along had been difficulties in his marriage, and the inability of R to accept this.

.....

76. ....It is these same people who know most about C’s marriage difficulties.

.....

77. The following list of points is relied upon as evidence for the contention that C’s marriage is the real underlying reason for his dismissal.

.....

78 For the reasons set out above C alleges that the real reason for his dismissal was the difficulties in his marriage. If he were not married he would not have been dismissed. ...”

11. The claim as pleaded is about the difficulties in the marriage. The claim is not that the Claimant was dismissed because he was married. For almost the entire period of his employment by the Respondent he had been a married man. I have taken into account the judgment of Underhill J, as he then was, in **Hawkins v Atex Group Limited**. At paragraph 9 he states:

“The starting point must of course be the language of s.3 itself. In my view it is clear that (to use the terminology of the 2010 Act) the characteristic protected by s.3(1) is the fact of being married - or to put it the other way round, what is prescribed is less favourable treatment on the ground that a person is married. That is what the language used says and the same is true for the section in its pre-amendment form: ‘marital status’ naturally means the fact of being married. The relevant comparator is thus, likewise, a person who is not married. Since in any comparison for the purpose of this section the relevant circumstances must be the same but for the protected characteristic, the appropriate comparator will usually be someone in a relationship akin to marriage but who is not actually married.....”

12. The Claimant has not claimed that he was dismissed because he was married. He refers throughout the pleaded case to discrimination because of difficulties with his marriage. Paragraph 25 of Underhill J’s judgment in **Hawkins v Atex Group Limited** case states:

“In my judgment, in the circumstances of this particular case the uncontested facts were incapable of supporting a finding that the ground of the respondents’ action fell within s.3 as I have construed it. There was in reality no prospect of the appellant being able to establish, with or without the assistance of the ‘reverse burden of proof’, that the respondents were motivated specifically by the fact that she and Mr Hawkins were married, rather than simply by the closeness of their relationship – or, to put it the other way, that she would not have been dismissed if she and Mr Hawkins had been common law spouses.”

13. Mr Cordrey has also referred me to the explanatory notes to the Equality Act which make clear in the examples below note 46 that a divorcee is not married. Mr Cordrey argues that to allow the Claimant's case would mean that someone with a marriage breakdown but no divorce would be protected, whereas one whose marriage breakdown had resulted in divorce, would not be. That, he says, cannot be right.

14. Mr Henderson has pointed me to Schedule 9 to the Equality Act. Paragraph 2 (1)(a) of that Schedule provides:

“(1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to employment a requirement to which sub-paragraph (4) applies if A shows that –

(a) the employment is for the purposes of an organised religion. ...”

Paragraph 2(4)(e) provides a requirement relating to circumstances in which a marriage or civil partnership came to an end.

15. Mr Henderson suggests that it would be discriminatory to dismiss on the basis of circumstances in which the marriage came to an end. The explanatory notes to the Equality Act do not give a divorced person the protection of marriage as a protected characteristic. Schedule 9 concerns the exceptions for occupational requirements, in particular, in relation to religion. What Mr Henderson is asking me to do is to infer that Section 8 Equality Act 2010 setting out the protected characteristics includes both marriage, and the circumstances of marital breakdown. It seems to me that Schedule 9 is a schedule that deals with exceptions and cannot be used to infer something additional into section 8.

16. Underhill J made clear in **Hawkins v Atex Group Limited** that that case was about the closeness of a marital relationship and not the fact that Mr and Mrs Hawkins in the case were married. The present case is about the difficulties in Mr Gould's marriage and not the fact that he was married. For these reasons, I am not satisfied that the claim that the reason for dismissal was the difficulties in his marriage, engages the protected characteristic in section 8.

17. Mr Cordrey has also argued that for the Claimant to have an arguable case he must claim that the dismissal was *because of* his marriage. This is the causation argument and he refers me to the **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065**, in which Lord Nicholls set out the 'but for' case. Paragraph 78 of the Claim Form states:

“.....C alleges the real reason for his dismissal was the difficulties in his marriage.

The Claimant is relying on the fact of his marriage as the strict causation point and the difficulties in his marriage as the real reason for dismissal.

18. I have been referred to **James v Eastleigh [1990] 2 AC 751 HL** which concerned the free admission to a swimming pool for those of pensionable age. I have also been referred to the **Amnesty International v Ahmed [2009] ICR 1450 EAT**. Underhill P, as he then was, stated:

“31 It seems that the relationship between the approaches taken in *James v Eastleigh* on the one hand and *Nagarajan* (as further explained in *Khan*) on the other, is still regarded by some tribunals and practitioners as problematic.

....

33 ....If an owner of premises puts up a sign saying ‘no blacks admitted’, race is, necessarily the ground on which a black person is excluded. *James v Eastleigh* is a case of this kind.

34 But that is not the only kind of case. In other cases – of which *Nagarajan*, is an example - the act complained of is not in itself discriminatory but is rendered so by discriminatory motivation”.

There are therefore two types of case. Mr Cordrey argues that there is no criterion relied upon, let alone an inherently discriminatory one, and even if there was such a criterion, it is far from being inherently discriminatory. Mr Henderson argues that paragraph 77 goes into the underlying motivation of the trustees but argues that this is a category one claim, that is a **James v Eastleigh** claim.

19. That does not get over the fact that it is stated that dismissal is by reason of the difficulties in the marriage and does not engage the protected characteristic. Mr Cordrey has given an example concerning an adulterous or bigamous vicar who was dismissed. It does not seem to me that this assists particularly. I agree with Mr Henderson that it is a ‘red herring’. In those circumstances, the church would probably dismiss for bringing the church into disrepute.

20. On the pleaded case, the Claimant has not engaged the protected characteristic of marriage and therefore I strike out the claim of direct discrimination.

### Conclusion on Indirect Discrimination

21. The second part of this matter is the claim of indirect discrimination which is a claim under Section 19 of the Equality Act. The claim is contained in paragraph 80 of the Particulars of Claim which reads:

“R has applied a provision, criterion or practice that SJDH cannot have a minister whose marriage has broken down.”

That is the PCP relied upon. Section 19(2)(a) Equality Act 2010 provides:

“For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if A applies or would apply it to persons with whom B does not share the characteristic.”

22. Mr Henderson argues that this would apply to an unmarried minister but would have no effect and therefore such a minister would have no risk of falling foul of the provision. An unmarried minister cannot have a marriage that has broken down. I do take into account the decision of Sedley LJ in **Eweida v British Airways [2010] IRLR 322 CA**, where he set out the position at paragraph 15 as follows:

“But there is in my judgment no indication that the Directive intended either that solitary disadvantage should be sufficient - the use of the plural (“persons”) makes such a reading highly problematical - or that any requirement of plural disadvantage must be dropped. I see no reason therefore to depart from the natural meaning of reg. 3, that meaning, as Ms Simler submits, is

that some identifiable section of the workforce, quite possibly a small one, must be shown to suffer particular disadvantage which the claimant shares.”

23. The Claimant has not pleaded that other married persons are adversely affected. His is a solitary disadvantage, which is excluded by that passage of Sedley LJ in Eweida.

24. For these reasons it is my decision to strike out the claim of indirect discrimination.

**Employment Judge Lewzey  
20 April 2017**