



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss P O Muchilwa

**Respondents:** 1. Stockport Metropolitan Borough Council  
2. Sean Reynolds

**HELD AT:** Manchester **ON:** 17 November 2016  
23 January 2017  
(in Chambers)

**BEFORE:** Employment Judge Feeney

## REPRESENTATION:

**Claimant:** In person

**Respondents:** Ms R Wedderspoon, Counsel

## JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that the claimant claims of:

1. Disability discrimination in relation to –
    - (a) flat shoes,
    - (b) toilet breaks; and
  2. Religion or belief discrimination in relation to her Channel referral,
- are struck out as having no reasonable prospect of success.

## REASONS

1. The preliminary hearing was listed for 17 November 2016 in order to decide whether a number of the claimant's claims should be dismissed on the grounds they had no reasonable prospect of success or that the proceedings had been conducted unreasonably by the claimant, failing that that a deposit be ordered on the ground

the claims had little prospect of success and further that some of the claimant's claims were out of time.

2. The history of this claim is that the claimant submitted a claim form that was 28 pages long on 23 March 2016. Her claims of discrimination included race, disability, sex and religion or belief. She stated that in summary she had been sexually harassed and discriminated against by association and perception in respect of religion and belief and victimised.

3. At a preliminary hearing for case management on 17 May 2016 Employment Judge Porter went to great lengths to explain to the claimant the relevant legal tests in relation to disability discrimination and asked her to clarify the nature of her disability claims. The claimant submitted a 63 page Scott Schedule detailing her alleged discrimination claims.

4. A further preliminary hearing for case management took place on 5 August 2016 in front of myself, and I noted that the schedule was inadequate in several respects and was disappointing in the light of the extremely detailed guidance given by Employment Judge Porter to the claimant in relation to the matters she needed to address in relation to disability discrimination. I noted that the schedule was, to a large extent, a narrative with dates along the left-hand corner including argument. Further, given the length of the document it was extremely difficult to ascertain what the claimant's claims were which might be a re-labelling of facts already pleaded. Further advice was given to the claimant about setting out her claims more clearly and she was given a further opportunity to particularise her disability discrimination claim and provided with guidance.

5. On 23 August 2016 the claimant provided a further particulars document in relation to her allegations of disability discrimination which is 18 pages in length. The claimant lists her claims as disability discrimination, discrimination arising from disability, harassment and victimisation. However, she refers to other types of disability discrimination not so identified, such as a failure to make reasonable adjustments including unrelated allegations of sex and race discrimination.

6. In this schedule there are 16 numbered allegations of disability discrimination, although each of the allegations is split into further detail between one and six bullet points.

7. The claimant's disability claims referred to:

- (1) An incident on 3 March 2016 when she was asked to keep personal conversations to a minimum and to make up 20 minutes of time that she had spent away from her desk.
- (2) That she received an email about "going walkabout several times a day".
- (3) That she had failed to comply with the respondent's dress code.

8. The claimant asserted that management's suggestion she should spend less time away from her desk talking to colleagues limited her ability to take regular toilet breaks.

9. The respondent agreed that the claimant was disabled and that it knew of her disability but submitted at that time it had taken all reasonable steps to assist with the claimant's difficulties and that no limitation was placed on her ability to visit the bathroom and use the toilet as required due to the nature of her disability.

10. In relation to a dress code, the respondent said that this was addressed at the claimant's Personal Development Review meeting on 13 May 2015 and she acknowledged she had worn casual clothes, hoodie and trainers, but suggested they were necessary because of the side effects of her medication which had a tendency to make her feel dizzy. The respondent has never objected to the claimant wearing flat shoes at work but it has stated that trainers were not appropriate. Following the PDR the respondent made arrangements for the claimant to attend an Occupational Health appointment in order to consider any further reasonable adjustments but the claimant was suspended for unrelated matters before this could take place.

11. The religious discrimination claim in the claimant's ET1 referred to discrimination by association and perception and said that the respondent was using radical Islam to promote and safeguard their own interests. Initially the respondent could not understand the claimant's claim as it was well-known that the claimant was a Christian. The claimant's claim referred to the fact that the claimant was identified for a channel referral and in her ET1 she stated:

"I am concerned that the Chief Constable of Greater Manchester Police copied to the Channel panel liaison officer, Darren Howarth, of 11 August 2015 is a gross overreaction to an unproven allegation that resulted in my humiliation with being escorted off the premises whilst being stared at and Mr Smallbone told me that I must at all times remain 300 metres away from any such premises unless prior permission to attend is granted. I have been ostracised from work by Stockport Council.

The referral to the Channel panel remains in my view an overreaction and was probably unwarranted. However the Council will I have no doubt successfully argue that they were obliged to flag up any such concerns and indeed they have a statutory duty to do so. The statutory duty does allow genuine duty to disclose concerns under section 26 CTSA. The circumstances of my case did not legitimately fall into the relevant categories. In addition the emails from Mr Reynolds and Andrea Stewart put undue pressure on me to extend their use deception techniques. What saved me from falling into their trap was the advice I received from the police officer.

On 7 September 2015 Ms Andrea Stewart sent me a letter stating the referral she made to the Channel panel was for treatment, it was not a punishment, and my references that I am innocent are misconceived. The council sent the report to the Chief Constable of Greater Manchester Police copied to the Channel panel liaison officer, Darren Howarth, of 10 August 2015. The counter terrorism unit has not questioned, arrested or made referral to the Channel panel. It is over six months since this referral was made but no action has been taken against me by the police as I am innocent but the Council believe they need to protect other employees from harm. This is an assumption by the Council I am associated [with] a certain religion. I am a Christian. My view is Stockport Council are using

radical Islam to promote and safeguard their own interests. This is discrimination by association and perception.”

12. At the same preliminary hearing the claimant was given time to provide further details of her religious discrimination claim in order to set out how she argued this given that she was a Christian .

13. Following the preliminary hearing on 5 August, on receipt of the claimant's further particulars the respondent took the view that the claimant had not clarified or established a legal basis for three claims and therefore sought to have those three claims struck out today or a deposit ordered.

14. The claims were namely:

- (a) Disability claims in relation to the flat shoes and the toilet breaks; and
- (b) The religion and belief claim in respect of the Channel referral.

### **Respondent's Submissions and Evidence**

#### Disability

15. In relation to disability the respondent submits, in relation to toilet breaks, that the claimant was remonstrated with because she was talking to colleagues for far too long (the respondent produced emails to support this contention) and not because she was having too many toilet breaks.

16. The respondent produced an email to the claimant from Rob Smallbone, her manager, on 3 March 2015 which said:

“Hi Phoebe, can you do me a favour please. If you need to go downstairs to the DM hub to help out can you keep any conversation with friends/colleagues in the ASC team to a minimum. I have managed to go over to the Town Hall, have a meeting with Elections and come back only to find you are still there chatting. Please ensure your flexi recording for today reflects this 20 minute plus break and in future keep this to your lunch hour please. If there is insufficient work on the hub to keep you busy please let me know and I will ensure that other work is redirected to you as I know your colleagues are extremely busy.”

17. A later email from Mr Smallbone's manager, Amwar Mojothi, of 21 April to Andrew Stewart referred to “a number of issues involving Phoebe”. This included a reference to:

“A few weeks back Rob reprimanded Phoebe for chatting about non work related matters when she went down with the scanning team. Phoebe was asked to take the time out of her flexi and she responded by saying that she would only work her contracted hours and not beyond (her right I suppose!)...

Although only put in writing this week a number of hub members have complained to the team members that they are finding it difficult to concentrate when Phoebe is in the office as she causes a distraction by interrupting them.

She is very helpful and keen to help out but does seem to talk quite a lot. I have already okayed a desk move for a colleague affected by Phoebe's behaviour but others have requested moves too."

18. The respondents say this clearly establishes that the claimant was only reprimanded for talking too much to colleagues and wasting time, and there is no evidence at all that any of these matters were related to the claimant taking toilet breaks, which were likely to be a different type of time taken i.e. shorter and more frequent, whereas the matters referred to in these emails were longer and there was corroborative evidence that the claimant was chatting to colleagues and not in the toilet.

#### Flat Shoes

19. The claimant in her own claim form referred to two matters in respect of her shoes:

- "(1) Mr Smallbone in an email he sent to Laura Walsh he discusses my dress code saying it has improved but he will make a referral to Occupational Health about my casual shoes. For the record they were Timberland black suede with a white sole; and
- (2) On 13 May 2015 during her PDR Laura Walsh said she had received several complaints I had worn "a hoodie", "trainers" and "tracksuit bottoms". I replied [to her] I wore my plain hoodie because I was cold. Other Council employees are currently wearing hoodies on the same floor. I stood up, asked her to touch my pair of trousers, they are not tracksuit bottoms. I had worn this pair of pants in different departments I worked and no manager complained. Laura then said I needed to wear shoes like hers. I replied 'I've worn these casual black suede in different Council departments as I am on different medication and some of the side effects of the medication makes me dizzy'. Laura Walsh did not believe me so when she started asking me questions on Amwar I replied 'no comment'. She then left the room."

20. There is no evidence that the respondent's complaint was about flat shoes per se; the complaint was all about trainers. The respondent said the claimant has not explained at all why her disability should mean that she needs to wear trainers, or even on her own case flat shoes.

#### Time Limits

21. In respect of time limits the respondents say the claimant was suspended from employment in July 2015 and therefore there can be no acts of disability discrimination since that date. The claimant's claim was presented on 23 March 2016.

#### Religious discrimination claim

22. The respondents say that as the claimant was well known as a Christian her claim cannot be based on a perception that she was Muslim, only on an argument that she was associated with Muslims. The claimant argues direct discrimination.

However, the respondents say that any person viewing such material would have been subject to a referral and there was no connection with a perception or association with the Muslim faith, rather that material was being viewed could have been produced by a terrorist organisation. The respondent's case is that it has a statutory obligation to make a channel referral where the guidelines are met.

23. The guidelines were set out in the respondent's response to the claim at paragraph 10. In particular ' the role of the Channel panel is to identify individuals who are at risk of being drawn into terrorism'

24. The respondent states that the referral arose because:

- (1) It was reported to the respondent that the claimant was viewing and showing a colleague a beheading video which had been described as an Isis style video. The claimant admitted she had watched and shown a colleague a video, but says it depicts a family member after he was killed in an accident. She was unable to produce the video.
- (2) That the claimant has repeatedly made statements to the effect that the respondent intends to have her assassinated including "that Stockport MBC can hire a hitman to assassinate me.."

25. The respondent felt that this triggered their obligation to consider whether a referral was appropriate. They took advice from their Community Safety Team and were told a referral was required. They asked the claimant if she consented. She said she did not but requested that the respondent took up the option of referring the matter to GMP. The respondent did so and the matter is now with GMP to decide. The respondent did advise that they did not believe she intended or had committed a terrorist act but might be vulnerable to radicalisation. The referral was made on 10 August 2015.

26. In respect of associative indirect discrimination the respondents say the claimant's case must be that being associated with Isis was indirectly being associated with Muslims. However, Isis is a terrorist organisation first and is recognised as such by Muslim countries and Muslim organisations. Therefore any association is with a terrorist organisation not a religion. The respondents would argue a referral is justified by their statutory duty to consider and make a Channel referral in such circumstances.

### **Claimant's Submissions**

27. The claimant submitted the following:

- (1) That Mr Smallbone had said to her that the channel referral was because Isis was a religious militant racist group.
- (2) In respect of the disability claims, the claimant said that she had to walk past manager Laura Walsh to go to the toilet and this is where her difficulties started from, so it was connected with the toilet.

- (3) In respect of the footwear the claimant said she could produce medical advice that she should wear flat shoes because her disability gives her pelvic pain. She had not been asked to provide this evidence. She had worn the shoes/trainers for a long time and they were not complained about in the past.

### Claimant's Means

28. The claimant advised that she currently works part-time, earning £150 a week; she owns no property and lives in a rented flat.

### **The Law**

29. The respondent applies for striking out of the above three claims. The Tribunal's power to strike out a claim is set out in rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 schedule 1 which states:

“At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –

- (a) That it is scandalous or vexatious or has no reasonable prospect of success;
- (b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent as the case may be has been scandalous, unreasonable or vexatious;
- (c) For non compliance with any of these rules or with an order of the Tribunal;
- (d) That it has not been actively pursued;
- (e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).”

30. The Higher Courts give guidance on this issue to the effect that claims should not be struck out except in the most obvious case. In **Anyanwu & another v South Bank Students Union & another [2001]** House of Lords, the House of Lords stated that discrimination claims should not be struck out:

“Except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination.”

31. In **Eszias v North Glamorgan NHS Trust [2007]** Court of Appeal, the Court of Appeal held the same or similar approach should generally inform whistle-blowing cases with have much in common with discrimination cases in that they involve an investigation as to why an employee took a particular step.

32. One situation where it might be reasonable to strike out would be where the facts the claimant wishes to establish are totally and inexplicably inconsistent with undisputed contemporaneous documentation.

33. In respect of a deposit order rule 39(1) provides that a tribunal may make a deposit order up to £1000 where a claim or response has “little reasonable prospect of success”.

#### Time Limits

34. In respect of a complaint of discrimination under Part V of the Equality Act 2010 it must be presented to the Employment Tribunal within a period of three months beginning with the date of the act complained of (section 123(1)(a) Equality Act 2010). However, this is extended by the ACAS Early Conciliation Rules set out in section 207 of the Employment Rights Act 1996.

35. In addition, a claimant can argue that a discriminatory act is part of a series of acts that comprises continuous discrimination. The leading case on this is **The Commissioner of Police of the Metropolis v Hendricks [2003]** Court of Appeal. It was stated that Tribunals should not take too literal approach to the question of what amounts to continuing acts by focussing on concepts of policy, rules, schemes, regime or practice. The focus should be on whether the allegations against the respondent show that the respondent was responsible for an ongoing situation or continuing state of affairs in which the claimant was treated less favourably.

36. In **Aziz v FDA [2010]** Court of Appeal, the Court of Appeal said that the Tribunal should consider whether the claimant has established a prima facie case or:

“The claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.”

37. Section 207B of the Employment Rights Act 1996 states:

“...(2) In this section –

- (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought; and
- (b) Day B is the day on which the complainant or applicant concerned receives or if earlier is treated as receiving (by virtue of regulations made under section (11) of that section) the certificate issued under subsection (4) of that section;
- (3) In working out when a time limit set by the relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
- (4) If a time limit set by a relevant provision would (if not exceeded by the subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.



- (5) Where an Employment Tribunal has a power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.”

### Religion or Belief Discrimination

38. Section 10 of the Equality Act 2010 defines the protected characteristic of religion or belief as follows:

- “(1) Religion means any religion and a reference to a religion includes a reference to a lack of a religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
- (3) In relation to the protected characteristic of religion or belief –
- (a) A reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
- (b) A reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.”

39. The same Act defines direct discrimination under section 13(1) as:

“A person (A) discriminates against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others.”

40. Section 13 differs from the previous equality legislation in that because it is unlawful to treat an individual less favourably because of a protected characteristic. Thus the individual does not need to possess a protected characteristic him or herself. The working is wide enough to cover someone who is perceived to have a protected characteristic or who associates with someone who has a protected characteristic.

41. In respect of the claimant’s case she relies on perception for her direct discrimination claim. The definition in the 2010 Act does not require a complainant to possess the protected characteristic at issue. The EHRC Code of Practice states that:

“Discrimination by association could occur where an individual has campaigned to help someone with a particular protected characteristic or refused to act in a way which would disadvantage a person or people or who the employer believed to have the protected characteristic.”

42. This is partly to take into account the ECJ’s ruling in **Coleman v Attridge [2008]** where the ECJ said:

“The framework directive protects those who although not themselves disabled nevertheless suffered direct discrimination or harassment owing to their association with a disabled person.”

43. Discrimination by perception is also encapsulated in section 13. An example in the Code is:

“Where an employer rejects a job application from a white woman who it wrongly believes is black because she has an African sounding name.”

#### Disability Discrimination

44. There are several types of disability discrimination set out in the Equality Act 2010 – direct discrimination, indirect discrimination, discrimination arising out of the disability and the failure to make reasonable adjustments.

#### Disability – Reasonable Adjustments

45. In order to proceed with a reasonable adjustments case the claimant must establish a provision, criterion or practice (“PCP”) which places her at a substantial disadvantage because she was as disabled person. There are other issues regarding knowledge, however for the purposes of this case the claimant’s concern is with the PCP. The respondents say simply that factually no such PCP was applied and therefore those claims should fall away.

### **Conclusions**

#### Disability

##### Toilet breaks

46. I am satisfied from the documentation produced by the respondent that the respondent’s concern in relation to the claimant was about the amount of time she spent talking to other members of staff and that indeed other members of staff had complained to management about this. There is no evidence the respondent had tried to prevent the claimant taking any toilet breaks whatsoever and therefore her putative PCP in respect of this is not factually correct and therefore any reasonable adjustments claim based on it must fail. Accordingly this claim is dismissed.

##### Flat Shoes

47. I am satisfied that the only issue the respondent had in this respect was with the claimant wearing what were perceived to be trainers. As such the claim in relation to flat shoes must fail on the basis that it is factually unsustainable. However, I am mindful that the claimant may have used the words “flat shoes” rather than “trainers”. If this is the case then she may apply to amend this particular claim to refer to a PCP to the effect that the respondent had a policy of not allowing staff to wear trainers which had a substantial disadvantage to herself as she was required to wear them because of her medical condition, which was a disability. If she wishes to so amend she must apply to the tribunal within 14 days of the promulgation of this judgement setting out the amendment in full.

48. In order to substantiate the claim the Tribunal would require the claimant to provide medical evidence that she had to wear trainers for medical reasons. The

claimant should provide this information within 14 days of the promulgation of this decision to the respondent and the Tribunal.

Religion or Belief

49. Whilst the respondent did not produce any source detail regarding the criteria for referral under the Channel programme, the claimant accepted that a referral was with a view to heading off the radicalisation of an individual in respect of any terrorist organisation. Information was set out in the respondent's ET3 and is readily available on the internet.

50. The Channel programme is not limited to Muslim terrorist organisations (so far as any such organisation can be affiliated to a religion) but refers to all terrorist organisations. Whilst the claimant does refer to Isis being referred to (a matter not mentioned in any of the pleadings but I am proceeding on the basis this is correct for the purposes of this application), it is clear that anyone viewing such a video would have been referred and the viewer of such a video may not have intended to join a Muslim terrorist organisation but another terrorist organisation. They may have been referred if they were in receipt of other material relating to other terrorist organisations not affiliated with the Muslim religion. For example, contemporaneously it is reasonably likely that an individual could be referred for their far right beliefs as we have recently seen incidents relating to this particular belief resulting in what could be described as acts of terrorism such as Jo Cox's murder and the actions of Anders Breivik in Norway.

51. Therefore I find that any claim of direct discrimination under this head is misconceived. It is misconceived because the claimant says herself she was a Christian and that this was clearly known by the respondents. There was therefore no perception of her being a Muslim. In any event, the perception would be that she was involved or at risk of involvement with a terrorist organisation which bases itself on Islamic beliefs, that is insufficient for a direct claim by perception as the prominent and significant issue is the terrorism link not the religious link.

52. If the claimant says she was referred because the videos were believed to be of Isis executions, and that means thereby associated her with a religious belief (Islam), again it might make her associated with a terrorist organisation purporting to be of the Islamic faith, but the faith aspect was irrelevant. The pre-eminent reason was the terrorism element. Again anyone viewing similar material not linked to ISIS would have been referred. If she had viewed material about the muslim faith per se for example she would not have been referred as that is a terrorism free topic.

53. The claim that she was referred because it was believed that she associated with Muslims because of the video is unsustainable, as it is clearly that she was referred because she was associated with execution videos known to be produced by terrorist organisations, therefore the association was with the terrorist organisation.

54. The claimant states that this was unwarranted exaggeration. That may be the case, but that is a different case and is irrelevant to whether or not the claimant has a legal basis for arguing she was directly discriminated against because of religion or belief.

55. I have not considered indirect discrimination because the claimant confirmed in the hearing that she was not making an indirect religion or belief discrimination claim.

Deposit Order

56. I would have made a deposit order in respect of each claim had I not struck them out.

57. I enquired into the claimants means and would have order a deposit order of £50 in respect of each disability claim and £300 in respect of the Channel referral.

Time Limits

58. The claimant is out of time in respect of her disability claims as the last day she was in work was the 15 July 2015. Accordingly no disability discrimination could have arisen after that date as the claimant did not seek an EC certificate until 4 February 2016 she was out of time before that process began. However I did not give the claimant the opportunity to give evidence as to why her claim was late and consequently I have not made a decision on this point. It is immaterial given my striking out decision unless the claimant seeks an amendment as described above in which case the matter can be dealt with then.

59. In respect of her religion and belief claim potentially the last act here was 10 August and again the claimant would be out of time. For the same reason as above, I have not made a decision in respect of this but the matter could be considered again at any amendment application if the claimant is required to give evidence about any matters relevant to the exercise of the just and equitable discretion.

Employment Judge Feeney  
28<sup>th</sup> February 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON  
2 March 2017

FOR THE TRIBUNAL OFFICE