



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Arunaben Limbachia Sprague v

Norfolk County Council

Heard at: Norwich
On: 15, 16, 17 and 18 August 2022

Before: Employment Judge Postle

Members: Mr Davey and Miss Blunden

Appearances

For the Claimant: Mr Frame, Solicitor

For the Respondent: Miss Ifeka, Counsel

RESERVED JUDGMENT

The Claimant's claim under the protected characteristic of race for direct and indirect discrimination and harassment is not well founded.

RESERVED REASONS

Background

1. The Claimant brings claims to the Tribunal under the Equality Act 2010 ("EqA") for the protected characteristic of race; the Claimant describes herself as being from the Indian sub-continent.
2. The issues the Tribunal has to determine were agreed between the parties and involve direct discrimination pursuant to s.13 EqA 2010, particularly did the Claimant suffer detriments, being subjected to a probationary review meeting, being dismissed and the Respondent's factual conclusions that the Claimant was not capable of being objective or impartial because she had been in an abusive arranged marriage.

3. The comparators relied upon by the Claimant are Miss K North and Miss S Timms, together with a hypothetical comparator.
4. The Claimant's claims under indirect discrimination, the Claimant relying on PCPs of not employing or retaining employees who are or have been in an abusive and or arranged marriage and are subject to intervention by Children's Services. Secondly, the Respondent's provision that employees in arranged marriages could not be objective and / or impartial and / or capable of thinking for themselves.
5. In respect of the indirect claim, the Respondents rely on the defence of a proportionate means of achieving a legitimate aim:
 - 5.1 the Respondents statutory duty to promote and safeguard the welfare of children within its area;
 - 5.2 in providing services to children, the Respondents must fully risk assess and consider the suitability of employees who work with children;
 - 5.3 to ensure that the Respondents fulfil its statutory duty the Respondents must reasonably be allowed to review and dismiss employees where their suitability comes into question, in particular where the employer works with children and families; and
 - 5.4 for employees to declare that they have themselves been subject to child protection involvement by Children's Services, the Respondent can only consider information as and when it is provided. If the Respondent learns about relevant information regarding employees then it is legitimate for the Respondent to reconsider the employee's suitability based on this and whether the information was provided up front.
6. In relation to the Claimant's claim under s.26 EqA 2010 for harassment, the following unwanted conduct, is relied upon; the contents of the Respondent's outcome letter, namely:
 - 6.1 lack of honesty and transparency;
 - 6.2 poor judgement, personal bias when providing advice to families you are working with, especially in cases relating to arranged marriages, domestic abuse, whether there are difficulties in terms of teenager behaviour and minimising seriousness of Child Protection Orders; and finally
 - 6.3 not being able to remain objective.
7. There were further claims of harassment for subjecting the Claimant to a probationary review meeting stating the Claimant was unable to remain objective and / or impartial due to her having been in an abusive, arranged marriage and the Respondent's position the Claimant was not capable of doing the role because she had been in an abusive arranged marriage and finally the Respondent's requirement the Claimant relive her past abusive relationship by insisting she divulge personal information relating to her

abusive arranged marriage and her children which had no bearing on the Claimant's ability to do her job.

8. In this Tribunal we heard evidence from the Claimant through a lengthy prepared Witness Statement.
9. For the Respondents we heard evidence from: Mr Newbolt, Assistant Director Children and Social Care; and Laurie Barker, Head of Family Support Service. Both giving their evidence through prepared witness statements.
10. The Tribunal also had the benefit of a Bundle of documents consisting of 402 pages.
11. The Tribunal first wish to comment on the credibility of witnesses. Firstly Miss Barker, notwithstanding the Tribunal's Judgment, the Tribunal found Miss Barker an unconvincing witness who clearly cherry picked the evidence she wished to give in her witness statement, she lacked consistency and was evasive in her responses under cross examination.
12. In relation to Mr Newbolt, again the Tribunal found this witness very evasive, choosing to make very long statements rather than focus on / answer the questions put to him. The Tribunal finds he lacks credibility and in some of his responses the Tribunal found, quite frankly, implausible.
13. Whereas the Claimant's evidence, to her credit, was clear and consistent, albeit sometimes brief.

The Facts

14. The Claimant was employed by Norfolk County Council as a Family Support Practitioner from 10 December 2020 until her dismissal on 4 March 2021. The Claimant worked within the Family Support City Team 3.
15. The Claimant's job involved working with families that did not require statutory intervention.
16. The Claimant was born in India and moved to the UK to be with her husband via an arranged marriage in India. The Claimant lived with her husband and his parents, during which she was not allowed her own bank account, driving licence or passport. She worked in the family shop without wages. The marriage ended with an acrimonious divorce and a long running dispute over contact with their children. The children originally living with the Claimant until November 2015 when there was an incident involving one of the children which led to intervention of the Police, Social Services and a LADO referral was made which led to a Child Protection Plan running to February 2017. A period of some 15 months from November 2015.

17. It is accepted that on 3 June 2014, the Claimant was found guilty at the Magistrates Court of battery against her husband and in May 2017 the Claimant was also convicted of criminal damage in relation to her father-in-law's car following the outcome of a Family Hearing involving the children.
18. The Claimant had in 2019 worked for an independent Social Worker Agency known as CF who provided their services to Norfolk County Council.
19. On 29 October 2020, the Claimant applied for the role of Family Practitioner, Children's Social Services and Norfolk County Council. The interview took place on 18 November 2020 and for reasons best known to Miss Barker for the Respondent, there has been no disclosure of the questions which were asked at that interview and the replies given by the Claimant. Nor were the scores attributed to the Claimant disclosed in these proceedings.
20. However, during the course of these proceedings a document was produced by the Claimant entitled 'Norfolk Safeguarding Children Partnership (Safer Recruitment Guidance)' and although dated July 2021, it seems inconceivable a similar document would not have existed at the time the Claimant's interview took place. The relevance of which deals with, amongst other things, the questions that should be asked on an application form; in particular whether there has been any previous involvement with Social Services and safeguarding issues which were not on the application form the Claimant completed. Surprisingly, Miss Barker seemed ignorant of the document or even its relevance.
21. Furthermore, the above document goes on to give guidance on interviews, in particular:

“Warner interviews are not essential for all individuals working with children and young people outside of the residential sector but it is strongly recommended that Warner style questions be included in interviews for relevant roles e.g. professional posts, as well as questions about the applicant's qualifications, previous work experience, competencies etc.”
22. A Policy the Respondents do not follow, Mr Newbolt suggests they were not relevant, Miss Barker also said they were not relevant which is surprising given the Head of Department both were not even trained in 'Warner' style interviews.
23. Miss Barker indicated she would have asked questions in accordance with Safer Care interview techniques despite the fact she has no record. The Tribunal thinks it was unlikely she did. The Tribunal also accept that the Claimant did not disclose her criminal convictions as she understood them to be spent convictions.

24. The Claimant was subsequently offered a job by Miss Barker on 27 November 2020 and the Claimant at that stage advised Miss Barker a DBS check would reveal two spent convictions and explained the detail of those. Miss Barker clearly had no concerns about those previous convictions at that stage. The Claimant provides a reference from a previous employer Mulberry Bush on 3 December 2020 on which they confirm the reason for the Claimant leaving their employ was that she did not fit into the Team and did not pass the probationary period (page 215). Miss Barker, on speaking to them ascertained the Claimant did not have her own children living with her.
25. On 4 December 2020, a telephone call between the Claimant and Miss Barker took place in which they discussed what Miss Barker had learned from the Nursery (oddly, although Miss Barker admits the call between the Claimant and herself took place, there is absolutely no mention of it in her witness statement, nor did she keep any notes, or the reason for such an important call). During this call the Claimant explained how the Police, Social Services and the LADO referral came about. Miss Barker says she would have asked further questions, however, unfortunately Miss Barker cannot recall what they might have been and of course there is no record kept of that telephone call.
26. Following the above, the Claimant emails Miss Barker on 7 February 2021, this is a lengthy email in which she details her family background, the break up of her marriage, the fact it was an arranged marriage and the summary of the core proceedings relating to the children and her working background. In summary, how her life had been extremely difficult at times (pages 91 – 93). The email ended,

“Please do not hesitate to contact me if you require any further information.”
27. Miss Barker’s response on the same day (page 98) was a short response with no further enquiries of the Claimant and thanking her for being honest. Surprisingly, at that stage Miss Barker did not probe further about the Claimant’s children, Social Services involvement or the core proceedings, or suggesting she had any concerns with the Claimant’s position with the Respondent’s organisation.
28. On 10 December 2020, the Claimant starts her employment with the Respondents. The DBS check received on 22 December 2020 confirms there are two convictions, as a result of which Miss Barker in accordance with the Respondent’s Policy completes a criminal risk assessment. On 11 January 2021, the Claimant is allowed to work alone with children which to the end of the Claimant’s employment there were in fact no issues in her capability.
29. Sometime between early January and early February, the Claimant was apparently recognised by a Social Worker who had been involved in supervising the contact between the Claimant and her children. This

Social Worker raised the matter with Miss Barker, although again there are no notes of what exactly was raised. The Claimant was then advised that Liquid Logic, the Respondent's data base, would be restricted in relation to the records regarding the Claimant and her children. The Claimant was also advised she could no longer see families / children unsupervised, although she was not suspended. At this stage Miss Barker then makes a LADO referral, though at this stage there was no allegation nor incident pending to reveal the Claimant's children, this was on 12 February 2021. The response from LADO was that this was an HR matter and as a result took the matter no further.

30. On 18 February 2021, the Claimant emails Miss Layden her direct report giving a detailed family history and information of the events surrounding her divorce and children (pages 135 – 138).
31. On 22 February 2021, the Claimant emails Miss Barker with a similar synopsis of her family background and divorce and matters pertaining to the children (pages 140 – 141).
32. The Claimant was then invited to a Probationary Review meeting by Miss Barker in a letter dated 25 February 2021 (page 149) which underlined, although it was not made clear in the letter, that there was to be a disciplinary meeting as it sets out allegations,

“Concern about your lack of honesty and transparency about the history of safeguarding concerns relating to your family. The lack of transparency has had a significant impact in my trust and confidence in you as a suitable employee for this role.”

33. The meeting was scheduled to take place on Thursday 4 March 2021, stating the purpose of the Review Meeting was to discuss the concerns and give the Claimant an opportunity to respond. It said that following the discussion a decision would be taken on whether to confirm the Claimant's appointment in her current role.
34. There appears to be a draft Agenda for the meeting on 4 March 2021 (page 160 – 161) which contains embedded comments suggesting that the outcome of the Probationary Review meeting would only have one outcome, namely that the Claimant would be dismissed regardless of what the Claimant put forward.
35. The meeting duly takes place on 4 March 2021 and the Claimant is dismissed. Despite the Claimant requesting minutes of the meeting (page 169) they are declined by Miss Barker and no minutes have ever been provided at this Hearing. Dismissal takes place on 4 March 2021, the outcome letter dated 10 March 2021 gives the reason for dismissal as,

“Lack of honesty and transparency about safeguarding history, conduct and behaviour during probationary period and failing to reach a satisfactory standard, inability to remain in position when

working with children cases related to arranged marriage, domestic abuse, difficult teenagers, minimising seriousness of Child Protection Orders, we have no way of measuring and ensuring confidence in your practice due to the role being largely done in isolation”.

36. Whereas there was little or no evidence to support any of these findings other than, at best, the Claimant did not reveal a Child Protection Plan which Miss Barker had every opportunity to ascertain for herself given the volumes of personal information the Claimant had given during the course of her employment.
37. The Claimant lodged a detailed Appeal dated 17 March 2021 (pages 195 – 200).
38. The Appeal was heard by Mr Newbolt on 12 April 2021, the minutes (page 254), Mr Newbolt was not provided a pack for the Appeal and it was unclear from his evidence what he had in fact in front of him at the Appeal. It is also clear to the Tribunal, he had discussions with Miss Barker possibly before the dismissal. It is also clear to the Tribunal Mr Newbolt's evidence that despite his assertion to the contrary, he was merely rubber stamping the decision that had already been made to terminate the Claimant's employment. Particularly if one looks at the outcome Appeal letter, little or no reference has been made by Mr Newbolt addressing the Claimant's specific grounds for the Appeal and in the Claimant's various correspondence with him before the Appeal. Mr Newbolt's outcome letter is, to say the least, extremely brief and lacks any details (page 203 – 204).
39. It would appear he carried out no further investigation into the Claimant's Appeal and the Tribunal repeats merely rubber stamping without giving the Claimant's Appeal due consideration.

The Law

40. In s.13 EqA 2010, direct discrimination,
 - (1) 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.
 - (2) If there are any facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
41. The burden of proof requires the Employment Tribunal to go through a two stage process. The first stage requires the Claimant to prove facts from which the Tribunal could, apart from that section, conclude in the absence of an adequate explanation that the Respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the

complainant. The Tribunal is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that unless the Respondent provides an adequate explanation then the Claimant will succeed.

42. It would be inconsistent with that assumption to take account of an adequate explanation by the Respondent at the first stage. The second stage, which only comes into effect if the complainant has proved those facts, requires the Respondent to prove that it did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld. If the second stage is reached, the Respondent's explanation is inadequate, it will be not merely legitimate but also necessary for the Tribunal to conclude that the complaint should be upheld.
43. The crucial question in the case of direct discrimination is why the Claimant received less favourable treatment, was it on the grounds of race or was it for some other reason.
44. S.19 EqA 2010, indirect discrimination,
 - (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which discriminates in relation to a relevant characteristic of B's;
 - (2) For the purposes of sub-section (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B if-
 - (a) A applies or would apply it to a person with whom B does not share that characteristic,
 - (b) It puts, or would put a person with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) Puts, or would put B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
45. In order to establish a prima facie case of indirect discrimination it is sufficient to show that a provision, criterion or practice results in a particular disadvantage to those sharing the Claimant's protected characteristic to the Claimant personally. It is not necessary to show why the PCP resulted in that disadvantage and that it was causally linked to the Claimant's protected characteristic. Thus, it is not necessary to establish the reason for the particular disadvantage to which the group is put. A potential element is a causal connection between the PCP and the disadvantage suffered not only by the group but also by the individual. This may be easier to prove if the reason for the group disadvantage is known, but that is a matter of fact not law.

46. To be a proportionate means of achieving a legitimate aim, measure has to be both an appropriate means of achieving the relevant legitimate aim and reasoning necessary in order to do so.
47. S.26 EqA 2010, harassment,
- (1) A person (A) harasses another (B) if-
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of-
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
 - (4) In deciding whether conduct has the effect referred to in sub-section (1)(b), each of the following must be taken into account-
 - (a) the perception of B;
 - (b) the other circumstances of the case; and
 - (c) whether it is reasonable for the conduct to have that effect.
48. The necessary element of liability of harassment are therefore threefold:
- 1: did the Respondent engage in the unwanted conduct?
 - 2: did the conduct in question either,
 - (a) have the purpose..., or
 - (b) the effect of,

violating the Claimant's dignity, or creating the adverse environment for him or her prescribed consequences.
 - 3: was the conduct on prohibited ground?

The Tribunal's Conclusions

Direct Discrimination

49. What is clear to the Tribunal is that the actions taken by Miss Barker throughout the unfortunate scenario leading to the Claimant's dismissal, however incompetent Miss Barker may appear to have been, were not on the grounds of the Claimant's race. It is clear, regardless of race, a hypothetical comparator in circumstances not materially different to that of the Claimant and involved in the same background with her children, would ultimately have been treated exactly the same, and dismissed. It is true that the Claimant's pleaded case is not entirely clear. It is also clear

that the comparators relied upon by the Claimant, Miss K North and Miss S Timms, together with a hypothetical comparator, the actual comparators are inappropriate and would have in any event been treated in exactly the same way. Clearly, when the Claimant's background came out, albeit the Respondents should have been on notice following the DBS check, nevertheless, ultimately the decision to subject the Claimant to a Probationary Review meeting and being dismissed were clearly nothing to do with the fact that the Claimant was or had been in an abusive arranged marriage, or the fact that she came from the Indian sub-continent. Therefore, the Tribunal could not conclude in those circumstances that the decision to dismiss for the alleged detriment came about as a result of the Claimant's race.

Indirect Discrimination

50. In respect of the indirect claim, it is clear the Respondents do have a statutory duty to promote and safeguard the welfare of the children and further, that the Respondents must fully risk assess and consider the suitability of employees who work with children. It clearly is a proportionate means of achieving a legitimate aim, even if it could be said that there was a PCP held by the Respondents of not employing or retaining employees who have been in an abusive or arranged marriage and have been subject to intervention by Children's Services. Had there been an issue over any of the children the Claimant was responsible for, the press would have had a field day if they had found out the background of the Claimant.
51. Once again, the Tribunal accept the matter was handled badly by Miss Barker and she should have been more proactive from the start. The actions taken by the Respondent, however, are not matters of indirect discrimination.

Harassment

52. In relation to the final claim of harassment, particularly the contents of the Respondent's outcome letter relating to dismissal, all of those whilst on the face of it do not make pleasant reading for any employee regardless of race, what is clear given Miss Barker's obvious lack of experience and competence that the comments were not made with the intention of violating the Claimant's dignity or creating a humiliating or hostile environment.
53. Particularly as the conduct, although the Tribunal accepting that the words spoken in the Probation Review meeting or written thereafter, fall within the definition of conduct, clearly the conduct as set out in the agreed List of Issues does not amount to conduct that had the purpose or effect of violating the Claimant's dignity or creating a humiliating or hostile environment.

54. Furthermore, it is true that given the role that the Claimant occupied, she should or would have been aware that the purpose of the Respondent in discharging its obligation to safeguard children is reflected in those comments, albeit they might have been put in better terms.
55. What the Tribunal hopes will come out of this unfortunate scenario, is that Miss Barker be given further training in recruitment, interviewing and exploring any question marks over the suitability of an applicant role within the Children's Services. Mr Newbolt be reminded that when he is conducting an Appeal Hearing he should come to it with an open mind, having clearly read the background and papers leading up to and including dismissal before he actually undertakes the Appeal. Further, if he feels in any way conflicted he should immediately notify HR that the Appeal should be passed to another competent individual who will not be so conflicted.

Employment Judge Postle

Date: 30 December 2022

Sent to the parties on: 11 January 2023

For the Tribunal Office