

Neutral Citation Number: [2024] EAT 163

Case No: EA-2021-001188-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01 October 2024

Before:

HIS HONOUR JUDGE JAMES TAYLER

Between:

PATRICK ARTHUR-BADDOO

Appellant

- and -

GUY'S & ST THOMAS' NHS FOUNDATION TRUST

Respondent

The **Appellant** appeared **in person**
Mr D O'Dempsey (instructed by **DAC Beachcroft**) for the **Respondent**

Hearing date: 01 October 2024

JUDGMENT

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES, RACE DISCRIMINATION and MARRIAGE AND CIVIL PARTNERSHIP

The Employment Tribunal failed properly to determine complaints of unauthorised deduction from wages, race discrimination and marital discrimination of an employee who was suspended from work on the basis that he required an ECS immigration check despite having provided evidence that as a spouse of an EU national he had the right to work in the UK. The matter was remitted to be redetermined.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against a judgment of the Employment Tribunal, Employment Judge Martin sitting with lay members, after a hearing held on 26 and 27 April 2021. The judgment with reasons was sent to the parties on 29 July 2021.
2. I have significant concerns about the judgment. The heading of the judgment does not give the names of the members although the hearing was before a full panel. Some issues were not determined. Parts of the judgment appear to be in draft. In rejecting an application for reconsideration, Employment Judge Martin stated that the claimant disagreed with findings of facts she made, rather than the facts found by the panel. The decision rejecting the application for reconsideration does not address many of the points raised by the claimant and does not refer to the members of the panel. If the members saw the liability judgment, it is troubling that they did not appreciate that it was incomplete.
3. The claimant was offered a job by the respondent on 20 January 2019. He contends that he provided evidence that he had a right to work in the United Kingdom as a spouse of an EU national on 13 February 2019. The claimant provided a letter from his MP enclosing a letter from the Home Office, a copy of a decision of the Upper Tribunal (holding that, although estranged from his wife, the claimant was not divorced and was entitled to work in the United Kingdom), and a copy of the relevant section of his passport.
4. There is nothing in the judgment to suggest that the claimant's evidence about the documents he provided was rejected. However, the Employment Tribunal did not analyse whether the respondent had material that established that the claimant was not required to undergo ECS checks. There is a reference to the Upper Tribunal decision in the judgment, without any finding as to when it was provided to the respondent, or what account should have been taken of it when the respondent considered the claimant's immigration status.

5. The respondent required the claimant to undergo ECS checks. ECS checks are for people who do not have a right, as a UK national, an EU national or a family member of an EU national, to work in the United Kingdom. ECS checks involve consideration of documents relevant to immigration status and can provide a statutory defence to the offence of employing a person without a right to work in the United Kingdom. The claimant's case was that he repeatedly explained to the respondent that he did not need to provide such evidence because he was married to an EU citizen.

6. Notwithstanding this, the claimant did allow the respondent to undertake an initial ECS check.

7. The claimant commenced employment on 13 May 2019. He signed a contract of employment that referred to ECS checks, and included this provision:

The result of your ECS check is valid for six months expiring on 14 October 2019. Please note that you will be required to show your new biometric card in person prior to this date. Failure to do so may lead to the termination of your contract as you will not have the statutory excuse required for the right to work.

8. While the claimant signed the contract, his position all along was that he was not required to undergo ECS checks and had an absolute right to work in the United Kingdom.

9. The respondent had previously had problems concerning the right to work of employees in the United Kingdom.

10. The respondent operated a suspension policy which, at paragraph 4.3, provided:

If there is reasonable evidence that an employee is not entitled to work in the UK, i.e. without valid documentation, the employee will be immediately suspended on no pay following consultation with the workforce relations team.

11. The respondent suspended the claimant on 16 October 2019, without pay, on the basis that new ECS checks had not been undertaken. The suspension ended on 13 November 2019. The respondent had repaid part of the deduction by the time of the Employment Tribunal hearing. The outstanding sum was subsequently repaid to the claimant.

12. The claimant brought complaints of unauthorised deduction from wages, indirect race discrimination and direct marital discrimination. The latter claim was added because, in its response to the claim, the respondent referred to the claimant being estranged from his wife. It appears that the respondent may have thought that the absolute right to work in the United Kingdom did not apply to a person who is married to an EU national, but is estranged.

13. The Employment Tribunal made relatively limited findings of fact. It was critical of the claimant for having signed the contract that recorded that the validity of his ECS check was limited to six months. The Employment Tribunal did not expressly evaluate the claimant's contention that he had, at the outset of his employment provided documentation that established that he had a right to work in the United Kingdom and was not required to undergo ECS checks. Nor did the Employment Tribunal evaluate his evidence that he had raised this point repeatedly during his employment.

14. The Employment Tribunal reached relatively brief conclusions. The Employment Tribunal dealt with the unauthorised deduction from wages claim at paragraph 38.

38. The Claimant has claimed that the Respondent's actions amounted to indirect discrimination on the protected characteristic of race and that he is owed arrears of pay. The Respondent's policy authorises it to make deductions in pay in these circumstances, and hence there is no unauthorised deduction from pay. In any event the Respondent has made good the pay he did not receive in his period of suspension and this part of his claim is dismissed.

15. In effect, the Employment Tribunal held that the respondent's policy authorised it to make the deductions from wages and that, in any event, the payment had been made good. Therefore, the complaint was dismissed.

16. The right not to suffer unauthorised deductions from wages is set out at section 13 of the **Employment Rights Act 1996** ("ERA"):

- “(1) An employer **shall not make a deduction from wages** of a worker employed by him **unless** –
- (a) the deduction is **required or authorised** to be made by virtue of a statutory provision or a **relevant provision of the worker's contract**, or
 - (b) the worker has **previously signified in writing his agreement or consent to the making of the deduction.**”
[emphasis added]

17. The **ERA** makes it clear that a deduction may be authorised by virtue of a relevant provision of the employee's contract or agreed in writing. In this case a deduction could be authorised by paragraph 4.3 of the suspension policy if the respondent had “reasonable evidence” that the claimant was not “entitled to work in the UK”.

18. Section 23 **ERA** provides for a complaint to the Employment Tribunal that there has been an unauthorised deduction from wages. Section 24(1)(a) **ERA** provides:

- (1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer –
- (a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13.

19. There is also provision for a claimant to recover compensation for any financial loss suffered as a result of the deduction pursuant to section 24(2) **ERA**:

- (2) Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount

ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

20. To analyse the unauthorised deduction from wages complaint, it was necessary for the Employment Tribunal to consider whether the respondent had reasonable evidence that the claimant was not entitled to work in the UK. The Employment Tribunal did not analyse that issue in any detail. The Employment Tribunal did not consider whether the evidence that the claimant had provided at the commencement of his employment, and he said he had repeatedly referred to thereafter, demonstrated a right to work in the United Kingdom. It was arguable that, notwithstanding him having signed the contract of employment that referred to ECS checks, it would be unreasonable for the respondent to conclude that he did not have a right to work in the United Kingdom on the basis of the evidence he had provided.

21. Accordingly, I uphold the appeal insofar as it challenges the complaint of unauthorised deduction from wages. The appeal is not, as was suggested by the respondent, academic. If the claim is made out, the claimant would be entitled to a declaration and, although the deduction has been repaid in full, it appears from the claim form that the claimant asserted he had suffered consequential financial loss. The Employment Tribunal did not consider any remedy arguments. Accordingly, the unauthorised deduction from wages complaint will have to be remitted to be determined afresh.

22. The complaint of indirect race discrimination relied on two PCPs, said to be (1) the requirement for a positive ECS check and (2) the insistence of the respondent on only accepting proof of right to work documents that produces a statutory excuse, regardless of the right/status and protection conferred on the employee by law. The Employment Tribunal dealt with the indirect discrimination complaint at paragraphs 39 through to 45 of the judgment:

39. The Claimant has claimed indirect discrimination on the grounds of race. The PCP's relied on by the Claimant are the requirement for a positive ECS check and the insistence on ONLY accepting proof of right to work documents that produces a statutory excuse regardless of the right/status and protection conferred on the employee by law.

40. The Respondent accepts it applied a PCP requiring a positive ECS check, but does not accept it applied a PCP of only accepting proof of right to work documents that produce a statutory excuse regardless of the rights/status and protection conferred on the employee by law. The Tribunal finds that the Respondent required a positive ECS check in order to protect itself from potential penalties. The Respondent submits that the only requirement was to undergo an ECS check and for the ECS service which is external to the Respondent to return a positive verification that was applied by the Respondent. It submits that the documents the Home Office required for a positive ECS check were not mandated by the Respondent. The Tribunal accepts this submission

41. The Tribunal finds that the Respondent did apply the PCP to all other non-EU or non-UK nationals.

Justification

42. The Respondent submits that it was justified in using the PCP it applied and the legitimate aim was (a) to employ employees lawfully and in line with immigration legislation and/or (b) to ensure the R had a statutory excuse against any potential penalty. The Tribunal accepts that the Respondent has a duty to ensure that all employees have the right to work in the UK and that it can be fined if it is found that employees do not have such a right. The Tribunal finds that the Respondent used proportionate means to achieve its legitimate aim given that here is a defence – the statutory excuse – that protects employers against penalties if it is found later that an employee does not have the right to work.

43. The Tribunal finds that these are legitimate aims in that the Respondent was concerned to minimise the risk of being subjected to a civil or criminal penalty for employing workers who did not have the right to work in the UK.

44. **The means adopted and their appropriateness**

45. **Were the means reasonably necessary?** [emphasis added]

23. Section 19 of the **Equality Act 2010** (“EQA”) provides:

- (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, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

- (3) The relevant protected characteristics are –

...

race; ...

24. A claim of indirect discrimination requires the Employment Tribunal to determine whether a provision, criterion or practice (“PCP”) has been applied to persons with whom the claimant does not share a protected characteristic, whether it puts persons with whom the claimant shares the protected characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the protected characteristic, and that it puts or would put the claimant at that disadvantage. That is subject to the respondent establishing that the application of the PCP was a proportionate means of achieving a legitimate aim.

25. The Employment Tribunal concluded that the first PCP was applied. It is unclear whether the Employment Tribunal accepted that the second PCP was not applied. The Employment Tribunal did not consider the group to whom the PCP was applied. The Employment Tribunal did not consider whether the PCP would place persons with whom the claimant shared a protected characteristic at a particular disadvantage when compared with persons with whom he did not share that protected characteristic.

26. The judgment did not identify the specific protected characteristic relied upon. It appears that the claimant was relying on the characteristic of a nationality other than EU or British nationality.

27. The Employment Tribunal appears to have given some consideration to justification. When dealing with justification in paragraph 42, it appears that the Employment Tribunal concluded that the application of the policy was a proportionate means of achieving a legitimate aim. However, paragraph 44 suggests that the Employment Tribunal did not consider whether the means were appropriate. Paragraph 45 raises the question of whether reasonable necessity was considered. Both paragraphs 44 and 45 raise the relevant question but do not answer it.

28. Overall, the reasoning of the Employment Tribunal is unsafe in circumstances in which it appears to be incomplete, and possibly is a draft.

29. I spent some time in discussion with the claimant seeking to ascertain precisely how the complaint of indirect race discrimination was put. I consider that there may be real issues about the relevant pool, comparative disadvantage and whether the claimant was put to the specific disadvantage. However, I note that the claimant is a litigant in person. I am not prepared at this stage to say that there is no arguable claim of indirect discrimination, although the claimant has struggled to explain one that I consider would be workable.

30. I appreciate that there is support for the claimant's indirect discrimination complaint in the decision of Soole J in **Badara v Pulse Healthcare Ltd** UKEAT.210.18, [2020] ICR 819:

54. Mr Randle submits that the tribunal's disregard of *Okuoimose* and the related "Additional information" in the Home Office guidance fatally undermined its conclusion on the claim of indirect discrimination. **The respondent accepted that the PCP (provision, criteria or practice), which required of non-EU nationals a positive ECS check, placed the claimant at a substantial disadvantage when compared with someone who was an EU national.** However the tribunal accepted the respondent's justification defence, holding that it was a legitimate aim of all employers to

comply with the appropriate immigration control and statutory requirements as set down by the Home Office; and that in the circumstances its practice of relying on the Home Office ECS checks was a proportionate means of achieving that legitimate aim.

55. If the tribunal had recognised that the provisions of section 15 of the 2006 Act and the related 2007 Order had no relevance to the claimant's established right to work, and had taken account of the related Home Office guidance, it must inevitably have concluded that its practice of reliance on the ECS checks was not a proportionate means of achieving the legitimate aim of compliance with the immigration control and statutory requirements of the Home Office. This required no further factual consideration but was the necessary consequence of the tribunal's failure to take account of *Okuoimose* and the guidance.

56. Mr Mitchell's essential response was that the issue of proportionality was a question of fact for the tribunal. There was no error of law in its treatment of *Okuoimose*. Bearing particularly in mind the penalties which employers could face if they did not require and receive the appropriate documents from prospective or actual employees pursuant to the 2006 Act and 2007 Order, and the strictures contained in the terms of negative ECS checks, the tribunal's conclusion of fact was unimpeachable.

57. I recognise, of course the difficult position in which employers may be placed in these circumstances. However the claimant had a right to work; and as the Home Office guidance made clear, was under no obligation to register with or obtain documentation from the Home Office. In consequence of the respondent's requirements of positive ECS checks, and Home Office responses which for some reason were negative, his ability to exercise that right was prevented.

58. In my judgment, when considering this claim the tribunal should have taken account of the decision in *Okuoimose* and the Home Office "Additional information". This was relevant both to the legitimate aim, i.e., to the extent of identifying what were the relevant immigration control and statutory requirements, and to the proportionality of the means used to achieve that aim. I am again not persuaded that the question necessarily admits of only one answer. In consequence this claim must also be remitted to the tribunal for reconsideration.

31. The reasoning in **Badara** rested on a concession that "the PCP ... which required of non-EU nationals a positive ECS check, placed the claimant at a substantial disadvantage when compared with someone who was an EU national." The difficulty with that concession is that it considered a group of people to whom the PCP, requiring "a positive ECS check", was applied "non-EU nationals" as against a group to whom it was **not** applied "EU Nationals", whereas indirect discrimination requires a PCP that **is** also applied to people with whom the

claimant does not share the protected characteristic (section 19(2)(a) **EQA**). It seems to me that because that element of the reasoning was founded on a concession it is not binding on an Employment Tribunal.

32. I consider that the decision on indirect discrimination must be set aside. I reject the invitation in the cross-appeal to substitute a decision that the treatment was solely a consequence of the claimant having signed the contract that suggested that ECS checks were required or because of the challenges he faces in establishing group disadvantage in comparison to others who have a share the protected characteristic to whom the PCP is also applied. Accordingly, the complaint will be remitted. However, the claimant should seek advice and carefully consider whether there is a viable claim of indirect race discrimination to be advanced.

33. In respect of the claim of direct marriage discrimination, the claimant's contention was that he was subject to discrimination because the respondent doubted that he had a right to work in the UK because of his marital status as a result of him being estranged from his wife. That issue was raised in the response to the claim and resulted in the successful application to add a claim of marital discrimination.

34. The claimant relied on the decision of the Employment Appeal Tribunal under the then President, Mrs Justice Simler, **Gould v Trustees of St John's Downshire Hill**, UKEAT/0115/17/DA. Mrs Justice Simler held that a claim of marital discrimination could be founded on marital difficulties. The appeal was against the strike out of a claim. Mrs Justice Simler merely held that the point was arguable. The facts were that a vicar had marital difficulties. It was accepted that it was arguable that a negative view that was taken by the church about the difficulties in his marriage could give rise to a claim of direct discrimination because of the protected characteristic of marital status. It is suggested in the judgment that the

relevant comparator is an unmarried person who has relationship difficulties. Thus to succeed in the claim the vicar would have to establish that the church took a more negative view of him because he was married and was having difficulties in his relationship than it would have done if another vicar had equivalent relationship difficulties with a person with whom he was in a relationship, but was not married to.

35. The complaint of marriage discrimination is more complex in this case because the claimant's claim to the Employment Tribunal was based on the assertion that, as a person married to an EU national, he was not required to undergo ECS checks, but was required to do so by the respondent because he was estranged from his wife. A comparison with a person in a relationship with an EU national who was not married would not work because such a person would not be exempt from undergoing ECS checks, so would be in materially different circumstances. However, as the claimant pointed out in argument, the exception from being required to undergo ECS checks applies to "family members" and it is conceivable that the respondent may have dealt differently with someone who, through some other basis of family membership, had a right to work in the UK, but was estranged from the family member. The claimant should, if possible, seek advice about the likelihood of making out a complaint of direct marital discrimination.

36. Accordingly, the appeal is allowed. The matter will be remitted. The errors of the Employment Tribunal were fundamental. The judgment is unsafe. The Employment Tribunal failed to engage with the claimant's application for reconsideration in which a number of the issues in this appeal were raised. In the circumstances, I considered it is appropriate that remission be to a differently constituted Employment Tribunal.

37. It is clear to me that the claimant feels very strongly about his situation. He feels that because he explained and evidenced his right to work in this country he should not have been

forced to undergo the ECS checks and then been suspended without pay. The claimant remains employed by the respondent and the deductions have been repaid, although I note his potential claim for consequential financial loss. The parties should consider the possibility of a resolution other than a further hearing in the Employment Tribunal, possibly judicial mediation, to resolve the dispute in a manner that can be satisfactory to the claimant and acknowledge the concerns that he has about his past treatment. That will be a matter for the parties to consider.