EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr B Rollett & others	**v**	British Airways plc

Heard at: Reading **On:** 14 & 15 December 2022

Before: Employment Judge Anstis (sitting alone)

Appearances
For the Claimant: Ms M Murphy (counsel)
For the Respondent: Mr B Carr KC (counsel)

RESERVED JUDGMENT

1. The tribunal has jurisdiction to consider indirect discrimination claims under section 19 of the Equality Act 2010 where there is a PCP applied by an employer that puts people with a particular protected characteristic at a disadvantage. Any claimant in such a case must also suffer that disadvantage but it is not necessary for them to have the same protected characteristic as the disadvantaged group.

2. The tribunal does not have jurisdiction to consider any other claim of unlawful discrimination (other than a claim of direct discrimination) that is based on association with a person holding a particular protected characteristic, rather than the claimant themselves holding the particular protected characteristic.

3. Any claim that withdrawal of or variation to staff travel concessions amounts to an unlawful deduction from wages has no reasonable prosect of success and is struck out.

4. Any claim under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 as described in para 11(d) and (e) in the sample pleadings relied upon has no reasonable prospect of success and is struck out.

REASONS

A. INTRODUCTION

1. This open preliminary hearing was convened to decide the following matters, which are set out across case management orders dated 24 February 2022, 23 June 2022 and 23 November 2022:

    "a. Whether the tribunal has jurisdiction to consider the Claimants' claims for associative indirect discrimination (race, sex and disability) under s.19 of the Equality Act 2010 ("EqA") and whether the tribunal has jurisdiction to consider claims of associative discrimination arising out of disability (s.15 of EqA) and associative failure to make reasonable adjustments (s.20 of EqA) in so far as these claims are advanced.

    b. The Respondent's application under rule 37 of Schedule One to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Tribunal Rules") for the strike out of the claims against the Respondent for unlawful deduction from wages in respect of staff travel on the grounds they have no reasonable prospects of success [and whether staff travel could constitute a "bonus" or "other emolument" pursuant to section 27(1)(a) ERA].

    c. The Respondent's application for a deposit order under rule 39 on the grounds that the claims in respect of which an application to strike out is made have little reasonable prospect of success. Any deposit ordered shall be limited to £5 for each Claimant.

    [d] *The Respondent's application for a strike out or deposit order in relation to the claims brought by the Claimants under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.*

    For the avoidance of doubt, the applications listed at paragraphs (b) and (c) above shall be limited to arguments based on section 27(5) Employment Rights Act 1996 ("ERA") and shall proceed on the basis (for this preliminary hearing only) that any entitlement to staff travel arises under the Claimant's contract or otherwise as set out in section 27(1) ERA."

2. On the question of associative discrimination, I am required to determine a preliminary issue on whether the tribunal has jurisdiction to consider the claims. On the question of staff travel and the part-time workers' claims I am required to consider if the claims have no reasonable prospect of success (for the purposes of any strike-out application) or little reasonable prospect of success (for the purposes of a deposit application).

3. The parties had prepared a list of agreed facts for the hearing, part of which was not agreed – although nothing seemed to depend on the areas of disagreement and neither party referred in any detail to this list of agreed facts.

4. Following a period of reading by the tribunal, the parties proceed to make oral submissions in support of skeleton arguments or written submissions they had prepared. At the conclusion of those oral submissions, I reserved my decision, and an order dated 16 December 2022 was made with a view to progressing these cases while this reserved judgment was awaited by the parties.

5. I am grateful to the parties for their clear and helpful submissions, which have made the task of preparing this decision much easier than it otherwise would have been.

B. ASSOCIATIVE DISCRIMINATION

The two kinds of associative discrimination

6. It was recognised during the parties submissions that in looking at associative discrimination the tribunal may need to make a distinction between two forms of associative discrimination.

7. The first was CHEZ-type associative discrimination (after CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia C-83/14 [2015] IRLR 746). This was described by Ms Murphy as occurring "*where the claimant, who does not have the protected characteristic, nevertheless suffers the same disadvantage from a PCP as those who do have the protected characteristic*".

8. The editors of Harvey do not regard this as a case of associative discrimination at all. It is described in Harvey L[291.03] in this way:

> *"the logic of the ECJ in CHEZ is simply that both direct and indirect discrimination are unlawful and that anybody who suffers from less favourable treatment which is direct discrimination because of one of the protected characteristics, or from the particular disadvantage suffered by persons with a particular protected characteristic, should be able to bring a claim – there is no requirement in that logic for 'association'."*

9. This CHEZ-type associative discrimination is relevant to indirect discrimination. It follows the tradition view of indirect discrimination under the Equality Act 2010. A claimant would have to show that the respondent applied a PCP which put people with a particular protected characteristic at a disadvantage. However, it omits the requirement for the claimant to have that particular protected characteristic. In Ms Murphy's formulation, set out below, the claimant still had to show that they were put at the same disadvantage as those with the particular protected characteristic, and that was the basis on which the parties' submissions were made.

10. The second was Follows-type associative discrimination (after Follows v Nationwide Building Society ET/2201937/2018). This was a broader concept, described by Ms Murphy as occurring "*where the claimant, who does not have the protected characteristic but who associates with a person who does, suffers*

a disadvantage that is unique to their association with the person with the protected characteristic". This could apply across the full range of discrimination claims.

CHEZ-type associative discrimination

11. CHEZ was a case of direct race discrimination during which the ECJ commented the scope of the Race Equality Directive 2000/43 in respect of indirect discrimination.

12. I do not need to go into the facts of CHEZ. The important point is that in CHEZ the ECJ found that (para 56) *"… the principle of equal treatment to which* [the] *Directive refers applies not to a particular category of person but by reference to the grounds mentioned in Article 1 thereof* [racial or ethnic origin]*, so that the principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds."*

13. The court cited Article 2 of Directive 2000/43 as follows:

> *"1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.*
>
> *2. For the purposes of paragraph 1:*
>
> *(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;*
>
> *(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."*

14. Unlike s19 of the Equality Act 2010, article 2 as cited above contains no requirement that the claimant in an indirect discrimination claim shares the racial or ethnic origin of the disadvantaged group.

15. Since then we have had the Equal Treatment Directive, but neither party suggested that that contained any wording that made a material difference to the position in CHEZ, nor did either party suggest that Brexit made a difference to any obligation to interpret domestic statutes in accordance with relevant EU law. Section 6 of the European Union (Withdrawal) Act 2018 preserves the so-

called “Marleasing principle” that I must apply national law “*as far as possible*” to give effect to the wording and purpose of the related EU directive.

16. There was, in fact, relatively little dispute between the parties as to the effect of CHEZ, at least so far as CHEZ-type indirect discrimination was concerned. Both agreed that CHEZ said that indirect discrimination under what is now the Equal Treatment Directive extended to those who did not share the same protected characteristic as the disadvantaged group. Both agreed that the Equality Act 2010 did not extend that far. The point in dispute was whether I could legitimately interpret the Equality Act 2010 in accordance with the Directive by reading particular words into it.

17. It was Ms Murphy’s position (by reference to Coleman (No.2) [2010] IRLR 10) that “*drafting was not of the essence*” of this task – that is, my decision should be based on principle, not on any detailed analysis of the particular form of wording that could be read into the statute. Nevertheless, I invited her to provide details of what it was she said should be read into the Equality Act in order to achieve compliance with the Equal Treatment Directive in relation to CHEZ-type discrimination (see para 39 of Vodafone 2 v Revenue and Customs [2009] EWCA Civ 446). The result is set out below. The underlining sets out her suggested addition, so this serves to set out the current state of s19 as well as the suggested addition.

> *“19 Indirect discrimination*
>
> *(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.*
>
> *(2A) A person (A) also discriminates against another (C), if:*

> *(a) A applies to C a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's, and*
>
> *(b) it puts, or would put, C at that same disadvantage as B, and*
>
> *(c) A cannot show it to be a proportionate means of achieving a legitimate aim."*

18. In this, the new ss(2A) is to be read together with ss(2), and is not a stand-alone provision.

19. Vodafone 2 addresses how far a court or tribunal can go in reading domestic legislation in accordance with the relevant EU directive. Ms Murphy says, and I accept, that "*the only constraints on the 'broad and far-reaching nature of the interpretative obligation' are (a) the meaning should "go with the grain of the legislation" and (b) that it "cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate""*.

20. There was some discussion during the hearing of the possibility of CHEZ-type associative discrimination "opening the floodgates" to many more claims than previously, but in his submissions Mr Carr focussed on the question of whether the proposed extension of indirect discrimination to cover CHEZ-type associative discrimination went "*with the grain of the legislation*". He said that "*The wording of section 19 is clear and unambiguous (and consistent with the other provisions of EqA) and cannot be reworded so as to accommodate the claims brought by Claimants.*" I do not consider that any point arises in CHEZ-type associative discrimination concerning "*practical repercussions … which the court is not equipped to evaluate*", particularly where it is understood as requiring the same disadvantage to the disadvantaged group.

21. I agree that the wording of s19 is clear and unambiguous. It is clear that the claimant in an indirect discrimination claim must share the protected characteristic with the group that is at a disadvantage. However, it is equally clear after CHEZ that this is not adequate to properly implement what is now the Equal Treatment Directive. I must, "*so far as possible*" and in accordance with Vodafone 2 interpret the domestic statute in accordance with the Equal Treatment Directive, even if that requires the notional addition or deletion of words. The relevant restriction is that any changes must "*go with the grain of the legislation*". In Vodafone 2 the grain of the legislation was also spoken of as the "*thrust*" of the legislation. At para 70 Longmore LJ said that "*the boundary between interpretation and legislation will have been crossed if it is proposed to give a statute a meaning which departs substantially from a fundamental feature of the Act … if the proposed meaning would remove the "core and essence" or "the pith and substance" of the Act or if it would insert something inconsistent with one of the Act's "cardinal principles" … Nor can the process*

of interpretation create a wholly different scheme from any scheme provided by the Act."

22. In this case I am being asked to remove a limitation from an Act whose purpose is (amongst other things) to make discrimination in the workplace on the basis of protected characteristics unlawful. I see nothing in what I am being asked to do that goes against the grain of the Act, or changes or removes its core meaning or infringes a "*cardinal principle*". There is no "*wholly different scheme*". There is at most an extension of an existing scheme.

23. Given that, I must read s19 of the Equality Act without the requirement for the claimant to share the protected characteristic of the disadvantaged group. CHEZ-type associative discrimination is unlawful. The tribunal has jurisdiction to consider indirect discrimination claims under section 19 of the Equality Act 2010 where there is a PCP applied by an employer that puts people with a particular protected characteristic at a disadvantage. The claimant in such a case must also suffer that disadvantage but it is not necessary for them to have the same protected characteristic as the disadvantaged group. Of course, it remains the case that the respondent may then justify the PCP as a proportionate means of achieving a legitimate aim.

Follows-type associative discrimination

24. The claimants have had the benefit of strong authority in their favour in considering CHEZ-type associative discrimination. That is not the case with the Follows-type associative discrimination. Follows-type associative discrimination takes its name from Follows, which is an employment tribunal judgment. At para 99 the tribunal says:

> *"We noted the reasoning in Chez, that the Directive is intended to benefit those who are associated with a protected class who suffer "less favourable treatment or a particular disadvantage on one of those grounds" … We concluded that s19 Equality Act 2010 must be read in a manner consisted with this judgment: that s19 "relevant characteristic of B's" must be read so as to apply to employees who are associated with a person with a relevant protected characteristic, that the provisions of s19(2)(a)-(c) are applicable to an associated person."*

25. This is, of course, not binding on me, but with respect to the tribunal that heard that case I do not find their reasoning (as set out there) persuasive in saying that there should be broader categories of associative discrimination.

26. I note that it is now well established that there can be associative direct discrimination, and there is authority in favour of associative victimisation too – but neither of those are at issue in this hearing. The analysis in both of those instances seems to draw on the broad wording of the underlying directive. CHEZ does not address anything beyond direct and indirect discrimination. There is no European equivalent of s15 of the Equality Act 2010, and

Hainsworth v Ministry of Defence [2014] EWCA Civ 763 says there is no concept of an associative duty to make reasonable adjustments. Ms Murphy seeks to distinguish Hainsworth from the current cases on the basis that in this case it is said that the adjustments should be made for the claimants (because of their association with disabled people) not for the associated disabled person themselves.

27. The difficulty for the claimants on the Follows-type associative discrimination is that there is little or no authority for extension of associative discrimination in this way, other than a broad appeal to limit discrimination as far as possible (e.g. Lord Neuberger in London Borough of Lewisham v Malcolm [2008] IRLR 700 "*anti-discrimination statutes should, at least in general, be construed benevolently towards their intended beneficiaries*").

28. Those submissions are helpful, but go nowhere near showing that I am compelled or ought to read into the statute words that are not there, or remove express limits. There is nothing like CHEZ in this situation that requires me to re-write the statute in accordance with EU law. I see no basis no which I could properly extend the tribunal's jurisdiction to encompass Fellows-type associative discrimination.

29. Beyond that, I have considerable concerns about how any such extension of the law could properly be achieved. Ms Murphy's redrafting of the Equality Act to cover this simply refers to people being "associated" with the claimant. It is difficult to see what this is supposed to mean in the context of any individual claim, or how far that association is intended to apply. I accept that the particular drafting put forward by Ms Murphy is not so important as the general principle, but it is an illustration of the difficulties that may be caused by a general extension of discrimination law to encompass those who are "associated" with people holding particular protected characteristics.

C. STAFF TRAVEL

30. The respondent's application in respect of staff travel is set out in a letter of 15 February 2022 and contains the following:

> *"The Respondent applies for the Claimants' claims for unlawful deduction of wages in respect of staff travel benefits to be struck out on the basis that the Claimants have no reasonable prospect of establishing that travel benefits are "wages" as defined by s.27 of ERA …*
>
> *On the Claimants' pleaded case the staff travel benefits do not constitute sums payable but are rather benefits to which the Claimants seek to attach a monetary value. Section 27(5) explicitly precludes a worker from bringing a claim in respect of the monetary value of lost benefits in kind save in limited circumstances that do not apply in this case. The Claimants do not suggest, nor could they, that staff travel benefits fall within the limited exceptions provided for within s.27(5). Accordingly, on*

the undisputed facts there is no reasonable prospect of the Claimants succeeding in establishing that staff travel benefits are wages within the meaning of s.27 of ERA."

31. There are a number of staff travel schemes under different names at issue in this case, each of which has their own detailed set of rules. For the purposes of this hearing, the schemes that applied prior to the changes at issue in this case can be summarised as follows: The respondent offered flights for staff (and their family or friends) either on a free basis (subject to payment of taxes and a "service charge", and with either one or two free flights per year depending on length of service) or on a discounted basis. In each case this was subject to there being seats on a flight that were not already occupied by commercial fare-paying passengers.

32. The different schemes provided for different degrees of priority between staff wanting to travel on the flights, so that on some flights a staff member may get priority over another staff member for a seat on that flight. Given that each scheme depended on there being seats not occupied by commercial fare-paying passengers, no member of staff could insist on using the staff travel scheme for any particular flight.

33. The free flights were known as "Annual Bookable Concessions" or "ABCs". Around 31 March 2020 the respondent's chief executive wrote to all staff saying:

"Despite the considerable challenges, we delivered a strong set of results for the year, but in terms of doing our best by customers and shareholders, we fell far short of what was expected of us. This means bonuses will not be paid to any colleagues, as was stated during the IAG Q3 financial update. Without a doubt, many of you worked incredibly hard last year and we do want to recognise your efforts. An additional ABC concession flight will be provided to you, valid for three years, giving you much more opportunity to make use of it."

34. The claims that this hearing is concerned with are claims for loss of staff travel concessions that are brought as claims for unlawful deductions from wages. The claimants have expressly not brought any claim in respect of breach of contract relating to the loss of staff travel concessions.

35. The relevant parts of section 27 of the Employment Rights Act 1996 for the purposes of this hearing are:

> *"(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including:*
>
> *(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise …*

…

(5) For the purposes of this Part any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document which is:

(a) of a fixed value expressed in monetary terms, and

(b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things).”

36. The respondent’s argument for the purposes of this hearing was that even if the staff travel concessions could fall within the general definition of wages at s27(1) they were then brought outside that definition by s27(5), being a benefit in kind that did not have the fixed value or capacity for exchange outlined there.

37. Mr Carr started his submissions on this point by reference to Coors Brewery v Adcock [2007] IRLR 440. In that case, the Court of Appeal drew a distinction between “*straightforward claims where the employee can point to a quantified loss*” and “*claims for unquantified damages for the breach or breaches of express or implied terms in the claimants’ contracts of employment*”. The former could be brought as claims of unlawful deductions from wages but the latter could only be brought as claims of breach of contract. He says that, in common with the point at issue in Coors, “*none of the claimants could properly say that on any given date …* [the respondent] *had made an unlawful deduction of a quantified amount from their wages.*”

38. He acknowledged that the distinction between quantified and unquantified loss was not one which was being relied upon by the respondent in its present application, but said that the Coors case illustrated that schemes such as the staff travel concessions could not be said to have a “fixed value” for the purposes of s27(5).

39. If the staff travel concessions do amount to wages then Coors would appear to be a formidable obstacle to those claims. I struggle to see how any claimant could identify any specific quantified deduction from wages if the respondent failed to properly operate the staff travel concessions. There would be considerable difficulties in identifying what deduction had been made given the variable price of flights and the fact that an individual had no right to insist on any particular flight. However, that is not what is to be decided today. I accept, however, Mr Carr’s point that if the staff travel was a benefit in kind it was not a *“voucher, stamp or similar document”* that had a fixed monetary value. The staff travel scheme is never expressed as, for instance, a notional amount of £200 or £300 to spend on a flight. It did not work like that.

40. The staff travel concession is, arguably, *"capable of being exchanged"* for services (s27(5)(b)). However, in order to fall under that exception it still has to be a *"voucher, stamp or similar document"*. It is not. I doubt that in the modern era this section is to be read as requiring a physical or even virtual document that could be called a "*voucher*", or "*stamp*" but the key point here is "*similar document*". The staff travel concessions are not of the same nature as a voucher or a stamp. Voucher or stamp implies something with a fixed or clear value, which the staff travel concessions do not have. This is an aspect of the Coors point about quantified versus unquantified losses. The staff travel concessions are not a "*voucher, stamp or similar document*".

41. What remains is to decide whether the claim in respect of the staff travel concessions concerns "*monetary value attaching to any payment or benefit in kind*", with the key words there being "*benefit in kind*". It seems to me that this is exactly what it is. It is not provision of cash or anything equivalent to cash. It is a benefit in kind. The respondent's authorities bundle includes an extract from the HMRC "Tax Credits Technical Manual" (TCTM04103) concerning benefits in kind. I do not consider that document to hold any particularly authoritative status in interpreting s27(5) of the Employment Rights Act 1996, but it does seem to contain an appropriate description of benefits in kind as being "*goods and services provided to an employee for free or at greatly reduced costs*". That is exactly what the staff travel concessions were.

42. Ms Murphy argues, amongst other things, that the staff travel concessions amount to an "emolument" from employment (by reference to tax law) and that particularly in relation to the additional ABC, a non-contractual bonus, once declared, can amount to wages (s27(3)) and (again by reference to tax law) that something given in lieu of a cash bonus is to be treated in the same way as that bonus.

43. The difficulty with this is that Mr Carr is content to proceed (at least for the purposes of this hearing) on the basis that the staff travel concessions fall within s27(1). His argument is that they also fall with s27(5), which provides that they "*shall not be treated as wages*", and which must be taken to supersede s27(1). I do not see that the claimants have any answer to that. Since the staff travel scheme amounts to a benefit in kind it can only be treated as wages if it is a "*voucher, stamp or similar document*", and it is not. That seems to me to be broadly in line with the principles outlined in Coors that a claim of unlawful deductions from wages is intended to be for quantified rather than unquantified amounts.

44. Any claimant's claim that changes to or withdraw of staff travel concessions amounted to unlawful deductions from wages has no reasonable prospect of success and is struck out.

45. I understand that claims in respect of staff travel concessions may also be made in respect of the remedy for any unlawful discrimination or (possibly) unfair

dismissal or other claims. This decision is not intended to affect that. It only rules out such claims being brought as claims of unlawful deductions from wages.

D. PART-TIME WORKERS

46. Following the respondent's original application of 1 June 2022 in respect of the part-time workers claims various amendments had been made to the claims of the affected claimants. This included the withdrawal of substantial elements of the part-time workers claims.

47. By the time of this hearing, the relevant parts of the claim (for those employees who were bringing such claims) were as follows:

> *"9. The Respondent discriminated against the Claimant under the Part-Time Workers (Prevention of Less Favourable Treatment Regulations 2000 (SI 2000/1551), by treating the Claimant less favourably than the Respondent treats a comparable full-time worker as regards the terms of his contract, and, or by being subjected to a detriment by any act, or deliberate failure to act, of the Respondent.*
>
> *10. The claimant relies upon a comparator who is a full-time Legacy Crew and/or Mixed Fleet worker.*
>
> *11. The less favourable treatment relied on is:*
>
> *a. The threatened removal of the 33% contract [33% claimants only];*
>
> *b. The proposed change of the 33% working pattern from 14 days on/28 days off to 21 days on/42 days off [33% Eurofleet claimants only]*
>
> *c. The proposed change of the 50% contract from 28 days on/28 days off to 21 days on/21 days off [50% claimants only];*
>
> *d. The statement in the Blue Book that the Respondent's approach to scheduling would change from contractual/fixed to non-contractual/variable (paragraph 4. above);*
>
> *e. Dismissal.*
>
> *12. The less favourable treatment was done on the ground that the claimant is a part-time worker / part-time worker status. Further, the treatment was not justified on objective grounds."*

48. Following this change, the respondent pursued its application to strike out (or for a deposit order) in respect of the claims at (d) (non-contractual scheduling) and (e) (dismissal) only. In an email dated 15 November 2022 the respondent said:

> *"In summary, the Respondent contends that it applied a common policy to all IFCE employees and that the Claimants have no reasonable prospects of showing that they were dismissed or otherwise treated less favourably because they were part time workers.*
>
> *The Respondent terminated the employment of all employees who opted for voluntary redundancy. The Respondent terminated the employment of all employees who failed to confirm that they wished to remain with the Respondent (on terms of employment as varied as per the collective agreement) by completing an electronic form by 25 September 2020.*
>
> *The Respondent does not understand this to be disputed by the Claimants, nor could it be. In light of the common approach taken by the Respondent to all IFCE employees, there is no reasonable prospect that the Claimants will succeed in showing that their dismissal or the approach taken to Scheduling (which applied to all IFCE employees) was because the Claimants were part time."*

49. I note that there remains an allegation that "*The less favourable treatment caused or contributed to the claimant's dismissal.*" I do not understand the respondent's application to affect this. Their application is made in respect of the direct allegation at 11(e) that dismissal was itself an act of less favourable treatment.

50. The claims are brought under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the Regulations"). Regulation 5 provides that:

> *"(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker:*
>
> *(a) as regards the terms of his contract, or*
>
> *(b) by being subject to any other detriment by any act or deliberate failure to act, of his employer.*
>
> *(2) The right conferred by paragraph (1) applies only if:*
>
> *(a) the treatment is on the ground that the worker is a part-time worker, and*
>
> *(b) the treatment is not justified on objective grounds ..."*

51. The essence of the respondent's argument is that, whatever the rights and wrongs of their treatment, both part-time and any comparable full time employees were treated the same, so no claim can arise under the Regulations. Mr Carr points to the fact that both part-time and full time employees have brought claims. He says there is nothing that would suggest that the treatment was on the ground that an employee was part-time, and that in any event there is no less favourable treatment compared to a comparable full-time employee.

52. Ms Murphy relies on Carl v University of Sheffield [2009] IRLR 616 to the effect that "*part-time work must be the effective and predominant of the less favourable treatment complained of; it need not be the only cause*". She refers to "*potential less favourable treatment*" on the basis that full time workers were either more or less likely to accept voluntary redundancy or not agree to new terms "*because their working pattern was not changing*". In her oral submissions, this developed to the part-time employees having been targeted by the respondent, with the changes having been designed to particularly affect part-time employees albeit incidentally affecting a small number of full time employees. She pointed to a table showing that 28 out of 33 claimants were part-time, with only 5 being full time employees.

53. In response Mr Carr said that even if all of that were true (which he did not accept) there was still no less favourable treatment compared to comparable full-time employees – all had been treated alike.

54. I accept Mr Carr's submissions on this. For any part-time worker's claim to succeed there must be less favourable treatment compared to a comparable full time employee, and there is none here. Whatever the reasons behind the respondent's actions, both part-time and full time employees have been treated alike. Even for the purposes of this hearing the claimants had not been able to point to any comparable full time employee who had been treated differently in respect of either matters (d) or (e). In those circumstances I find that these claims have no reasonable prospect of success.

55. A further element of Ms Murphy's submissions was that even if these claims had no reasonable prospect of success there was nothing to be gained by striking out the dismissal element of the claim, as the reasons for any dismissals would have to be analysed in relation to other claims that remained. There would be no saving of time or cost in striking out the part-time workers element of the claim.

56. I accept in principle that the tribunal will have to consider the dismissals under other heads of claim even if not directly as a claim of less favourable treatment under the Regulations. However, I do not think that this means that the claims should not be struck out. If they have (as I have found) no reasonable prospect of success there is nothing to be gained by them continuing and by the parties repeating their arguments on this point at a final hearing.

57. The claims identified at (d) and (e) above under the Regulations have no reasonable prospect of success, and are struck out.

Employment Judge Anstis
Date: 29 December 2022

Sent to the parties on: ..20/01/202.....

.....S.Kent.....
For the Tribunals Office

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