Neutral Citation Number: [2023] EAT 5

Case No: EA-2021-000196-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 January 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

EARL SHILTON TOWN COUNCIL	**Appellant**
- and -	
MS K MILLER	**Respondent**

- -
- -

DANIEL BROWN (instructed by DAS Law) for the **Appellant**
SINEAD KING (instructed by Lawson West Solicitors Limited) for the **Respondent**

Hearing date: 2 December 2022

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JUDGMENT

SUMMARY

SEX DISCRIMINATION

The employment tribunal did not err in law in holding that the respondent's provision of inadequate toilet facilities for women subjected the claimant to direct sex discrimination.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge Faulkner, sitting with members, at the Leicester Tribunal Hearing Centre on 9, 10, 11 and 12 March, remotely on 21 October and in chambers on 22 October 2020. The judgment was sent to the parties on 27 November 2020.

2. The employment tribunal found that the claimant had been subject to harassment on three occasions and had been victimised by being dismissed. This appeal is against a further finding that the respondent discriminated against the claimant because of her sex in relation to the provision of toilet facilities from August 2016 until 18 June 2018.

The facts

3. The outline facts are taken from the judgment. The Respondent is a town council with volunteer elected councillors. The respondent has few employees. The Claimant was employed from 30 August 2016 as an Office Clerk. The Respondent operates from a building owned by the Methodist Church. The building also hosts a playgroup. The men's toilets are in the part of the building used by the respondent. The women's toilets are in the part of the building used for the playgroup. The women's toilets are used by children attending the playgroup. Female employees had to attract the attention of one of the playground staff if they wanted to use the women's toilets and wait until the toilets had been checked to see if a child was present. It was not always easy to attract the attention of one of the playgroup staff. This arrangement was not suitable for the claimant if she needed to use the toilet urgently.

4. From May 2017, Mark Jackson, the respondent's Town Clerk, offered female employees the use of the men's toilets. The men's toilets consisted of a single cubicle and a trough urinal. There was a sign that should be placed on the door when the toilet was being used by a woman, but it did not always stay in place. The only facility suitable for women was the single cubicle. It could only be accessed by passing the urinal. There was no lock on the main entrance door to the men's toilets. There was a risk of a man entering the facility regardless of the sign on the door, which meant that a

woman might see a man using the urinal without knowing he was there having used the lavatory in the cubicle, or on entering the men's toilet. The claimant used the women's toilet if she could, but often had no choice but to use the men's toilet, particularly if in a hurry. The men's toilets had no sanitary bin. The claimant complained about the lack of a sanitary bin in January 2018. It was not until early June 2018 that the church arranged for an internal lock to be fitted to the external door to the men's toilets, that could prevent access to the men's toilets when the cubicle was being used by a woman, and provided a sanitary bin. The sanitary bin was only emptied on request by the claimant.

The claim

5. The claimant claimed this arrangement resulted in direct sex discrimination or harassment. It appears that the allegation of harassment was not pursued at the employment tribunal to any significant extent and is not relied on by the claimant in responding to the appeal. The claimant asserted that the direct discrimination was inherent in the treatment because of a difference of treatment between women and men in the provision of toilet facilities adequate to their needs. There was no claim of indirect sex discrimination. The claimant did not assert the failure to provide the sanitary bin constituted discrimination that was inherently sex based in the manner that pregnancy discrimination was held to be in **Webb v Emo Air Cargo (U.K.) Ltd. (No. 2)** [1995] ICR 1021. The relevant issues were agreed:

> 4…Did the Respondent between August 2016 and 18 June 2018 make inadequate arrangements for the Claimant to share male toilets and/or otherwise provide inadequate toilet facilities for the Claimant? …
>
> 8.1…did the Respondent by the alleged conduct referred to at...paragraph 4 subject C to a detriment or detriments?
>
> 8,2 If it did, did it treat the Claimant less favourably than it treated or would have treated a hypothetical male comparator in materially similar circumstances?
>
> 8.3 If so, was the treatment because of sex?

The decision of the employment tribunal

6. The employment tribunal directed itself generally as to the law concerning direct sex

discrimination. The employment tribunal analysed the claim as follows:

> 166. We are in no doubt that the arrangements we have summarised above **subjected the Claimant to a detriment**. We firmly reject Mr Brown's submission that the use of the male toilet not being a requirement for female employees or the fact that failure to provide a bin was an oversight, means that there was no detriment as interpreted in **Shamoon**. **Any reasonable person could reasonably consider not having immediate direct access to toilet facilities, the risk of seeing a person of the opposite sex using toilet facilities (the risk need not have materialised to be a detriment in our judgment) and not having a bin in which to dispose of sanitary products as a series of detriments.** They were all matters of practical impact on a daily basis and we note that Mrs Coe's email to Mr Jackson of 20 May 2018 (pages 94 to 95) expressly referred to the need to put a bolt on the door to prevent male access to the urinal whilst the toilet cubicle was in use. The same reasonable person could also reasonably consider that having to tell a caretaker of the opposite sex that the bin needed emptying of sanitary products was similarly a detriment, being both demeaning and (as the Claimant described it) an invasion of privacy. We do not think that Mrs Burton's being more comfortable with the arrangements detracts from those conclusions. She agreed that there was no immediate access to facilities until May 2017. As for the other matters, the test is whether a reasonable worker would or might take the view that in all the circumstances the situation was to her detriment, not whether every person in the same circumstances would take the same view.
>
> 167. **It is also plain that the Claimant was less favourably treated in these respects than a man. At no point until May 2017 was Mr Jackson, or indeed any other man working for the Respondent, in the position of not having immediate access to toilet facilities. Thereafter, at no point was he at risk of seeing a member of the opposite sex using toilet facilities nor did he experience any disadvantage by the absence of a bin** within those facilities. **(It might be argued that a man was at risk of being seen using the toilet facilities and a woman was not, but that was not an argument pursued by the Respondent** and in any event would not detract from the less favourable treatment of women in respect of the risk of what they might experience). The bin was provided in June 2018, but at no point did Mr Jackson have to inform a caretaker, still less one of the opposite sex, that the bin needed emptying of intimate waste.
>
> 168. The remaining question therefore is whether the less favourable treatment was because of sex. **It is clear in our judgment that this is a case of inherent discrimination, referred to in Nagarajan and Amnesty and exemplified in James. The absence of and subsequent arrangements with the bin make this particularly clear; they simply did not arise as an issue as far as men were concerned.** It is not difficult to see that **the same is the case in relation to the immediate access to facilities prior to May 2017 and the risk for women of seeing a man using the facilities thereafter.** Sex was more than part of the context or circumstances in which these issues arose. **Where, as here, all women are in a less favourable situation than all men, sex being the reason for the treatment is in the nature of the arrangements.**

> 169. As a result, **the question of the reason for the treatment in the usual sense of exploring the mental processes of the alleged discriminator (which in his written submissions Mr Brown summarised as safeguarding children or, in relation to the bin, an oversight on the Respondent's part) does not arise**. Nor therefore does the application of the burden of proof provisions as would be required in a mental processes case.
>
> 170. We will however deal briefly with one submission made by Mr Brown. He argued that short of carrying out building work, which was not within the Respondent's control, there were limits to what it could do to rectify the situation, his implicit point being that it would be unfair to find against the Respondent in these circumstances. Cases of this nature can on some occasions seem unfair – **Amnesty** seems a good example of this where essentially the employer was seeking to protect the employee from the safety implications of travel to a certain country because of her particular nationality. It was still direct discrimination. In this case however, in June 2018 the Respondent essentially found a straightforward solution to most of the issues on which the complaint depends. We have been told of no reason why those arrangements could not have been made before, nor indeed why the Respondent could not have arranged for the bin to be emptied regularly thereafter without the Claimant having to request it.
>
> 171. The Claimant's complaint of sex discrimination in respect of toilet facilities for the duration of her employment therefore succeeds. [emphasis added]

The appeal

7. The respondent asserts that the employment tribunal erred in law in failing to apply, properly or at all, the requirements that:

7.1. the less favourable treatment in respect of each detriment must be because of sex - the respondent asserts that the employment tribunal found that the reason for the toilet arrangements made for the claimant resulted from safeguarding requirements, so could not be sex.

7.2. the treatment of the claimant be less favourable than an actual or hypothetical comparator – the respondent asserts the employment tribunal should have considered whether the risk a man faced of being observed using the urinal by a woman was equivalent to that of a woman seeing the man using the urinal, such that there was no less favourable treatment

8. The claimant argues it is not open to the respondent to assert that less favourable treatment was not established as it was not a point that was argued by the respondent.

The law

9. Section 39 of the **Equality Act 2010** ("**EQA**") renders detrimental discriminatory treatment unlawful:

> (2) An employer (A) must not discriminate against an employee of A's (B)— …
>
> (d) by subjecting B to any other detriment.

10. Direct discrimination is defined by section 13 **EQA**:

> 13 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.

11. Section 23 **EQA** provides:

> 23 Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

12. In **Regina (E) v Governing Body of JFS and another (United Synagogue and others intervening)** [2010] 2 A.C. 728 Baroness Hale explained the fundamental distinction between direct and indirect discrimination:

> 56. The basic difference between direct and indirect discrimination is plain: see Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 , para 119. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.

13. Crucially, save for age discrimination, direct discrimination cannot be justified whereas indirect discrimination can be justified, where the application of a provision, criterion or practice that would otherwise be discriminatory is a proportionate means of achieving a legitimate aim.

14. As noted above, this claim was only argued as direct sex discrimination. A claim of direct discrimination should be analysed in a realistic manner applying commons sense. As far back as the decision in **Gill and Another v El Vino Co. Ltd.** [1983] 2 W.L.R. 155 it was said of the Sex Discrimination Act by Eveleigh LJ:

> In my judgment, the correct way to approach this case is to take the simple words of the statute and try to apply them. It sometimes is helpful in judgments to substitute some other phraseology which the judge thinks is more apposite in the particular case under consideration, but that is by no means always necessary and if it can be avoided it is desirable to do so. It is also, in my view, desirable to avoid looking at cases where substituted phraseology has been evoked, because the next step is that one goes on to rephrase the substituted phraseology, and on and on one goes and departs further and further from the approach which the statute indicates. Now this is not a technical statute and, therefore, is not of a kind where one should or need go for the meaning of words to other decided cases. It is a simple statute seeking to deal with ordinary everyday behaviour and the relative positions of men and women.

15. The issues were agreed by the parties so that consideration was first given to detriment, then less favourable treatment and, finally, to whether any less favourable treatment was because of sex. That was the approach agreed by the parties and is a valid way of analysing the claim. It can also be helpful to consider the questions in a different order: (1) treatment (2) less favourable than that of an actual or hypothetical comparator (3) detriment. I will analyse the legal principles in that order because I find it helpful on the facts of this case. However the provision is split into its components, it is also necessary to keep an overview of the provision as a whole and to consider whether the analysis in the particular case under consideration is consistent with its purpose.

16. Generally, the authorities treat "less favourable treatment" as a single issue. It can be helpful to analyse what constitutes the treatment, as it may significantly affect whether it is less favourable than that of a comparator. In this case it might be said that the same toilet facilities were provided to men and women and so the treatment was the same. However, if the treatment is assessed as being

the provision of toilet facilities that are appropriate to a person's requirements the analysis may differ.

17. It is important to note that the statute is concerned with "less favourable" treatment rather than "different" treatment. Applying different requirements in a dress code to men and women does not necessarily result in less favourable treatment: **Smith v Safeway Plc**, [1996] I.C.R. 868. As Phillips L.J. stated at 876:

> If discrimination is to be established, it is necessary to show not merely that the sexes are treated differently, but that the treatment accorded to one is less favourable than the treatment accorded to the other.

18. In the context of a school that provided education that was segregated by sex, it was held that what had been described as "separate but equal" treatment was less favourable: **Chief Inspector of Education, Children's Services and Skills (Secretary of State for Education and others intervening) v Interim Executive Board of Al-Hijrah School** [2018] IRLR 334. The question of whether there is less favourable treatment is to be assessed by considering the situation of the claimant; Sir Terence Etherton MR at paragraph 50:

> The starting point is that EA 2010 s13 specifies what is direct discrimination by reference to a "person". There is no reference to "group" discrimination or comparison. Each girl pupil and each boy pupil is entitled to freedom from direct discrimination looking at the matter from her or his individual perspective.

19. Accordingly, girls and boys could both establish less favourable treatment through being segregated.

20. Thus, the authorities establish that in certain circumstances treatment that is the "same" could be less favourable treatment and that in other circumstances treatment that is "different" would not be less favourable. Context is all - and the assessment calls for the robust common sense of the employment tribunal in determining whether there is less favourable treatment because of sex of the type that the **EQA** is intended to combat.

21. In considering whether treatment is because of a protected characteristic, a distinction is often drawn between cases in which it is necessary to consider the mental processes of the alleged

discriminator(s) and those where it is not. The employment tribunal spends much of its time hearing cases of the former type, in which the factors that influenced a decision maker are unclear. The complexity of such cases generally derives from the complex facts from which inferences may be drawn. Where the factors that have influenced the alleged discriminator are clear it is not necessary to consider mental processes - and a "good" motive will not prevent discrimination from having occurred; Lord Philips in **JFS**:

> Whether there has been discrimination on the ground of sex or race depends upon whether sex or race was the criterion applied as the basis for discrimination. The motive for discriminating according to that criterion is not relevant.
>
> 21 The observations of Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572 and *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, cited by Lord Hope at paragraphs 193 and 194 of his judgment, throw no doubt on these principles. Those observations address the situation where the factual criteria which influenced the discriminator to act as he did are not plain. In those circumstances it is necessary to explore the mental processes of the discriminator in order to discover what facts led him to discriminate.

22. On analysis, there are at least two main types of cases in which it is not necessary to consider the mental processes of the alleged discriminator. One is where the proximate cause of the treatment is something other than sex, but it is an exact proxy for sex. In **Essop and others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice** [2017] UKSC 27, [2017] I.C.R. 640 Baroness Hale described that type of case at paragraph 17:

> *James v Eastleigh Borough Council* also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it.

23. That analysis is not required where the reason for the treatment obviously is sex, rather than something that is a proxy for it. In **Regina (Coll) v Secretary of State for Justice (Howard League for Penal Reform intervening)** [2017] UKSC 40, [2017] 1 W.L.R. 2093 fewer Approved Premises ("AP") were provided for women than men with the consequence that women were likely to be placed in an AP further from home than men. Baroness Hale stated at paragraph 29:

> However, as Ms Rose correctly points out, the "exact correspondence" test is

> only relevant where the actual criterion used by the alleged discriminator is not a protected characteristic but something else. In *Patmalniece* it was not having the right to reside in the United Kingdom; in *Preddy v Bull*, it was not being married. The question is whether some other criterion is in reality a proxy for the protected characteristic. The best-known example is *James v Eastleigh Borough Council* [1990] 2 AC 751, where people who had reached the state retirement age were allowed free entry to the council's swimming pool. The differential state retirement ages for men and women meant that a 61-year-old woman got in free whereas her 61-yearold husband did not. This was held to be direct discrimination on grounds of sex.

24. It was argued that direct discrimination was inherent in the provision of fewer APs for women than men, just as it had been when Birmingham provided fewer grammar school places for girls than boys:

> 26. The claimant's case on direct discrimination is a simple one. Being required to live in an AP a long way away from home is a detriment. A woman is much more likely to suffer this detriment than is a man, because of the geographical distribution of the small number of APs available for women. This is treating her less favourably than a man because of her sex.
>
> 27. Ms Rose QC, on behalf of the claimant, argues that this case is on all fours with the well known case of *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155. Birmingham City Council maintained a system of selection for secondary school places but, for historical reasons, it had fewer places at selective schools for girls than for boys. This meant that the pass mark for girls in the entrance examinations was higher than for boys. This was treating the girls less favourably than the boys because of their sex. The council had not deliberately set out to discriminate against girls; it was a historical accident. But "whatever may have been the intention or motive of the council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are subject to discrimination under the [Sex Discrimination Act 1975]": per Lord Goff of Chieveley, at p 1194.

25. Baroness Hale accepted this argument and concluded there was no doubt that the difference of treatment was because of sex; paragraph 29:

> In this case, there is no doubt what the criterion is. It is sex, which is itself a protected characteristic.

26. If sex is the reason for the difference of treatment between a claimant and an actual or hypothetical comparator it does not matter that the difference of treatment is not suffered by all women or men: see paragraph 30:

> Furthermore, it cannot be a requirement of direct discrimination that all the people who share a particular protected characteristic must suffer the less

> favourable treatment complained of. It is not necessary to show, for example, that an employer always discriminates against women: it is enough to show that he did so in this case. In the Birmingham case, some of the girls achieved a high enough pass mark to gain a place at a selective school. What all the girls suffered from was the risk that if they did not get a high enough mark, they would not get a place—just as, in the recent case of *Essop v Home Office (UK Border Agency)* [2017] 1 WLR 1343, all the BME candidates suffered from the greater risk of failing the core skills assessment required for promotion, but of course some of them passed it. In the Birmingham case, some of the girls did of course achieve a high enough mark to get a place. But there were some who achieved a mark which would have been high enough had they been boys but was not high enough because they were girls. That is direct discrimination on grounds of sex.

27. Detriment is established if treatment is of a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 HL, and particularly in the judgment of Lord Hope at paras 33-35.

Conclusions

28. I can see no error of law by the employment tribunal in determining this case. It applied robust common sense to determine that this is the type of treatment that constitutes direct sex discrimination contrary to the **EQA**. Taken from her perspective the claimant was treated less favourably than men in that she, a woman, was at risk of seeing a man using the urinals. While a man might see another man use the urinals, the treatment of the claimant, as a woman, was less favourable. A woman being at risk of seeing a man using the urinals is obviously not the same as the risk of a man seeing another man using the urinals. Put another way, if one starts by considering the nature of the treatment, the claimant was not provided with toilet facilities that were adequate to her needs, because of the risk of coming across a man using the urinal and the lack of a sanitary bin. That treatment was less favourable than that accorded to men.

29. The respondent did not argue at the employment tribunal that there was no less favourable treatment because a man was at risk of being seen by a woman using the urinals. That point was raised by the employment tribunal in its judgment, but it was specifically noted that the point had not been raised by the respondent. In any event, the fact that a man might also be able to assert direct sex

discrimination would not be fatal to the claimant's claim, just as it was not fatal to the claim of a girl asserting less favourable treatment through segregation in education that a boy might be able to bring a similar claim. Nor did it matter that another woman had not objected to the arrangements because the discriminatory impact was to be assessed from the perspective of the claimant.

30. The employment tribunal was entitled to conclude, on the basis of the arguments advanced before it, that the provision of toilet facilities for the claimant was inadequate in comparison to men and she had thereby suffered less favourable treatment. I do not consider there was any arguable error of law in considering the overall provision of such toilet facilities rather than separately analysing the possible components of the treatment. Ground 2 therefore fails.

31. The treatment clearly constituted a detriment. The respondent did not assert otherwise in this appeal.

32. The employment tribunal correctly concluded that this was a case in which it did not have to consider the mental process of a discriminator because the treatment was inherently because of sex. This was not an "exact correspondence" type case, but one in which the discrimination was inherent in the treatment. Women were provided with inadequate toilet facilities in comparison with men. As in the **Birmingham** and **Coll** cases separate facilities, of a poorer quality, were provided for females than males. That less favourable treatment was inherently because of sex, just as the provision of fewer grammar school places for girls in comparison with boys was inherently because of sex. The facilities were inadequate for the claimant because she is a woman. Accordingly, the safeguarding issue could only go to motive and could not prevent direct discrimination being established. In any event, the safeguarding issue was a factor in the claimant not being able to use the women's toilets but not in the unsatisfactory arrangements put in place when the men's toilets had to be shared. Those arrangement could be remedied by putting a lock on the main door to the toilet and requiring men and women to lock it when in use. Such an arrangement might comply with the provisions of regulation 20(2)(c) of the **Workplace (Health, Safety and Welfare) Regulations 1992** which deals with the provision of separate toilets for men and women but was not referred to by the parties in this

case. Ground 1 also fails.