Employment

Personal liability: indirect discrimination and Maclay

Posted on 13 April, 2018 by | Bayo Randle

Employment tribunal claims dealing with the issue of personal liability are being considered with increasing frequency. Claimants often only consider such claims due to concerns over the possible insolvency or dissolution of a former employer. In this situation the opportunity to pursue a claim against an individual may be the only means to obtain a financial remedy. The EAT decision in *Nicola Murray v Maclay Murray & Spens LLP UKEATS/0004/18/JW* explores this trend in the context of indirect discrimination claims and provides guidance on the circumstances in which such a claim can be pursued.

Discrimination claims generally

Broadly speaking, employees or agents will be liable for their acts if such acts are done:

- In contravention of the Equality Act 2010 (EqA).
- In the course of their employment or with the authority of a principal.

(*Section 110, EqA*.)

Under the section, there will be no personal liability where the employee or agent has reasonably relied on a statement by the employer or principal that their acts are not in contravention of EqA.

Furthermore, where the employee or agent has no knowledge of the facts that would render their actions tortious, liability will arguably not attach to the individual. In the context of a victimisation claim, the EAT in *Peninsula Business Services Ltd v Baker [2017] ICR 714*, suggested that to attach liability to an agent in such circumstances would create an "absurd and unreasonable result" (*paragraph 79*). It can be inferred that this applies equally to employees.

Indirect discrimination

Indirect discrimination claims require a PCP, which is applied neutrally to all but in fact puts members of a certain group at a particular disadvantage. As suggested by counsel in *Murray*, individuals in the workplace are less likely to know that there was any indirect discrimination caused by a PCP than their employers (*paragraph 22*). However, unlike other forms of discrimination, a lack of knowledge or intention to discriminate is common in indirect discrimination claims; neither is required in order for liability to attach. Therefore if the reasoning in *Baker* were applied in cases of indirect discrimination, liability would rarely attach to individuals. However, the decision in *Murray* raises further difficulties for claimants pursuing such claims.

Murray

Ms Murray was a solicitor, who alleged that her former employer, the respondent, had indirectly discriminated against her on the grounds of sex. She alleged that she was dismissed for failing to work at least the contracted number of hours in the office (the PCP), despite working additional hours at home and at weekends. Ms Murray alleged that this was principally due to her childcare responsibilities and because women were more likely than men to have such responsibilities, the PCP was indirectly discriminatory.

The respondent ceased practice six months after Ms Murray lodged her application. Due to her concern that the respondent might have no assets, she made applications to join (to the proceedings) the new firm that the former members of the respondent joined and three individuals who were corporate partners, and alleged to be agents, of the respondent at the time of her dismissal. The appeal was against the tribunal's dismissal of her application to add the corporate partners as respondents.

The EAT

The EAT found that an agent is not liable for indirect discrimination committed by the application of a PCP by the principal and not by the agent. The section applies when a PCP is applied by the agent and is treated by s.109 EqA as having been done by the principal. The respondent's counsel argued that an agent (or employee) must have a discretion as to how to act; if the agent or employee had no choice, it was unlikely that they would be seen to have "applied" the PCP and there would therefore be no liability for indirect discrimination (*paragraph 24*).

Unfortunately, this reasoning was not fully explored by the EAT in Ms Murray's appeal. This was because she failed to plead that the corporate partners had actually applied the PCP. Instead she only asserted that her former employer had done so, therefore her appeal was dismissed as there was no act which fulfilled the requirements of s.109(2).

Nonetheless, the PCP was contractual and the contract was between Ms Murray and her employer. If the corporate partners had applied the PCP, applying the EAT's reasoning, they may have been liable whether or not they had a discretion.It appears that an indirect discrimination claim against the corporate partners could have been pursued if the claim were properly pleaded.

Further comment

An employee or agent probably still "applies" a PCP, even if they enforce it in the absence of discretion. Nonetheless, given that the law of indirect discrimination is aimed at scrutinising neutral requirements, it may be unreasonable, in most instances, to impose personal liability where the individual has no control or individual influence over the application of requirements created by an employer.

A previous version of this blog was published on 12 April 2018 by Practical Law Company. This can be viewed here

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