Employment

VL and indirect discrimination

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In his opinion in *VL v Szpital Kliniczny im. dra J. Babi?skiego, Samodzielny Publiczny Zak?ad Opieki Zdrowotnej w Krakowie* (Case C-16/19) EU:C:2020:479, Advocate General Pitruzzella concludes that, where an employer treats two groups of disabled people differently on the basis of an apparently neutral criterion, there may be a breach of the principle of equal treatment. However, it is not clear that his approach (and in particular, his analysis of the case as indirect discrimination) stands up to scrutiny. The case provides a reminder of the care needed when dealing with comparators in discrimination claims.

Facts

The Polish Labour Code creates an incentive to employ disabled people by imposing a levy on employers where disabled people make up less than 6% of their workforce. The closer the employer is to 6%, the lower the levy. Whether an employee counts as disabled is determined by whether they have provided a certificate attesting to their disability.

VL was a psychologist employed by the Dr J Babi?ski Clinical Hospital. On 21 December 2011 she gave her employer a disability certificate.

Following a staff meeting in late 2013, the hospital director decided to start paying an additional monthly allowance of around EUR60 to encourage staff to submit disability certificates. It was granted to disabled staff who handed in their certificate after the staff meeting. Disabled staff who had already provided a certificate, like VL, were not paid the allowance.

The national employment inspectorate found that the criterion for paying the allowance was discriminatory, but the district court in Krakow disagreed. On VL's appeal the regional court referred the question to the ECJ for a preliminary ruling.

Law

Under Article 2 of the Equal Treatment Framework Directive (2000/78/EC), so far as relevant:

- Direct discrimination occurs where one person is treated less favourably than another person in a comparable situation on the grounds of disability.
- Indirect discrimination occurs when "an apparently neutral provision, criterion or practice (PCP) would put persons having … a particular disability … at a particular disadvantage compared with other persons" unless the PCP is justified.

The Polish Labour Code contains similar provisions.

Under the Equality Act 2010 (EqA 2010), A directly discriminates against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (section 13(1)).

A indirectly discriminates against B, a person with a protected characteristic, if:

- A applies a PCP to B.
- A applies (or would apply) that PCP to persons who do not share B's protected characteristic (section 19(2)(a)).
- The PCP 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 (section 19(2)(b)).
- It puts B at that disadvantage (section 19(2)(c)).
- A cannot show that the PCP is a proportionate means of achieving a legitimate aim (section 19 (2)(d)).

Scope of protection

AG Pitruzzella's reasoning in VL is not easy to disentangle. His first step is to consider the scope of protection under the Directive. He notes that the grounds on which discrimination is prohibited are to be interpreted strictly (limited to the protected characteristics listed in Article 1 of the Directive), but suggests that provisions governing both the persons who are to be protected, and the proper comparators for the purposes of establishing discrimination, should be interpreted less strictly.

Thus the ECJ has already broadened the scope of protection to include not just those who are themselves disabled, but those who are associated with a disabled person (*Coleman v Attridge Law and another* [2008] (C-303/06) ECLI:EU:C:2008:415). Similarly, he says, although the comparison is ordinarily made with someone who does not have the protected characteristic, it is possible for a prohibited difference in treatment to occur within a group of disabled people. He continues:

> "Obviously, this does not mean that every difference in treatment between one disabled worker (or group of disabled workers) and another disabled worker (or group of disabled workers) should be treated as discrimination prohibited by the Directive … What is prohibited … is the favourable treatment, on grounds of disability, of one group of disabled workers to the detriment of another group of disabled workers." (Paragraph 44.)

That is clearly correct, and to illustrate the idea AG Pitruzzella imagines an employer who treats disabled workers differently from one another according to the type or degree of disability each person has.

Under the EqA 2010, that is captured because section 6(3)(a) provides that a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability. If, for instance, an employer treats a worker less favourably because her disability involves a mental rather than a physical impairment, the appropriate comparator is someone with the same abilities as her but who does not have her impairment (section 23, EqA 2010) (see also paragraph 3.29 of the EHRC Employment Statutory Code of Practice). That comparator may, however, have a physical impairment.

Direct discrimination?

In VL's case, AG Pitruzzella says, we therefore have to investigate whether the difference in the way she was treated was related to disability "… regardless of whether the comparison is made with individuals within the group having the

protected characteristic or with individuals outside that group“ (paragraph 45).

Thus far, the analysis appears to be in terms of direct discrimination, and the point is the one made by Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; that sometimes it is necessary to start by identifying the “reason why“ someone was treated as they were (paragraphs 8-12).

In VL‘s case it might seem clear that the “reason why“ was the date on her certificate. That reason is not her disability. AG Pitruzzella agrees that it cannot be direct discrimination because there is “no direct connection between the employer‘s measure and the protected characteristic“ (paragraph 77).

Indirect discrimination?

AG Pitruzzella does not stop there. His second step is to argue that the criterion for the award of the allowance was in fact “… the receipt of a new disability certificate such as would increase the number of disabled persons employed“ (paragraph 64); that is to say, beyond the number employed at the date of the staff meeting. Because disability is the necessary prerequisite for an employee to be able to obtain a disability certificate, he says, “the submission of such a certificate and the date on which it is submitted are inextricably linked to the protected characteristic“ (paragraph 78). Having already determined that it is not direct discrimination, he concludes that it is indirect discrimination.

At least under the EqA 2010, however, indirect discrimination requires that people who share the claimant‘s protected characteristic are put at a particular disadvantage when compared with people who do not share it. That means VL would have to compare herself with people who are not disabled; and in that case, there would be no disadvantage, because non-disabled people do not receive the allowance.

In fact, there is a problem with AG Pitruzzella‘s characterisation of the criterion. It may be true that the provision of a certificate is inextricably linked to disability, but the date on which it is provided is not, and it is the date (and only the date) which is the criterion.

It is therefore not correct to say, as he does, that the criterion “places at a particular disadvantage … persons having a particular disability in comparison with other persons“ (paragraph 80). At VL‘s hospital, persons having a particular disability, or any disability, may be equally distributed either side of the cut-off date and there is no “particular disadvantage“ when they are compared with each other.

The case is different from AG Pitruzzella‘s illustration, above, which was his reason for seeking to extend the comparators permitted under the Directive. That involved comparisons between people who were all disabled but who differed with respect to the “type or degree“ of their disability, and were treated differently as a result.

In UK law, of course, there is another option. VL‘s case might be analysed as discrimination arising in consequence of disability under section 15 of the EqA 2010. That involves unfavourable treatment, rather than less favourable treatment, and so does not require a comparator. However, following *Williams v Trustees of Swansea University Pension and Assurance Scheme* [2018] UKSC 65, great care would need to be taken in characterising the “treatment“ so as to identify whether it really does amount to unfavourable treatment.

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