O'Neill v Buckinghamshire County Council

By Anya Palmer

In *O'Neill v Buckinghamshire County Council*, the EAT has held that `pregnant workers are not automatically entitled to a work assessment under regulation 16 of the Management of Health and Safety at Work Regulations 1999 in the absence of evidence that the work involved a risk as to health and safety to the expectant mother'. Therefore, the tribunal was right to reject the claimant's claim for sex discrimination. But what have the regulations got to do with discrimination in the first place? Anya Palmer reports

Background

The Pregnant Workers Directive places a duty on employers to carry out a risk assessment `for all activities liable to involve a specific risk of exposure to ... agents, processes or working conditions'.

Those provisions were given effect in the UK by regulation 16 of the Management of Health and Safety at Work Regulations 1999, which places a specific duty on employers to carry out a risk assessment for pregnant employees in certain circumstances.

The facts

The claimant, a teacher, brought claims for constructive dismissal and sex discrimination. The sex discrimination claim was based in part on an alleged failure by the respondent to carry out a risk assessment during her pregnancy.

The tribunal found that the requirement to carry out a risk assessment for pregnant workers under regulation 16 did not apply, because the claimant's work was not `of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby' such that regulation 16(1)(b) was engaged.

The tribunal also found that the respondent had not failed to carry out a risk assessment when a draft risk assessment had been completed without the claimant's input and a meeting with her had not been held due to difficulties in the relevant working relationship.

The appeal

The claimant appealed, relying on *Hardman v Mallon*. The EAT headnote in this case reads:

`A failure to carry out a risk assessment in respect of a pregnant woman as required by the Management of Health and Safety Regulations is sex discrimination. Carrying out a risk assessment is one way in which a woman's biological condition during and after pregnancy is given special protection.'

The EAT held that it was not necessary for the treatment of Mrs Hardman to be compared with how her employer treated or would have treated a comparable male employee or a non-female employee in order to establish less favourable treatment on the ground of sex. It relied on *Webb v EMO Air Cargo*

(UK) Ltd (No.2), the leading case of dismissal of a pregnant employee on the ground of her pregnancy. The EAT therefore allowed Mrs Hardman's appeal.

Regulation 16 was further considered by the EAT and the Court of Appeal in *Madarassy v Normura International plc*.

The EAT held that there is no obligation to carry out a risk assessment in respect of new or expectant mothers under regulation 16 unless the work is of a kind that `could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions or physical, biological or chemical agents'. There was no evidence of any such risk in Ms Madarassy's case. The EAT therefore allowed Nomura's cross-appeal in respect of this complaint.

Ms Madarassy appealed to the Court of Appeal, arguing that proof of some risk was not required before the 1999 regulations imposed an obligation on Nomura to undertake a risk assessment. The Court of Appeal agreed with the EAT:

`A finding that the work involved potential risk to health and safety was necessary before there was an obligation on Nomura under regulation 16 to carry out a risk assessment.'

That principle is now considered and applied by the EAT in *O'Neill*, rejecting the claimant's appeal. The judgment also includes a detailed consideration of whether, if a duty does arise under regulation 16, that duty is complied with in circumstances where a risk assessment is prepared but a meeting is not held with the claimant.

Comment

The MHSW Regulations 1999 place a duty on employers to assess and manage risks to their employees and others arising from work activities. They are a very important piece of health and safety legislation, but many employment lawyers will not be familiar with them because breach of the regulations does not normally fall within the jurisdiction of the employment tribunal. A breach of the regulations, if it gives rise to loss on the part of a claimant, would be actionable as a personal injury claim and/or a claim for breach of statutory duty in the civil courts.

So why is it potentially sex discrimination if an employer fails to comply with this particular regulation?

In *Day v Pickles*, the EAT held that failure to carry out a risk assessment could constitute a `detriment' for the purpose of the Sex Discrimination Act 1975.

In *Hardman v Mallon*, the EAT held that it could also constitute less favourable treatment on the ground of sex and that no comparison with a man was needed.

In Madarassy, the EAT and the Court of Appeal qualified this by holding that no duty arises under regulation 16 unless it is established in evidence that there is a potential risk of danger to health and safety in the specific working conditions.

What none of these cases addresses, presumably because it was not argued, is that there is a fundamental difference in discrimination law between acts and omissions. S.63 of the Sex Discrimination

Act gives employment tribunals jurisdiction to deal with complaints that any person 'has committed an act of discrimination ... against the complainant which is unlawful by virtue of part II [emphasis added]'.

S.82 (Interpretation) provides that the word `act' is to include `a deliberate omission'. In other words it does not include unintentional, accidental or negligent omissions. To constitute an act of discrimination on the ground of sex, an employer's failure to carry out a risk assessment would therefore have to be a deliberate failure and not merely a negligent one. There is no room here for the concept of unconscious discrimination. An omission cannot be both unconscious and deliberate at the same time.

In most cases, if there is an omission, it is likely to be a negligent one. Not many employers deliberately set out to not do a risk assessment for a pregnant worker.

There is therefore a crucial difference between the pregnancy dismissal cases referred to by the EAT in Hardman and the risk assessment cases: dismissal generally involves a positive act on the employer's part, whereas failure to carry out a risk assessment is a sin of omission. If the omission is negligent, the tribunal has no more jurisdiction to deal with this than if the employer negligently failed to comply with some other aspect of the MHSW regulations.

Of course it is open to a claimant to argue that the omission was deliberate, but representatives on both sides (and tribunals) should be clear that the claim should only proceed if that is what is alleged.

Where this issue is raised and addressed by the tribunal, the tribunal's decision will be difficult to challenge on appeal. In *Hussain v HM Prison Service*, the claimant claimed race discrimination/victimisation where the respondent omitted to allow him to sit a promotion exam, but the tribunal's finding that the omission in question was `unfortunate, accidental and incompetent' was upheld on appeal.

However, in *Brocklebank v Silveira*, the tribunal found that an employer's omission to carry out a risk assessment for a pregnant employee was deliberate. This too was upheld on appeal.

Implications

Where a claim is brought for failure to carry out a risk assessment, representatives on both sides need to establish whether it is in fact contended that this was a deliberate failure. If not, the claim should be withdrawn. If it is, what evidence is there is to support or refute this claim?

Representatives also need to consider what evidence there is that the working conditions were such that there was in fact a potential risk to the mother's health and safety or that of her baby, since this must be established by the claimant before any duty arises under regulation 16.

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