OUTER HOUSE, COURT OF SESSION

[2022] CSOH-56

P748/21

OPINION OF LORD ERICHT

In the Petition of

VICTORIA REID

Petitioner

for

Judicial Review of the Scottish Ministers public appointments policy in relation to disabled applicants

Petitioner: Dailly, Sol-Ad; Drummond Miller
Respondent: McGuire, Scottish Government Legal Directorate
Interested party: Webster QC, Office of the Solicitor to the Advocate General

18 August 2022

Introduction

[1] The petitioner seeks judicial review of the Scottish Ministers' public appointment policy in relation to disabled applicants. In particular, it seeks judicial review of the policy that, in the words of paragraph 3 of the petition, "[the petitioner's] application could not be progressed unless she was able to commit to two days tribunal work per month (hereinafter referred to as the 'two days policy')."

[2] The petitioner seeks the following orders:

> "(i) Declarator that in exercising its functions under the Mental Health (Care and Treatment) (Scotland) Act 2003, the respondent's two days policy

unlawfully discriminated against the petitioner as a disabled person in terms of the Equality Act 2010 *et separatim* was irrational and Wednesbury unreasonable;

(ii) Declarator that the respondent's failure to make any reasonable adjustments to its two days policy for disabled persons such as the petitioner was unlawful in terms of sections 19, 20, 29 and 50 of the Equality Act 2010.

(iii) Declarator that in exercising its functions under the Mental Health (Care and Treatment) (Scotland) Act 2003 the respondent failed to comply with its duties under sections 1 and 149 of the Equality Act 2010 by the rigid application of its two days policy to the petitioner.

(iv) reduction of the respondent's decision of 21 June 2021 insofar as it refuses to permit the petitioner to apply to become a general member of the Mental Health Tribunal for Scotland unless she can comply with the respondent's two days policy;

(v) an order under the Court of Session Act 1988, section 45(b), for specific performance of the respondent's duty to revise its two days policy in compliance with the Equality Act 2010;"

[3] As can be seen from the declarators sought, the petitioner has formulated her case as Wednesbury unreasonableness and also as breach of various statutory provisions. However, each of these formulations has as its foundation the petitioner's claim that she would lose her entitlement to Employment Support Allowance ("ESA") if she worked more than one day a month.

The factual circumstances

[4] The petitioner has a commendable desire to engage in public service by becoming a general member of the Mental Health Tribunal for Scotland ("MHTS").

[5] In 2021 the respondents were recruiting for MHTS members.

[6] On 14 June 2021 the petitioner emailed the respondents' recruitment mailbox in the following terms:

> I am interested in applying for the post: General Member - Mental Health Tribunal for Scotland, ref. 3938.
> I would apply as a general member with experience of a mental disorder and of using mental health services. …….
> I wonder what time commitment the job would entail?
> (Presently I am receiving Employment and Support Allowance, a benefit which limits me to a maximum of 16 hours/week paid work and an income ceiling of £143/week. I see that the daily rate of the post well exceeds this allowance.)
> Please do send me out an application pack…"

[7] The respondents' Mr Merrill replied the same day enclosing an application pack and stating:

> "Thank you for your interest in the General Member vacancy of the Mental Health Tribunal for Scotland. Whilst the estimated time commitment is 2 days per month, there is no guaranteed number of allocated days. Time committed per day varies with each case."

[8] On 20 June the petitioner emailed Mr Merrill:

> "The post of General Member interests me very much. However, as I am on Employment Support Allowance at present, and need to stay within the earning threshold of this benefit, I could only commit to one day per month. Would this preclude me from being considered?"

[9] Mr Merrill replied on 21 June:

> "This vacancy requires two days of availability per month. We unfortunately cannot progress your application if you can't commit to at least two days per month at this stage."

[10] On 30 June 2021 the petitioner emailed the respondents' Tribunals and Administrative Justice Policy mailbox in the following terms:

> "Subject: query re. disability members of MHTS and SSTS
> Sir / Madam,
> I am on the benefit Employment and Support Allowance due to a mental health condition, and am considering applying for a post as general member of the MHTS, for which the first eligibility criteria is a person who has experience of a mental disorder and of using services provided in relation to mental disorder.
> Can you please clarify for me the following:
> Is income earned as a disability member of a mental health tribunal taken into account for the purposes of Employment and Support Allowance?

Is income earned as a disability member of a social security tribunal or any other tribunal taken into account for the purposes of Employment and Support Allowance?"

[11] The respondents' Lauren Keillor replied on 1 July:

"The Scottish Government cannot provide any specific advice as to whether or not the MHTS would fall under the ESA's 'permitted work' scheme; more information on which and how you can submit the relevant application for this can be found here Permitted work: factsheet - GOV.UK (www.gov.uk).

You may wish to talk to the DWP or your Jobcentre plus contact in advance of applying to clarify this matter. In doing so, you may wish to tell them that the MHTS is not currently in the First-tier Tribunal for Scotland (FTT). It is expected to transfer to the FTT in 2022."

[12] The petitioner did not apply for the post.

[13] As explained in further detail below, there is an exemption which allows members of English and UK tribunals to work for one day (or two half days) a week while in receipt of ESA, but that exemption does not apply to Scottish tribunals. On 15 March 2022 the Scottish Minister for Community Safety wrote to the UK Minister for Disabled People, Health and Work. The letter stated, inter alia:

" I am writing today to formally request an amendment to the Employment and Support Allowance Regulations 2008 (the 2008 Regulations) and the Employment and Support Allowance Regulations 2013 (the 2013 Regulations) to address an apparent omission in the exempt work provisions of the regulations….

There is no equivalent provision [to the exemption for English/UK tribunal members] for general members of the First-tier Tribunal or Upper Tribunal of the devolved Scottish Tribunals, or the MHTS….. We do not believe that there is any objective justification for this difference in treatment, and are of the view that the omission of devolved Tribunal members may well have been an oversight.

A constructive meeting took place on 25 January 2022 between my officials and UK Government colleagues regarding the issues related to the judicial review. Following the meeting, agreement was reached that there is an omission of devolved tribunal members from the exempt work provisions of the Regulations, and a willingness to consider a formal request for amendment of the Regulations was confirmed by UK Government colleagues.

> Given the lack of any objective justification for the difference in treatment of devolved tribunal members who are in receipt of ESA and meet the eligibility criteria set out in the 2008 Order, the current Judicial Review (which, in part, concerns this issue), and our forthcoming plans to undertake a substantial recruitment of general members to the Social Security Chamber of the First Tier Tribunal in Scotland later this year, I am writing now to request that you give urgent consideration to amending both the 2008 and 2013 ESA Regulations to extend the exempt work provisions to devolved First and Upper-tier tribunal members."

[14] The UK Minister replied on 20 April 2022 stating:

> " Thank you for your letter on the 15th March 2022 regarding a request for the Department to make an amendment to Employment and Support Allowance (ESA) Regulations.
> I am unable to offer a full response at present as we are still considering this issue and enquiries are taking longer than anticipated. I will, of course, provide a response as soon as possible."

[15] In view of the exchange of correspondence between the Scottish and UK ministers I ordered that intimation of the petition be given to the Advocate General, and invited counsel for the Advocate General to address me on certain matters for the benefit of the court.

Submissions for the petitioner

[16] The Solicitor Advocate for the petitioner submitted that if the exemption covered the devolved tribunals the issue in this case would not arise, and also accepted that the matter was under review by the UK Government but submitted that a decision required to be made on the basis of the current law.

[17] The Solicitor Advocate submitted that as a person in receipt of ESA and disability benefits the petitioner was unable to work more than 16 hours per week or earn more than £143 per week or £619.66 in any monthly work cycle in terms of the 2008 Regulations. The Department for Work and Pensions guidance allowed for working hours to be averaged out

over a work cycle which would allow the petitioner to earn up to £619.66 per month (para 4.12.14). In certain circumstances permitted hours could be averaged over five weeks where there was no recognisable work cycle, which would give a threshold of £715 in a five week period. The fee for general members of the MHTS is £423.71 per day so two days payment per month of £845.42 in total would have meant the petitioner would lose her ESA, with no guaranteed income from the MHTS.

[18] The Solicitor Advocate submitted that the two days policy indirectly discriminated against the petitioner contrary to sections 19, 20 and 29 of the Equalities Act 2010. Further, the two days policy discriminated against the petitioner contrary to section 50 of the 2010 Act. The respondents ought to make reasonable adjustments to their two days policy to prevent discrimination against disabled persons. (*Archibald* v *Fife Council* [2004] UKHL 32, *Griffiths* v *Secretary of State for Work and Pensions* [2015] EWCA Civ 1265). Further, the respondents failed to comply with their duties under sections 1 and 149 of the 2010 Act in relation to their two days policy. Finally, he submitted that the respondents should revise their two days policy so as to be compliant with the 2010 Act.

[19] In response to the respondents' argument that the petitioner had failed to exhaust her remedies, the Solicitor Advocate submitted that this petition also raised issues of Wednesbury irrationality which could only be addressed in a Judicial Review and not by the Employment Tribunal.

Submissions for the respondents

[20] Counsel for the respondents submitted that the petitioner had an alternative remedy of commencing proceedings in the Employment Tribunal in relation to alleged breaches of section 19 and section 20 of the Equalities Act 2010 and the court should not exercise its

supervisory jurisdiction in relation to that allegation (*R on the application of (1) Good Law Project Ltd* (2) *Runnymede Trust* v *The Prime Minister and The Secretary of State for Health and Social Care* [2022] EWHC 298(Admin)). An application to the supervisory jurisdiction was not available where the issue could be raised under another enactment unless special or exceptional circumstances were averred (rule of court 58.3.1: *BBC and others petitioners* 2020 SLT 345 at para 36).

[21] Counsel further submitted that the petitioner had not suffered indirect discrimination in terms of section 19 of the 2010 Act. The petitioner had not established that she was a disabled person under section 6 of the 2010 Act nor that the minimum commitment of availability for two days per month put her at a particular disadvantage when compared to persons who were not disabled. The petitioner had not averred an appropriate pool for comparison. Even if she were to work one day per month on the Tribunal, her daily earnings of £422.71 would affect her eligibility for ESA. Any disadvantage caused to the petitioner had been caused by lack of an exemption for the Scottish Tribunal.

[22] Counsel further submitted that even if the petitioner had satisfied the requirements of section 19(2)(a-c) of the 2010 Act, the estimated minimum time availability for general members of the MHTS of two days per month was a proportionate means of achieving a legitimate aim in terms of section 19(2)(d). The respondents have the legitimate aim of ensuring the effect of a proper running of a properly resourced MHTS. The two days availability each month was necessary to ensure members established and maintained the skills and experience required to exercise the functions as a member effectively, and to allow the MHTS to discharge its functions efficiently, including in relation to short notice hearings, and ensure a fair and reasonable distribution of work among members. Counsel further

submitted that the respondents were not in breach of a duty to make reasonable adjustments in terms of section 20. The petitioner did not make a request for reasonable adjustments in respect of the application process, but sought to alter the terms of appointment, despite not making an application, in the erroneous belief that a change to the terms of her appointment would mean that she would continue to be eligible for ESA, which was not the case.

[23] Further, the petitioner had not established that the minimum commitment of availability for two days per month would put her at a substantial disadvantage compared to persons who were not disabled. If she sat for two days per month her earnings would be in the region of £845.42 which would make her significantly financially better off compared with the amount of ESA she would receive if she did not sit. Any disadvantage caused to the petitioner by absence of an exemption sitting at a Tribunal was not within the control of the respondents. Further the adjustments sought were not reasonable. Her eligibility for ESA would be affected even if she only worked one day per month for MHTS. The inflexibility flowing from the petitioner being able to make a minimum time commitment of only one day over a four or five week period would have significant implications on MHTS's ability to properly induct and train the petitioner to a sufficient standard to allow her to sit as a member. The aim of the two day requirement was primarily to ensure high quality decision making by the Tribunal, ensure statutory requirements throughout the hearing were met, and ensure the best possible service for users: infrequent sitting and lack of availability for training/multiple day or continued hearings would impact on the effectiveness of the members.

[24] In respect of the petitioner's section 50 case, counsel submitted that the petitioner failed to exercise her alternative remedy of bringing a claim in the Employment Tribunal, and in any event had not specified the alleged breaches of section 50.

[25] Counsel further submitted that the duty under section 1 of the 2010 Act did not arise. This applies when an authority is making strategic decisions about how to exercise its functions section 1(1) and does not apply to the petitioner's complaint of a single decision taken in relation to an application process. *Esto* it does arise, that the respondents had complied with the duty. The recruitment process reflected the requirement under regulation 2 of the Mental Health Tribunal for Scotland (Appointment of General Members) Regulations 2004 that a general member shall be a person who has experience of a mental disorder and of using services in relation to a mental disorder. The MHTS has members who have a disability across each type and the two day requirement had not provided any impediment to this.

[26] In respect of the petitioner's argument on the public sector equality duty in section 149 of the 2010 Act, counsel submitted that the duty did not arise separately in the circumstances of the case as the petitioner had not made an application for the position and therefore the respondents had not made a decision to refuse her application *R* (*Leighton)* v *Lord Chancellor* [2020] EWHC 336(Admin) para 86). *Esto* the duty did arise, the respondents accepted that they did not have due regard to the matter set out at section 149(1)(a-c) of the Equality Act 2002 however in conducting the recruitment exercise the respondents specifically sought to include persons with experience of a mental disorder so the respondents had carried out an internal review. It was unlikely that an application of the PSED would have made any material difference to the outcome in the present circumstance and further, and the review had identified several recommendations to avoid a similar situation in the future.

[27] Counsel further submitted that the respondents had not acted irrationally or unreasonably in a Wednesbury sense: the minimum requirement of two days availability per month for work on the MHTS was not unreasonable nor irrational.

[28] Finally, counsel submitted that if the respondents were found to be in breach of the 2010 Act, the appropriate remedy would be declarator and not reduction or specific performance.

Submissions for the Advocate General

[29] Counsel for the Advocate General, who appeared for the assistance of court, explained that the position in respect of exemption under the EWA regulations for members of Scottish Tribunals was under review by the UK Government. He submitted that the current petition was a challenge to the Scottish Ministers, and the court should determine that challenge and not the issue between the Scottish and UK Government as to the exemption. ESA was assessed weekly if the income for that week is more than £152 then ESA is not available for that week. For that week, the petitioner would not get the ESA but instead would get the money which they had earned for sitting in the Tribunal.

Analysis and decision

[30] This is a petition for judicial review of the Scottish Minister's public appointments policy in relation to disabled applicants, in particular the two days policy, i.e. the requirement for the applicant to commit to two days' work per month.

[31] ESA is an allowance which is payable where a claimant has limited capacity to work and certain other conditions are met. The statutory provisions in respect of ESA can be

found in the Welfare Reform Act 2007 ("the 2007 Act") and the Employment and Support Allowance Regulations 2013 (the "2013 Regulations").

[32] For present purposes, there are two important principles underlying the ESA which can be drawn from the wording of the primary and secondary legislation.

[33] The first principle is that ESA is payable in respect of a week. That can be seen from section 1(5) of the 2007 Act which states:

> "An employment and support allowance is payable in respect of a week"

It can also be seen from the various references to a week in the Regulations.

[34] The second principle is that the claimant is not entitled to claim ESA and work.

[35] Both of the principles are explicitly stated in Regulation 37 of the 2013 Regulations:

> "**37- A claimant who works to be treated as not entitled to an employment and support allowance**
>
> (1)…a claimant is to be treated as not entitled to an employment and support allowance in any week in which that claimant does work"

[36] There are however a number of exceptions to the second principle.

[37] One of the exceptions is for certain kinds of public service. Regulation 37(2) provides that Regulation 37(1) does not apply to the activities listed in Regulation 37(2). The list includes public service work as a local councillor in England and Scotland (Reg 37(2)(a)). It also includes public service for either one day or two half days a week as a member of an English or UK Tribunal (Reg 37(2)(b)). However, there is no such exception for public service as a member of a Scottish tribunal.

[38] The distinction between the members of English/UK and Scottish tribunals is one which may be difficult to justify. ESA applies throughout the UK, and it is difficult to see why a member of an English or UK Tribunal should be entitled to an exemption for one day's (or two half day's) work but a member of the equivalent Scottish tribunal should not

be. The difficulty may be particularly acute in respect of the Mental Health Tribunal for Scotland as there is a legal requirement for the appointment of members who have experience of mental disorder or of using services provided in relation to mental disorder (Mental Health Tribunal for Scotland (Appointment of General Members) Regulations 2004 Regulation 2(a)). Counsel for the Advocate General did not seek to justify that distinction but restricted himself to explaining that in the light of the matter being raised the UK Minister would review it, and that if there is to be a change then due to the procedures involved to change the regulations and parliamentary time it would take into the new year.

[39] This is not a judicial review of the UK government in respect of the distinction between English/UK and Scottish tribunal members as it exists at present, nor is it a judicial review of the outcome of the UK Minister's review, whatever that may be. These are not matters for this court under the present petition, and they have not been argued before me. In this petition I require to deal with the petitioner's challenge to the Scottish Ministers' public appointments policy on the basis of the Regulations as they currently stand.

[40] Another of the exceptions, and the one which is relevant to the petitioner's challenge, is the exemption for limited part time work. Regulation 37(2)(f) of the 2013 Regulations provides that Regulation 37(1) does not apply to "any of the categories of work set out in regulation 39(1) (exempt work)". Regulation 39(1)(3) sets out the following category:

> "work which is done for less than 16 hours a week, for which earnings in any week do not exceed 16 multiplied by the National Minimum Wage …."

[41] Two points are immediately apparent from that wording.

[42] Firstly, the exemption relates to a week. The limit in respect of hours is expressed as a number of hours a week, and the limit in respect of earnings is expressed as earnings "in any week". That is consistent with the principle that ESA is payable in respect of a week.

[43] Secondly, the hours limit and the earnings limit are not alternatives. In order for the exemption to apply, both must be satisfied. So if the earnings limit is exceeded then it does not matter whether the number of hours which it took to earn that amount is less or more than 16 hours: for the exemption to be disapplied it is enough that the earnings limit has been exceeded.

[44] It is helpful to put a figure on the earnings limit, which is expressed as a formula of 16 times the national minimum wage. The national minimum wage is currently £9.50 so the current earnings limit is £152. The daily fee for a general member of the MHTS is £423.71. That means that even if the member sat for only one day in a particular week, the earnings limit would be exceeded and the member would lose ESA for that week. There is nothing unfair to the member about that: the member would be £271.71 better off for that week. If the member sat for two days that week, the member would be even better off: the member would lose the ESA for that week but receive two days fee so would be £695.42 better off.

[45] Indeed, in certain circumstances the member might be even better off than that and might be able to retain both the two days fee for that week and the ESA for that week. The Department of Work and Pensions has a discretion to average out weekly income in certain circumstances. Regulation 79(5) of the 2013 Regulations provides:

> "(5) Where the amount of the claimant's income fluctuates and has changed more than once, or a claimant's regular pattern of work is such that the claimant does not work every week, the foregoing paragraphs may be modified so that the weekly amount of the claimant's income is determined by reference to the claimant's average weekly income—
>
>> (a) if there is a recognisable cycle of work, over the period of one complete cycle (including, where the cycle involves periods in which the claimant does no work, those periods but disregarding any other absences);

> (b) in any other case, over a period of five weeks or such other period as may, in the particular case, enable the claimant's average weekly income to be determined more accurately."

[46] Depending on whether and how the Department for Work and Pensions exercises that discretion, it may be that a member of the MHTS would be able to sit for two days per week or month without losing ESA. The averaging need not be over a set period of five weeks, but may be over another period which in the particular case of the claimant, enables the claimant's average weekly income to be determined more accurately. It is premature to speculate to what the appropriate period would be in respect of a particular member of the MHTS as this will depend on how frequently that person sits as a member.

[47] In my opinion, the petitioner's criticism of the two days policy is misconceived. It is not the case, as the petitioner contends, that ESA is available when sitting as a member of the MHTS for one day but is lost by sitting for a second day. Entitlement to ESA for the week is lost by sitting as a member for just one day. Sitting for a second or further days that week makes no difference: ESA is already lost. That misconception is the foundation for all the challenges to the two days policy, whether they are formulated as Wednesbury unreasonableness or statutory breaches. That misconception goes to the heart of all the remedies which the petitioner seeks, and the petitioner's case must fail.

Order

[48] I shall sustain the respondents' first, third and fourth pleas in law and dismiss the petition.