The importance of correctly identifying the relevant provision, criterion or practice ('PCP') and pool for comparison in any indirect discrimination claims

By Katherine Anderson
3PB Barristers

The Royal Parks Ltd v Boohene, Antwi and Others [2023] EAT 69

This appeal, decided on 5 May 2023, raised the question whether, under section 41 Equality Act 2010 ('EqA'), workers employed by third-party contractors could rely on the principal's own employees as comparators in a claim of indirect race discrimination relating to rates of pay. It highlights the importance of identifying, correctly, the relevant provision, criterion or practice ('PCP') and pool for comparison, in any indirect discrimination claim, if necessary seeking further information or disclosure from the respondent in order to do so.

The claimants were contract workers employed by a third party to work on its toilet and cleaning services contract with the respondent in London. They had minimum rates of pay set below London Living Wage ("LLW"). In contrast, the respondent's direct employees were office-based and had a level of pay higher than LLW. The respondent had committed to ensuring that the minimum pay of its direct employees would not fall below LLW, but it had decided not to accept the option of LLW as the minimum pay rate on the toilet and cleaning contract. The claimants complained that the contractual arrangements put in place by the respondent for determining the pay of the outsourced worker treated outsourced workers less favourably than the respondent's direct employees and thereby had disparate impact on workers from a black or minority ethnic ("BME") background, who were more likely to find themselves in outsourced roles.

The EAT agreed that, generally speaking, privity of contract should mean that terms agreed between a contractor and its workers would fall outside the ambit of section 41. However, where a principal could properly be said to have directed the terms on which the contractor is to employ the worker, it would be open to an ET to find that section 41(1) was engaged if it

found that this had impacted upon the contractor's ability to freely offer contractual terms to its workers: at [69]. If the reality is that the principal has effectively dictated the terms on which the worker is to carry out the work, the ET would be entitled to conclude that this falls within section 41(1)(a), notwithstanding the fact that the principal's decision is then implemented by the contractor through its contractual relationship with that worker. What the true position is in any particular case will require the kind of common sense, fact-based enquiry that the ET is best placed to undertake: at [70]. In this case, the contractor's tender had offered two options, and it was the choice of the respondent's predecessor as to which option it decided to accept. That choice was determinative as to the terms on which the workers would undertake their work insofar as the minimum level of pay was concerned. Having regard to the very specific choice made by the principal in this instance, and the real-world impact that had, and also to the further degree of control that it exercised on the minimum rate of pay that would be allowed to be paid to workers working on the toilets and cleaning contract, the EAT considered that the ET was entitled to reach the conclusion that this was a case falling within section 41(1) EqA: at [71-2].

The initial step required under section 19 EqA was for the ET to identify the PCP said to have been applied by the respondent; once that PCP was identified then the identification of the pool itself would be a matter of logic: at [74]. The respondent contended that the ET had fallen into error in its construction of the PCP in the present case and, consequently, in its identification of the pool for comparison. Here, the respondent's complaint related back to a dispute between the parties which had arisen at the hearing before the ET, in relation to how the PCP had been pleaded by the claimants. The respondent had contended that the relevant PCP had been defined in terms of the divide between its direct employees and the outsourced workers employed by its contractors, whereas the claimants had said that the PCP was defined by the distinction drawn by the respondent between its direct employees and the outsourced workers employed by the contractors on the toilets and cleaning contract. The ET had resolved this dispute in favour of the claimants.

The EAT accepted that it was for the claimants to identify the PCP in issue in these proceedings, but found it difficult to see how the pleaded case could be seen to have limited the scope of the PCP to solely those outsourced workers employed by the contractor on the toilets and cleaning contract: it was the claimants' case that the respondent had maintained a practice of applying a different minimum level of pay (by reference to the LLW) depending on whether the staff in question were its direct employees or outsourced workers employed by its contractors, not limited to a particular contractor or to any particular contract: at [78]. Having

defined the relevant PCP in this way, the ET determined that the pool for comparison was no longer between the respondent's "directly and indirectly employed staff" (the claimants' pleaded case) but was restricted to the direct employees and only those outsourced workers employed by the particular contractor on the toilet and cleaning contract.

In the EAT's judgement, that was an incomplete and indefensible comparison. The ET had effectively constructed two different PCPs: the first, providing that anyone carrying out work for the respondent must be one of its direct employees in order to secure LLW as a minimum rate of pay; the second, providing that anyone employed by the contractor to carry out work for the respondent on the toilets and cleaning contract would not be guaranteed LLW as a minimum rate of pay. The problem with that analysis is that it also created two different comparative assessments, neither of which was undertaken by the ET. The first would require a comparison between both directly employed and outsourced workers; the second would need to compare those working on the toilets and cleaning contract with all others (whether directly employed or outsourced) carrying out work for the respondent. By failing to appreciate the bi-directional nature of the PCP it had constructed, the ET erroneously limited the pool for comparison to all the respondent's employees and all of the contractor's employees who worked on the toilets and cleaning contract. That, however, indefensibly left out of the picture all other outsourced workers undertaking work for the respondent: at [79-80]. The way that the claimants' case was put before the ET meant that the comparative assessment that was then undertaken was incomplete. By limiting the pool for analysis to only the respondent's direct employees and those employed on the toilets and cleaning contract with the particular contractor, no account was taken of the respondent's treatment of other outsourced workers. That was illogical and amounted to an error of law as, whichever way it was defined, the PCP complained of by the claimants plainly required an assessment of its impact across all those directly and indirectly engaged to carry out work for the respondent. That was how the case had originally been pleaded. It was, however, also the necessary implication of the revised PCP identified by the ET, which either required a comparison between the respondent's direct employees and all outsourced workers, or a comparison between those engaged on the particular contractor's toilets and cleaning contract and all other workers (whether directly employed by the respondent or working for it (indirectly) pursuant to its other outsourced contracts: at [84].

The claimants argued that the respondent had not disclosed evidence relating to the procurement process with other contractors and the ET was thus bound to focus on the case

before it, which was limited to the contract with the particular contractor. However, the EAT did not agree that it would have been impossible for the claimants to obtain this information. This was not a situation where any such application for further information or disclosure on the part of the claimants could have been dismissed as a fishing expedition: their case had expressly put the spotlight on the distinction drawn by the respondent between its direct employees and outsourced workers, and there was material within the documentation that had been disclosed which supported that characterisation: at [82-3].

https://assets.publishing.service.gov.uk/media/64552cfc479612000cc29166/The_Royal_Parks_Ltd_v_E_Antwi_and_Others__2023__EAT_69.pdf

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Katherine Anderson

Barrister
3PB Barristers

0330 332 2633
katherine.anderson@3pb.co.uk

3pb.co.uk