Following up Follows: S19A EqA 2010 – finally clarity on indirect associative discrimination, but not on associative victimisation

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S19A EqA 2010

With little fanfare, the government brought in a new section of the Equality Act 2010 on 1st January 2024. S19A is an addition to the existing provisions on indirect discrimination that expressly allows *associative* indirect discrimination. It is an important codification of the law for carers and others who do not have a protected characteristic but who are associated with those who do.

Until this change, the law was very clear only on *direct* associative discrimination. A Claimant did not have to have a particular protected characteristic in order to claim, for example, direct discrimination because of age. The wording of s13 assists with that as it states '*because of a protected characteristic*' and confirms the possibility of discrimination by association in the explanatory notes.

When it came to indirect discrimination however, the position was far more murky. S19 appears to state that it is mandatory for a Claimant claiming indirect discrimination to have that protected characteristic: '*A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's'*.

There was no clear domestic appellate law assisting with a claim for associative indirect discrimination. Indeed, the Court of Appeal case of *Hainsworth v Ministry of Defence (Equality and Human Rights Commission intervening)* 2014 IRLR 728 found that the mother of a disabled child could not bring a claim relating to reasonable adjustments when she wanted to change place of work due to her caring responsibilities. This did not bode well for a similar

case involving indirect associative discrimination, e.g. a Claimant who argues that forcing employees to come into the office (rather than work from home) affects carers more than non-carers.

The only way to argue such a point was to refer to European jurisprudence, and in particular the case of CHEZ *Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] EUECJ C83/14, CJEU in which the Claimant lived in a mainly Roma area where the authorities had put electricity 6-7 metres high off the ground to prevent tampering. Ms Nikolova succeeded in her argument that the authorities were discriminating against Roma people and that because she lived in the area, she was associated with them and suffering direct discrimination too.

In the case of *Follows -v- Nationwide Building Society* [2023] UKET 2201937/2018, referring to *CHEZ*, I successfully argued that Mrs Follows had been subject to indirect associative age discrimination (due to her status as a carer for her elderly mother) as homeworking posts had been deleted. She was awarded nearly £350,000 by the Employment Tribunal.

However, with the ending of the supremacy of European Law at the beginning of this year, relying on the principles in CHEZ has become far more difficult. S19A has been brought in and neatly plugs that gap. It expressly states that where B is a person *without* a certain protected characteristic, B can still bring a claim if a provision, criterion or practice puts, or would put, B at substantively the same disadvantage as who have the relevant protected characteristic. It will therefore no longer be necessary to rely on European case law.

Strikingly, despite similar lack of clarity in the law on associative victimisation (eg dismissing a wife because the husband has made a claim of discrimination), there has been no equivalent change. In the case of *Thompson v London Central Bus Company Ltd* UKEAT/0108/15/DM, the ET had decided, using European Law, that a claim for associative victimisation was permissible. This was contrary to the wording of s27 EqA (which specifies that the Claimant must have done the protected act) but in line with EU obligations. The appeal at the EAT only considered how close the association needed to be. Such a claim would appear very difficult without relying on EU Law.

Indeed, the fact that the law was changed on indirect discrimination and the opportunity was not taken to make a similar amendment to the victimisation provisions, might suggest that Parliament deliberately decided not to provide protections for associative victimisation.

It is also noteworthy that the law on reasonable adjustments has not been amended. Therefore, if a case similar on the facts to *Hainsworth* were to come up again, it appears that the Claimant would have to try and find a way of arguing the facts as an indirect associative discrimination claim instead.

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