

Essop & Ors v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27

By Thomas Acworth, Barrister

1. In a claim for indirect discrimination under section 19 of the Equality Act 2010 is there a need for a claimant to establish the reason why a PCP puts the group with which he or she shares a protected characteristic at a disadvantage? “No”, held the Supreme Court. In addition, the reason why a PCP puts a group at a disadvantage does not have to be related to the protected characteristic in question.

BACKGROUND

Essop

2. This case concerned a Home Office employee. To be eligible for promotion to certain civil service grades, all Home Office employees had to pass a Core Skills Assessment ('CSA'). In 2010, the Home Office commissioned a report, the results of which demonstrated that the CSA pass rate for Black and Minority Ethnic candidates and older candidates was lower than the pass rate for white and younger candidates. The reason for this disparity was unknown.
3. At a pre-hearing review, the ET ruled that the reason for the lower pass rate had to be established. This ruling was overturned by the EAT, which held that it was enough for the Claimants to demonstrate that the group had been or would be put at the disadvantage of a greater risk of failure and that each Claimant had been put at this disadvantage in reality. The Home Office appealed to the Court of Appeal, which, allowing the appeal, held that there was a need for the Claimants to show why the group had been put at the disadvantage in question and that each Claimant had to be put at the disadvantage for the same reason as the group.
4. The principal issues for the Supreme Court to resolve were whether sub-sections 19(2)(b) and (c) of the Equality Act 2010 require the claimant to establish the reason why the group was or would have been put at the relevant disadvantage and, if so, whether the individual had to have been put at the relevant disadvantage for the same reason as the group.

Naeem

5. This case concerned a Muslim chaplain employed by the Prison Service. Prior to 2002, the Prison Service had not employed any Muslim chaplains on a salaried basis. Instead,

it had engaged them on a sessional basis. This was because the Prison Service believed that there had been an insufficient number of Muslim prisoners to justify employing Muslim chaplains on a salaried basis before 2002. The Prison Service operated an incremental pay scale, where the amount of pay was related to a prison chaplain's length of service. At the time that proceedings were instigated, the scheme was in transition: the length of time taken to reach the top pay grade was being reduced. Notwithstanding this, the average rate of pay for Muslim chaplains remained around £2,000 per annum less than the average rate of pay for Christian chaplains. The reason for the disparity was that Christian chaplains had been engaged on a salaried basis prior to 2002 and had a longer average length of service than Muslim chaplains.

6. Despite it being indirectly discriminatory on the grounds of race and religion, the ET held that the application of the scheme was justified. Both sides appealed to the EAT, which held that the scheme was not indirectly discriminatory because those chaplains employed prior to 2002 should have been excluded from the pool for comparison. The EAT went on to say that the justification defence had not been made out as the ET had failed to consider the ways in which it could have been modified to avoid the disadvantage. The Claimant then appealed to the Court of Appeal, which held that the reason for the disparate impact had to be peculiar to the protected characteristic(s) in question. In this case, the court was of the view that the reason for the disparity was the absence of a need for salaried Muslim chaplains before 2002, which was not reflective of any characteristic peculiar to Muslims. Consequently, the court dismissed the Claimant's appeal.

DECISION

7. The Supreme Court heard the cases together. It allowed the appeal in *Essop* but dismissed the appeal in *Naeem*. The judgment was delivered by Baroness Hale, who began by setting out the historical versions of the definition of indirect discrimination. Having done so, the court held that the later versions had not been designed to restrict the definition of the prohibited conduct and identified six salient features shared by all of the different definitions:
 - a. None of the definitions contained any express requirement for the reason why a PCP put a group at a disadvantage to be explained. It was enough that the group was put at that disadvantage by the PCP.
 - b. Indirect discrimination does not require a causal link between the protected characteristic and the disadvantage. Rather, it requires a causal link between the PCP and the disadvantage.
 - c. The reason why one group may find it harder to comply with a PCP than others does not need to be unlawful or under the control of the employer.
 - d. There is no requirement for the PCP to put every member of the group at the disadvantage.

- e. It is commonplace for the disparate impact of the PCP to be established by statistical evidence.
- f. Respondents can always show that the application of the PCP is justified.

Essop

8. Having regard to the six salient features, there was no need to prove the reason why a PCP puts or would put the relevant group at a particular disadvantage. The language of the Equality Act 2010 required a correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual. Establishing such a correspondence would depend in large part on how the disadvantage in question was defined. In this case, there were two potential definitions: the fact of failure of the CSA; and the likelihood of failure. Each potential definition presented the same problem: allowing undeserving individuals, who had failed the CSA for reasons unrelated to the disparate impact, to coattail upon the claims of deserving claimants.
9. Baroness Hale thought that the problem could be countered in three ways if the fact of failure definition was adopted. Firstly, it would be open to the Home Office to show that there was no causal link between the PCP and the individual's failure: he or she might have failed because of insufficient preparation, non-attendance or an inability to finish the test. Secondly, there would be a material difference in circumstances within the meaning of section 23(1) of the the Equality Act 2010 between a person who failed a test for such reasons and a candidate who has prepared appropriately, attended the assessment and finished the test. Finally, it might be possible for the Home Office to justify the PCP notwithstanding its disparate impact. Whilst all members of the group could be said to suffer the disadvantage if the likelihood of failure definition was used, the Home Office could counter this by demonstrating that there was no causal connection between the PCP and the disadvantage suffered by the individual.
10. The Home Office was not able to justify importing additional words into the definition of indirect discrimination. The essential element in indirect discrimination claims is a causal connection between the PCP and the disadvantage suffered by the group and the individual. It is not necessary to prove the reason why the group has been disadvantaged. Establishing this connection might be easier if the reason for the disadvantage is in evidence. This is not, however, a matter of law but is, instead, a matter of fact.
11. The court held that the disadvantage in this case was that a disproportionate number of members of the group failed the CSA. Because there was no need for all members of the group to be put at the disadvantage, it was irrelevant that it was no more than potential at the level of the group. Regardless of whether it is potential or actual, a disadvantage remains the same. However, the individual claimant must actually be put at the disadvantage in question.

Naeem

12. In *Naeem* the court held that the reason why a PCP puts a group at a disadvantage does not have to be related to the protected characteristic in question.
13. The appropriate method for identifying the pool was to identify all workers affected by the PCP so that a comparison could be made between those with the relevant characteristic and those without it. There is no justification for including only some of the workers to whom the PCP applies. Christian chaplains employed on a salaried basis prior to 2002 fell within the pool. The court was satisfied that the scheme did put Muslim chaplains at a disadvantage when compared with Christian chaplains and that the Claimant had been put at the disadvantage.
14. The Claimant challenged the justification defence on the basis of proportionality. Because the pay scheme was in transition, the question to be addressed was not whether the original scheme was justified but whether the steps being taken to move towards a new system were proportionate. Where a part of the legitimate aim identified is to move to a system that reduces or eliminates the disadvantage suffered by a group, it is necessary to consider whether there are alternative methods that would reduce or eliminate the disadvantage faster. Whilst the burden of proving that there were no other methods rests with respondents, claimants do need to challenge an assertion that nothing else could be done. It is incumbent on an ET to consider any alternatives that are suggested or which may be obvious. This is a question of fact. Because this had not been explored at first instance properly, the Supreme Court would not interfere with the ET's finding on justification.

COMMENT

15. The absence of a requirement to establish why a PCP has or would put a group at a particular disadvantage ought to make it easier for claimants to establish a *prima facie* case of indirect discrimination. Demonstrating that a disadvantage has been caused by the PCP will be sufficient.
16. Although the reason why a group is or would be put at a disadvantage is irrelevant legally, it still has an important evidential role to play. For claimants, it may be easier to establish the causal connection between the disadvantage and the PCP if the reason why the group has been or would be put at the disadvantage by the PCP is known. Moreover, there may be cases in which it is essential for a claimant to establish the reason – for instance, cases where there is a lack of statistical evidence.
17. The 'reason why' also remains an important evidential consideration for respondents. If attempting to demonstrate that the PCP has not resulted in any disadvantage to the individual, it will be essential to adduce some evidence as to why the individual claimant suffered the disadvantage. This may necessitate adducing evidence of the individual's circumstances and of the circumstances of others who have failed to comply with the PCP so that a comparison can be made.

18. However, whilst it may be effective in countering a claim brought by an individual, respondents should be wary of focussing on this causal element unduly. Causation is fact-specific: defeating a claim will not mean that a given PCP is not discriminatory; it will mean that an individual has not suffered because of it. Much the same can be said for the section 23(1) defence. Succeeding on either of these grounds leaves scope for other members of the group to bring section 19 claims arising from the application of the PCP. For those respondents concerned about the broader implications that a ruling might have upon their workforces, it would seem prudent to focus attention on disproving the existence of the disadvantage at the level of the group and/or making out the justification defence.

19. The full judgment and press summary can be found at <https://www.supremecourt.uk/cases/uksc-2016-0005.html>.

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