CASE LAW UPDATE

by

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Supreme Court overturns the Court of Appeal and provides clarity on Indirect Discrimination in two cases*: Essop and others v Home Office (UK Border Agency)* and *Naeem v Secretary of State for Justice [2017] UKSC 27.*

CASE 1: ***Essop and others v Home Office (UK Border Agency) and Naeem***

Facts:

The claimants were civil servants who brought claims in the ET alleging that they had been indirectly discriminated on the grounds of race and/or age by the Home Office's requirement to pass a core skills assessment ('CSA') in order to be eligible for promotion. The claimants asserted that black and minority ethnic ('BME') candidates over the age of 35 were significantly less likely to pass the assessment than non-BME and younger candidates. The PCP relied on was the requirement that all candidates for promotion to pass the CSA and the particular disadvantage was the increased likelihood of failure of the CSA.

A statistical report concluded that BME candidates over 35 years of age had a proportionately lower CSA pass rate than white and younger candidates (and significantly so). Although all of the claimants had failed the CSA not all BME candidates over 35 failed. Many white candidates also failed the CSA. The report did not identify any reason for the differential impact.

Decision of the London South ET:

The ET stated that it was not enough to establish that a claimant formed part of a group that was less likely to pass the CSA. The mere fact of failure of the CSA in any particular case is not determinative of whether that claimant was put at that disadvantage. Each claimant would also need to establish the reason why he or she failed the CSA test.

Decision of the EAT *[2014] IRLR 592]*:

Langstaff P, disagreed with the ET and stated that the wording of s19 does not require a claimant to show the reason why he or she was subjected to a disadvantage, in addition to the fact that they had done so. In particular, the EAT stated that the imposition of the 'why' test by the ET went beyond the scope of the legislation. As such, it was confirmed that proof of disparate impact on the group under s19(2)(b) could enable claimants to surmount the s19(2)(c) test.

Decision of the CA *[2015] IRLR 724*:

Disagreed with the EAT and held that Claimants do need to show the reason why they and the group have been put at a disadvantage. It was therefore necessary for each claimant to prove the reason that he or she failed the test. The CA accepted that in principle statistics were capable of being relied upon by claimants to prove group and individual disadvantage caused by the PCP so long as that evidence is sufficiently clear. If so, then it may be enough to engage the statutory reverse burden of proof. If not, then in some cases the decision may in some cases increase the evidential burden on the claimant.

CASE 2: *Naeem v Secretary of State for Justice*

Facts:

A Muslim prison chaplain complained that the Prison Service's pay scale, which was based in part on length of service, indirectly discriminated against Muslim chaplains who had only been permanently employed from 2002. The Tribunal found that until 2002 the number of Muslim prisoners had not been such that there had been a need for employed Muslim chaplains. On that basis, it held that the non-employment of Muslim chaplains prior to 2002 had not been discriminatory (it was accepted that due to a significant increase in the Muslim prison population and increased work due to the combating extremism agenda requirements changed and this was non-discriminatory).

It was found that the average length of service and pay level of Christian chaplains as a group was greater than that of Muslim chaplains (£31,847 versus £33,811 and 5.76 years versus 9.43 years). Since Christian chaplains were predominantly white and Muslim chaplains predominantly non-white, there was also a disparity between the pay of white and non-white chaplains. Mr. Naeem therefore brought claims of indirect race and religious discrimination on the basis of pay disparities. The PCP relied upon was the relationship between length of service and pay and the particular disadvantage was the difference in pay between Muslim and Christian chaplains.

Decision of the Reading ET:

Mr. Naeem had established a prima facie case of indirect discrimination against him as a Muslim but that the claim failed because the prison service had established justification.

Decision of the EAT *[2014] IRLR 520:*

Held that there was no prima facie case of indirect discrimination.

Decision of the CA *[2016] ICR 289, CA*:

(Lord Justice Underhill) The enquiry under s19(2)(b) enabled the Prison Service to go behind the bare fact that Muslim and Christian chaplains had different lengths of service and establish why that was the case. ***Essop*** was applied. An employer may rebut a claim of indirect discrimination by showing that an apparent disparate impact is the result of wholly non-discriminatory factors. In this case the reason for disparity was that Muslim Chaplains were not required until 2002 and this was not discriminatory in the circumstances.

The issue: Is it enough to prove that the individual and group were disadvantaged by the PCP, or does the group also need to prove why the PCP caused them to be disadvantaged?

The Supreme Court's decisions in Essop and Naeem:

In a unanimous decision delivered by Lady Hale the SC has overturned the CA's decisions in both ***Essop*** and ***Naeem*** and held that when establishing a prima facie case of indirect discrimination:

(a) There has never been any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. It is enough that it does.

(b) Indirect discrimination, unlike direct discrimination, does not require a causal link between the characteristic and the treatment. However, a causal link between the PCP and the particular disadvantage suffered is required.

(c) The reason for the disadvantage may not be in itself unlawful, or within the control of the employer, but both the PCP and the reason for the disadvantage must be 'but for' causes of the disadvantage.

(d) The PCP need not put every member of the group sharing the protected characteristic at a disadvantage. In the ***Essop*** case, it was irrelevant that some BME or older candidates could pass the CSA: the group was at a disadvantage because the proportion who could pass was smaller than the proportion of white or younger candidates.

(e) In respect of establishing particular disadvantage, Lady Hale noted that it is commonplace for the disparate impact to be established on the basis of statistical evidence.

(f) It is always open to a respondent to show that the PCP is justified.

In relation to ***Essop***, Lady Hale held that the disadvantage suffered by the individual must correspond with the disadvantage suffered by the group. In Essop, the disadvantage was that BME and older candidates failed the CSA disproportionately and the claimants suffered this disadvantage. However, a candidate who failed the CSA because he or she did not prepare or did not turn up would not suffer harm as a result of the PCP in question and it would be open to the Home Office in such a case to show that the causal link between the PCP and the individual disadvantage was absent. The appeal in ***Essop*** was therefore allowed and the case has been remitted to the employment tribunal.

In ***Naeem***, the reason why the pay scale put Muslim chaplains at a disadvantage was known - namely, that they have on average shorter lengths of service than Christian chaplains. This was deemed sufficient to establish that the PCP put Muslim chaplains at a particular disadvantage. However, the employment tribunal had ruled that the scheme was objectively justified, accepting that the Prison Service was trying to transition to a new scheme where length of service would be determinative of pay only over a shorter period, but the process had been halted by government pay restraint. The Supreme Court refused to interfere with the tribunal's assessment on the question of justification and therefore dismissed the appeal.

Observations: The Supreme Court's guidance brings welcome clarity on what is necessary to establish a prima facie case of indirect discrimination. Claims of indirect discrimination can be hideously difficult to succeed on and it would seem that although the guidance clarifies the test and will assist Claimants that there will still be ample room for Respondent's to successfully challenge claims. That said, in the case of ***Essop*** for example, whilst it should be relatively easy to establish whether or not a candidate attended for the test I suspect that it will be very difficult to establish that they failed to prepare or perhaps did not do so adequately etc...that though is a matter for the Tribunal. ***Naeem*** on the other hand, is testament to the importance of pleading and thoroughly evidencing the statutory defence of objective justification.

EAT refuses to apply and contradicts previous EAT authority (*Agarwal v Cardiff University, Cardiff and Vale University Local Health Board UKEAT/0210/16/RD* (22 March 2017)) in relation to the Tribunal's jurisdiction to construe contracts of employment: *Weatherilt v Cathay Pacific Airways Limited UKEAT/0333/16/RN (25 April 2017).*

CASE 3: ***Weatherilt v Cathay Pacific Airways Limited UKEAT/0333/16/RN (25 April 2017).***

Facts:

Mr. Weatherilt, a commercial pilot, brought a claim of unauthorised deduction from wages under Part II ERA against the Respondent. The claim raised the question whether his contractual sick pay should include elements reflecting two allowances, Hourly Duty Pay and Excess Flying Pay. This depended on the proper interpretation of his conditions of service.

The ET decision:

The Tribunal interpreted the contract and concluded that contractual sick pay did not include elements reflecting the said allowances. The claim was therefore rejected.

The issue:

Does the employment tribunal have jurisdiction to construe a contract of employment and decide on whether an implied term exists in the context of a wages claim under Part II of the Employment Rights Act 1996?

The EAT decision:

On appeal, the Respondent sought to introduce a new argument not pursued before the ET and this was permitted. The argument was raised that the tribunal had no jurisdiction to interpret a contract of employment or imply terms into it, and so it ought not to have heard the claim at all. It relied on the earlier EAT decision in ***Agarwal*** which had been handed down on 22 March 2017 (but heard on 20 December 2016).

The EAT rejected the argument. It acknowledged that the EAT in ***Agarwal*** had proceeded on the basis that the tribunal has no jurisdiction in such cases but pointed out that this had been agreed between counsel and there had therefore been no adversarial argument.

The EAT in the present case considered Court of Appeal case law including ***Delaney v Staples 1991 ICR 331***, which interpreted the antecedent provisions in the Wages Act 1986, and ***Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714.*** It held that those cases were binding authority and that they required the tribunal's jurisdiction to include questions of interpretation and implication.

The EAT noted that, in ***Delaney***, Lord Justice Nicholls had held that the tribunal is required to determine a dispute 'on whatever ground' as to the amount of wages properly payable under what is now Part II ERA. This had to include a dispute as to the interpretation of a contract or the existence of an implied term.

Observations:

There is now a clear contradiction between two EAT decisions reported within a month of each other. However, in my opinion the ET is on balance more likely to follow the guidance in ***Weatherilt*** than that of ***Agarwal***. In ***Agarwal*** the EAT was not referred to all of the relevant appellate case law, there was no adverse argument on the issue of jurisdiction and the ***Weatherilt*** decision is emphatic and persuasive in concluding that ***Agarwal*** was incorrectly decided. However, as with any other legal principle the application of ***Weatherilt*** will always hinge on the particular circumstances of each case.

In ***Weatherilt***, HHJ David Richardson has accepted that there is a degree of tension in the appellate case law applied in ***Agarwal*** (***Southern Cross Healthcare Co Ltd v Perkins [2011] ICR 285***) and their preferred line of authority (***Delaney and Camden***) but ultimately concluded that it was because of the different origins, purpose and terms of the statutory provisions. It appears an important point that in ***Southern Cross*** the issue related to Statement of Particulars of Employment opposed to s13 ERA. However, at present there is no indication of an appeal. In the interim parties to proceedings may be able to proceed tactically – an issue to be explored during the Breakfast Briefing.

CASE 4: Multiple choice test amounts to indirect discrimination: *Government Legal Service v Brookes UKEAT/0302/16/RN*

Facts:

The GLS recruits approximately 35 trainee solicitors each year but receives thousands of applications for the posts.

In attempt to sift applicants they are required to sit on online 'situational judgement test' (SJT). The SJT poses multiple choice questions Brookes, a law graduate with Asperger syndrome, contacted the GLS ahead of the 2015 recruitment round and requested adjustments to the SJT by being allowed to submit her answers to the questions in a short narrative form. She was told that an alternative test format was not available. GLS did generally offer time allowances and a guaranteed interview scheme for those who passed the SJT and two subsequent tests.

Brookes failed the test (by just 2 marks) and her application went no further. She subsequently brought claims pursuant to s19, s15 and s20 Equality Act 2010.

The ET Decision:

The GLS had applied a PCP of requiring all applicants in the trainee recruitment scheme to take and pass the online SJT. With the benefit of expert medical evidence, it concluded that the PCP generally placed people who had Asperger syndrome at a particular disadvantage compared with those who did not have it.

It found that Brookes was put at that disadvantage because her Asperger's results in a lack of social imagination and causes difficulties in imaginative and counterfactual reasoning in hypothetical scenarios, and no alternative explanation as to why she failed the SJT was advanced by the GLS.

The PCP pursued the legitimate aim of testing a fundamental competency required of GLS trainees, but the means of achieving that aim were not proportionate because there was the less discriminatory alternative of the adjustments proposed by Brookes. The tribunal considered these adjustments to be reasonable, so the claims under S.19 and S.20 were both upheld.

The claim under S.15 also succeeded.

The issue: Did Brookes suffer individual disadvantage?

The EAT decision:

The EAT held that the tribunal's reasoning was beyond reproach: *'The tribunal was presented with what appeared to be a capable young woman who, with the benefit of adjustments, had obtained a law degree and had come close to reaching the required mark of 14 in the SJT, but had not quite managed it. The tribunal was right to ask itself why, and was entitled to find that a likely explanation could be found in the fact that she had Asperger's, and the additional difficulty that would place her under due to the multiple choice format of the SJT'.*

The EAT further upheld the tribunal's reasoning in respect of proportionality under Ss.15 and 19 and reasonableness under S.20.

Observations:

Many will have empathy for the employer in this situation. However, this case serves as another useful reminder to employers that before rejecting a request for adjustments they must ensure that they have safe grounds for doing so and another lesson in ensuring that recruitment procedures are compliant with the provisions of the EqA 2010.

In other news…

The Court of Appeal has overturned the EAT's decision in Day v Health Education England [2017] EWCA Civ 329, that a trainee doctor employed by an NHS Trust could not bring a whistleblowing claim against the national training body Health Education England (HEE). The fact that the Trust was a S.230(3) employer of Day did not prevent HEE also having that status. In Elias LJ's view, it was plain that the words of the statute could not be taken literally and concluded that S.43K should be read to cover someone who is not a S.230(3) worker *'as against a given respondent'*. The case has been remitted to decide whether HEE 'substantially determined' the terms on which the doctor was engaged, such as to make it his employer under s43K of the Employment Rights Act 1996 for the purpose of whistleblowing protection (which was another element of the EAT's decision overturned on appeal).

In other news…The EAT has held that no higher threshold existed for dismissals involving 'no fault' on the part of the individual – Ssekisonge v Barts Health NHS Trust UKEAT/0133/16/LA: The EAT concluded that the dismissal of a nurse whose identity raised concerns was fair on the ground of 'some other substantial reason'. The EAT noted case law that in such circumstances employers should not be expected to investigate too far beyond what official information they reasonably obtain about an employee from a responsible public authority. However, it was acknowledged that fairness would depend on the facts. In the present case, it was relevant that the Claimant was a nurse and the Respondent and NHS Trust.

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