11KBW

Discrimination Update

Sean Jones QC

Indirect Discrimination

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

Almost everyone has an immediate intuitive understanding of direct discrimination. That is not to say that there are no difficult cases, but the core concept is easily grasped. Imagine an employer with an express policy of refusing to employ women. In a case of that sort the discrimination is obvious. To use the language of Equality Act 2010, s. 13, the employer treats women less favourably because of their sex. The reason for the simplicity of direct discrimination is that it usually needs no context for the discriminatory impact of the criterion to be apparent. The criterion is inherently discriminatory.

What makes indirect discrimination different? What if the employer had a different criterion; a minimum height requirement? Unlike the policy in the earlier example, that criterion is not inherently discriminatory – it focuses on height not sex. If men and women are, on average, the same height, the apparently neutral criterion will be neutral in application. But men and women are not the same height on average. Women are on average shorter. Therefore, the criterion will exclude more women than men. In order for the discriminatory impact of the criterion to be apparent one needs context. The lower average height of women is a "context factor".

Indirect discrimination occurs when the employer's criterion combines with one or more context factors to produce a disparity in outcome between people with a particular protected characteristic and those that do not have it. Put pseudo-mathematically one might say: PCP + Context Factor = indirect discrimination.

Context factors can come in many different forms. The height example is a genetic difference. Length of service criteria are well-understood to discriminate against women. The relevant context factor is the social expectation that women will be principal carers for children which leads to a greater likelihood of career interruption. These examples highlight two important things about context factors. First, they do not need to be in the control of the employer. It is not, as it were, the employer's fault that women tend to be shorter or that a social expectation exists about childcare responsibilities. When the employer's criterion combines with the context factor the result is an uneven playing field. The employer must then justify the use of the criterion.

That is not to say that a context factor may not be within the employer's control. It may, in fact, be another PCP, as it was in **Homer** [2012] UKSC 15; [2012] ICR 704). In that case the PCP was the employer's requirement that employees should have a university degree if they were to be

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

promoted. The context factor was the employer's retirement age. When the PCP combined with the context factor it had a discriminatory impact: employees who were close to their retirement age were unable to acquire the necessary qualification in sufficient time for it to be of any use to them.

The second important thing about context factors is that they are always "but for" causes of the discriminatory impact. A height requirement will not be discriminatory if men and women are the same average height. A length of service criterion would not be discriminatory if men and women were equally likely to interrupt their careers to care for their children. Without the context factor, there is no discriminatory impact, thus the context factor is always a cause. Lady Hale acknowledges this causal contribution by calling the context factor the "reason for the disadvantage". It is equally true, however, that the PCP is always a cause. If there is no height requirement, it does not matter if there is a difference in the average height of men and women. Similarly, if you avoid using a length of service criterion you avoid the discrimination that might otherwise occur. So both the PCP and the context factor are but for causes of the discriminatory impact. They both contribute to uneven slope of the playing field.

Do we need to be able to identify the context factor? This was the critical issue in Essop. In that case civil servants needed to pass a skills test if they wanted to obtain a promotion. BME employees did less well in the test. So did older employees. Statistics suggested that the was only a 0.1% likelihood that this on average poorer performance was unconnected to race. The same percentage likelihood applied to its being unconnected to age. What that meant was that there was a PCP – the test – and the playing field was demonstrably uneven and statistics suggested overwhelmingly that a context factor was in play but no-one could say what it was. The question for the Supreme Court was whose problem that was. The employer's position was that the claimants had to identify the precise nature of the context factor. The Supreme Court has decided that they do not need to do so. If, as in Essop itself, the statistics point towards there being context factor that results in a disadvantage that is linked to the protected characteristic, that is all the Act requires. The employer must turn to justification. It cannot say: "it looks likely my PCP is indirectly discriminatory but unless you can explain exactly how it is having that effect, I should escape liability."

Indirect discrimination requires a claimant to establish not just the uneven playing field (i.e. the group disadvantage) but that they were individually disadvantaged. This led to much agonising in the Court of Appeal about "coat-tailing". What if the claimant fails because he or she does not turn up for the test at all? If the requirement that they establish an individual disadvantage means only that they have to show that they failed the test (as colleagues who share their protected characteristic are, on average, more likely to) they win. That seems an unjust result. Lady Hale

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

spends some time seeing off the difficulty. Again, it is suggested, the context factor analysis is helpful. In a case where an employee simply does not turn up, it is clear that his failure to attend is the whole of the causal context. The context factor that causes his disadvantage is not the same as the context factor that causes the group disadvantage. One can imagine a harder case. What if he is 10 minutes late for a two hour test? The tribunal is persuaded that his lateness was a cause of his failure but that it is satisfied on balance that the mystery context factor causing the group disadvantage also played a role? The tribunal should call on the employer to justify in those circumstances. Both context factors may be playing a role but each context factor only has to be a cause. It does not have to be the sole or principal cause. So the Tribunal should ask: (1) Is there a PCP; (2) Is there a context factor; (3) Do they combine to create a group disadvantage; (4) Is the same context factor a cause of the individual disadvantage? If the answer to all four questions is yes, the employer should be made to justify the use of the PCP even if there were other context factors in play. If the tribunal is satisfied that some other factor entirely explains the individual disadvantage, the fourth question must be answered in the negative and the claim should fail.

Does the context factor need to be independently unlawful? Mr Naeem is an imam who works for the Home Office as a prison chaplain. In his case the PCP was his incremental pay scale. Like all such incremental scales, the longer your service the more likely you were to have advanced higher up the scale. Although it was found as fact that a prison chaplain with 6 year's experience had all the knowledge and expertise they were likely to need, it took a lot longer than that to progress to the top of the scale. The relevant context factor was that the Home Office had not been willing until 2002 to recruit Muslim chaplains as employees. They were engaged instead on a sessional basis. The justification was that there were insufficient numbers of Muslim prisoners to justify employing imams. The combined effect of the PCP and context factor was an uneven playing field: Muslim chaplains were more likely to be found towards the lower end of the scale. Naeem, then, is a case like Homer, where two PCPs (i.e. the incremental pay scale and the pre 2002 policy of nonrecruitment) are combining to produce the discriminatory effect. The Court of Appeal took the view that the "real" cause of the uneven playing field was the context factor and that the decision not directly to employ imams prior to 2002 was justified. But of course the context factor causes the disadvantage. If it did not have a causal impact, it would not be a context factor. But the question the Act requires is whether the PCP causes the disadvantage. It plainly does. If there were no incremental scale and chaplains were paid a flat rate, the playing field would be even. It does not matter if it is not the "main" cause, it simply has to be a cause. Nor does it matter if the context factor is "justified". As observed above, context factors may well be things over which the employer has no control at all and which, on any view are lawful (e.g. the fact women are on average shorter than men). The proper question is whether the use of a PCP is justified in a

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

context in which it produces a discriminatory impact. This was the analysis adopted by the Supreme Court and its ability to untangle the knot the created by the Court of Appeal's approach makes it a tool for analysis that is likely to assist tribunals very considerably.

Indirect Discrimination: Justification

Harrod v Chief Constable of the West Midlands [2017] EWCA Civ 191

A police force suffered budget cuts and needed to reduce numbers. It had a power under the **Police Pensions Regulations 1987, Pt A, Reg 19** compulsorily to retire officers but only if they were entitled to receive a pension of 2/3rds or more of their average pensionable pay. In practice that meant officers that had more than 30 years' service.

Harrod and others complained that the use of Regulation 19 was indirectly discriminatory. The criterion was, in essence, a length of service criterion and it put older officers at a particular disadvantage.

The Court of Appeal (a Employment dream team of Elias, Underhill and Bean LJJ) accepted that the PCP (which they considered to be the decision to use Regulation 19 to effect the reduction in headcount) was indirectly discriminatory, but was justified.

The legitimate aim was to "achieve the maximum practicable reduction in the number of their officers". Since there was no general power to dismiss officers, Regulation was in practice the only way to achieve that aim. Since the option was the only option, it could not be said to be disproportionate.

The tribunal had taken the view that there were alternative, less discriminatory, alternatives available. The Court of Appeal felt that the alternatives ultimately amounted to saying that the respondent should have been prepared to consider living with fewer terminations. That was to stray unacceptably into substituting a different aim to that of the respondent rather on focussing on what was proportionate to the legitimate aim the respondent had fixed upon.

Disability Discrimination

Discrimination arising from disability (EA 2010, s. 15)

EA 2010 s. 15 provides:

> "15. **Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145

A teacher was absent from work for more than 12 months. She had a stress disorder as a result of an assault by a pupil. She was a disabled person. The teacher brought claims for both unfair dismissal and for discrimination arising from disability.

For the purposes of the unfair dismissal claim, it had to be decided whether the dismissal was within the range of reasonable responses. For the purposes of the s. 15 claim it had to be decided whether dismissal was a proportionate means of achieving a legitimate aim (within the meaning of s. 15(1)(b)). The teacher argued that the latter was a more demanding standard. The Court of Appeal decided that it was not:

> "However the basic point being made by the Tribunal was that its finding that the dismissal of the Appellant was disproportionate for the purpose of section 15 meant also that it was not reasonable for the purpose of section 98(4) . In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses does not reduce the task of the tribunal under section 98(4) to one of "quasi—Wednesbury " review: see the cases referred to in para. 11 above. Thus in this context I very much doubt whether the two tests should lead to different results.
>
> Judge Serota dealt with this point only briefly, at para. 137 of his judgment, where he said:

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ
T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com
DX: 368LDE
Twitter: @11kbw
11kbw.com

> "While in determining if a dismissal is discriminatory, contrary to section 15 of the Equality Act 2010, it may be appropriate to carry out a balancing exercise the test is objective and therefore it is inappropriate to import the reasonable range of responses considerations relevant to unfair dismissal."
>
> I respectfully disagree with that formulation. The test under section 98(4) of the 1996 Act involves is objective, no less than the test under section 15 of the 2010."

Per Lord Justice Underhill.

Buchanan v Commissioner of Police of the Metropolis UKEAT/0112/16 [2016] IRLR 918

A consistent area of difficulty has been the interaction between the rights of an employee not to be discriminated against and employer policies designed to terminate the employment where an employee has unacceptable levels of absence. There are two simple ways of dealing with this: (1) the Law could require employers to discount disability-related absences entirely; or (2) the Law could provide that disability-related absences are to be treated just like any other. The Law has opted for a middle course.

In **Buchanan**, a police officer was absent with PTSD following a motorbike accident in the course of his duty. The Met has an "unsatisfactory performance procedure" that deals with, amongst other things, absence. The procedure was applied to the officer. He was set a series of dates for return to work. On each occasion, he was unable to return. The Met accepted that he was seriously ill throughout – it was not a question of malingering. Like most modern sickness absence policies, there were discretions built in to the procedure so that the Met was not necessarily obliged to take any specific step at each stage of the process.

Ultimately the officer was retired. He alleged, and the Met accepted, that he had been treated "unfavourably" and that the unfavourable treatment was because of something (his absence) arising in consequence of his disability. The case turned on justification.

The issue between the parties was as to what required justification. Was it sufficient to show that the procedure itself was a proportionate means of achieving a legitimate aim or did the Met have to justify what it had done at each stage of the process? The EAT decided that it was the latter that was required.

The Met relied upon a Lady Hale's agreement in **Seldon** with the following proposition (made by the EAT in that case):

> "Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue."

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

The EAT in **Buchanan** accepted that where the complaint relates to the consequence of the application of a procedure it will be the procedure that needs to be justified. However, he felt that where a procedure allows discretions at each stage and it is the individual exercises of discretion that are being complained about, justifying the procedure is insufficient. He thought it would be a rare case in which the **Seldon** approach would apply to an absence management procedure.

Madani Schools Federation v Mr F Uddin UKEAT/0194/16

The section title is misleading. The prohibition is not on discrimination arising from disability. It is on unfavourable treatment because of something which arises from disability. There are two causal limbs in the test. Last year I spoke about the EAT's decisions in **Pnaiser** and **Weerasinghe** which considered the two-stage nature of the test and set out guidance. That guidance is applied in **Uddin** but with the following points being emphasised:

(1) Where more than one act of unfavourable treatment is relied upon, one should look at the cause of each act rather than simply aggregating them;

(2) When asking whether the unfavourable treatment is because of something, one must identify what that "something" is. That requires the consideration of a subjective question: what was in the alleged discriminator's conscious or unconscious mind; and

(3) It is important to make sure the two causal questions are addressed discretely (although order is less important).

Duty to Make Reasonable Adjustments (EA 2010, s. 20)

EA 2010, s. 20(3) provides:

> "... where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, [it is one requirement of the duty] to take such steps as it is reasonable to have to take to avoid the disadvantage."

First Group plc v Paulley [2017] UKSC 4, [2017] IRLR 258

FG's bus had a designated wheelchair space. FG had a policy of asking passengers to vacate the space when needed but would not force them to do so. Mr P wanted to get on the bus and use the space for his wheelchair. A passenger with a push chair was occupying the space and refused to move. Mr P could not get on the bus – was he the victim of an act of discrimination?

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

Mr P brought a claim alleging a breach of the duty to make reasonable adjustments contrary to **EA 2010, s 29(7)** (which is the version of the duty that applies in provision of services cases). There was some dispute as to what the PCP was. Some justices thought the Recorder had defined the PCP as the "policy of asking but not compelling other passengers to vacate the space". The dispute was as to whether the Recorder had further defined the policy so that it also did not require passengers who refused to vacate the space to get off the bus.

A wide variety of approaches are scattered across the judgments given in the Supreme Court.

Lord Neuberger felt that it would not have been reasonable to have an absolute policy of requiring someone to vacate the space in all circumstances. Even a policy of compelling people to move when their refusal was unreasonable was one that risked confrontation and possibly violence. Stopping the bus until the space was vacated would be reasonable provided it was not mandatory. It would be a reasonable adjustment to require a driver to use their "best endeavours to persuade someone to move".

Lord Toulson felt the driver could go so far as to tell the recalcitrant passenger that there was a requirement to move but they could not be compelled to move them. The driver could keep the bus at the stop for a while … unless it would make the bus late.

Lord Sumption reminded everyone that you cannot enforce basic decency and courtesy. He disagreed with Lord Toulson's idea that the drier should essentially pretend that there was a requirement to move when there wasn't. Nor would it make sense to try to include one in the contract of carriage as there would still be questions about when it was reasonable to enforce and risk confrontation. If a driver was going to be required to persuade someone to move, he felt that the steps that were required should be specified. However, he agreed with Lord Neuberger's approach on the magnanimous basis that it was the least unsatisfactory.

Lady Hale (with whom Lord Clarke agreed) stressed the social importance of public transport and the fact that the law is intended to produce equality of results and not just of treatment. She felt the recorder was entitled to take the view that he had. Importantly, she suggests that it should be open to a Claimant to argue for lesser adjustments than those specifically pleaded.

Lord Kerr emphasised that reasonable adjustments may, properly, put others to inconvenience. FG had argued that a polite notice was thought to be more effective than an express requirement to move. Lord Kerr did not accept that argument and felt a requirement to move rather than a mere request was a reasonable adjustment. He was sceptical of arguments that drivers could not be trusted to exercise judgment as to how far they could safely go in terms of confrontation as they already had a power to eject badly behaving customers. The risk of confrontation had been over-stated and was in any event not the lone yardstick for assessment of reasonableness.

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

Religious Discrimination

Achbita v G4S Secure Solutions NV Case C-157/15; [2017] IRLR 466

Ms Achbita is a Muslim. She wanted to wear a headscarf whilst doing reception work. G4S has a policy of which forbids the wearing of any signs of political, philosophical or religious beliefs by any customer-facing staff in their workplace. Ms Achbita was dismissed.

She was not dismissed for being Muslim, per se. Rather, she was dismissed for wanting to manifest her belief in the workplace. A right to manifest belief is to be found in Art 9 of the European Convention on Human Rights and in Article 10(1) of the Charter of Fundamental Rights of the European Union. The ECJ confirm that protection from discrimination on grounds of religion includes protection against discrimination on grounds of manifesting that religion.

The ECJ took the view that there had been no direct discrimination because the policy of neutrality applied to all employees whatever their beliefs.

The ECJ moved on to consider, on what we would consider an obiter basis, whether it might be unlawfully indirectly discriminatory. The ECJ decided that there was legitimate aim: "the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality".

The ECJ thought the policy was a proportionate means of achieving that legitimate aim provided it was applied consistently and, was limited to what was "strictly necessary" which, in this context meant that it was applied only to customer-facing staff.

Bougnaoui v Micropole SA Case C-188/15; [2017] IRLR 447

Ms Bougnaoui was employed by Micropole as a design engineer. She was sent to work at the premises of a client. She wore a headscarf (also described in the judgment as a veil). The client objected saying that it upset a number of its employees.

Micropole asked her to observe a policy of neutrality when dealing with clients. She refused and was sacked.

The ECJ felt that it was unclear whether the case was being run as one of direct or indirect discrimination. If there was direct discrimination, there would, of course, only be room for justification if a genuine and determining occupational requirement could be established. The ECJ took the view that there did not seem to be anything about the *job* that required that she should not manifest her religion. The subjective desire of the employer to take account of the client's wishes would not be a G&DOR.

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com

Wasteney East London NHS Foundation Trust UKEAT/0157/15, [2016] IRLR 388

W was a senior employee who is Christian had been trying to convert a junior Muslim colleague. The colleague did not want to be converted and complained. W was disciplined.

Proselytising is a manifestation of religion. If W was disciplined for it she would, on the face of it, have been the victim of an act of direct religious discrimination. That would not be capable of justification. That is so even though the ECHR recognises that the right to manifest may sometimes be subject to proportionate restrictions.

The EAT the problem by use of a familiar form of distinction: the problem was not the proselytising, but the manner in which it was done. The less favourable treatment was not, therefore, because of the manifestation of religion.

Shorts

Onu v Akwiwu [2016] UKSC 31, [2016] IRLR 719, [2016] ICR 756

There was no direct race discrimination where a worker was treated less favourably on grounds of her status as a vulnerable migrant worker. Although all vulnerable migrant workers were foreign nationals and that status could be said to be a "function" of nationality, absent was the necessary "exact correspondence" between status and protected characteristic. Whilst all vulnerable migrant workers were foreign nationals, not all foreign nationals were vulnerable migrant workers.

Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16

An employer may breach the duty to make reasonable adjustments for failing to take steps that the employee has never asked should be take.

Peninsula Business Service Ltd v Baker UKEAT/0241/16, [2017] IRLR 39

A claim for harassment related to disability can only succeed where the claimant is disabled. The EAT was persuaded that such cases represent a special category (relying on **J v DLA Piper** – where the EAT rejected the possibility of a perceived disability discrimination claim). Thus, a person who claims, but has not established, that they are a disabled person cannot claim that the unwanted conduct "related to" the protected characteristic of disability.

Sean Jones QC
May 2017

11KBW
11 King's Bench Walk,
Temple, London EC4Y 7EQ

T +44 (0)20 7632 8500
F +44 (0)20 7583 9123
Sean.Jones@11kbw.com

DX: 368LDE
Twitter: @11kbw
11kbw.com