

# 11KBW

---

## **Employment Law Update**

Christopher Jeans QC

## Asda Stores v Brierley (No 1) [2016] ICR 945

Mass equal pay claims in ET - Shop worker claimants; depot worker comparators.

Application to stay on the basis that the High Court would be the more appropriate forum

CA (Elias and Christopher Clarke LJJ): ET has no **power** to stay claims on this basis

### **Asda Stores v Brierley (No 2) : Farmah v Birmingham CC; Sainsburys v Ahmed EAT/0059/16 (13<sup>th</sup> June 2017)**

Mass claims brought on same form by store workers with *different* jobs/genders, using the same depot comparators

Saved over £600k fees by using same form.

ET Rule 9 allows use of same form (with potential fee-saving) where claims are “*based on same of facts*”.

ET Rule 6 empowers strike out for breach of Rule 9

EAT (Lewis J) held

(1) Claimants with different jobs or genders did not base their claims on the “same set of facts”. Rule 9 breached.

(2) Asda cases remitted to ET to re-consider whether to strike out under Rule 6.

Could be *perverse* not to strike out in absence of sufficient excuse for breach.

Flexible ways of working

“Work if/ when you like” arrangements – sometimes underpinned by “apps”

Pose new challenges on “worker” and “employed” status .

---

Recurrent issue on “worker” status (or extended definition of “employment in EA 2010)

are

- whether there is the necessary **obligation to work**
- whether a right of **substitution** negates obligation to work personally

Existence of **obligation to work personally** depends on terms of contract, not practice : **Pimlico Plumbers v Smith** [2017] IRLR 323 at para 73

But courts look at reality in deciding what terms are (**Autoclenz v Belcher** [2011] ICR 1157)

---

Sir Terence Etherton MR **Pimlico Plumbers v Smith** [2017] IRLR 323 at para 84

- 1) **Unfettered** right of substitution means no obligation to work personally (and thus no worker status)
- 2) If right of substitution is **conditional**, depends on extent of conditions whether obligation to work personally can exist
- 3) Right of substitution only when individual is *unable* to work does not normally negate obligation to work personally
- 4) Right of substitution restricted only to *suitably qualified* substitutes does normally negate obligation to work personally
- 5) Right of substitution subject to *unqualified discretion of another* whether to consent does not normally negate obligation to work personally.

First instance battles on gig economy

**Aslam v Uber** [2017] IRLR 4 Taxi driver using Uber apparatus held to be a worker. ET held he was obliged to work whilst “app” switched on. EAT appeal in August

Similarly package courier cases: : **Dewhurst v City Sprint. ET 2202512/2016; Boxer v Excel ET 3200365/2016**

**IWGB and Deliveroo** – Riders who deliver meals. CAC Decision awaited on worker status (in context of Union recognition)

**Jhuti v Royal Mail [2016] ICR1043** (appeal pending to CA)

Confirms and applies “lago” principle (suggested by Underhill LJ in **Co-op v Baddeley [2014] EWCA Civ 658**):

where A, the officer responsible for dismissal is “manipulated” by report or recommendation of another officer B, the “reason” for dismissal may be tainted by “bad” reasons held by B - even though A’s reason is good and fair.

Poses issues for local authorities

Eg Where councillors approve eg restructuring /redundancy recommended by senior officer without knowledge of “backstories” which may have influenced shape of new structure.

S19 EA: “*Provision criterion or practice*” (“PCP” which puts those with a protected characteristic at a “*particular disadvantage*” and puts the claimant at “*that disadvantage*” (and is not justified as a proportionate means of achieving a legitimate aim)

**Essop v Home Office; Naeem v Sec of State for Justice [2017] IRLR 558**

SC held: Not necessary for claimant to show

- i. how or why protected characteristic has caused a “particular disadvantage” which has been demonstrated by statistics;
- ii. that reason for disadvantage is unlawful or within his control.

Entry tests applied by Home Office. Statistically demonstrated that racial minorities did less well in written test.

Held: claimant could establish PCP without need to show reason connected with race for these results; but, even in the absence of justification, an employer could meet claim by showing “individualised” reason for claimant’s failure in test (eg that he turned up late) .

Pay progression for prison chaplains dependent on length of service. Christian Chaplains predated Imams in the service and so had generally longer service and greater pay progression.

Held (1) PCP established even though length of service was operative cause of disparity

But (2) ET entitled to find for Respondent on justification

After **Essop** and **Naeem** is indirect discrimination rightly described as an “obligation of result”, unrelated to the cause of disparities?

Or can a statistical “PCP” advanced by a claimant still be negated by showing that there is “another story” behind the statistics?

# Discrimination - Justification defence

## Chief Constable of W Midlands v Harrod [2017] IRLR 539

Police force justified in using age discriminatory criterion for to effect redundancies. Aim of reducing workforce was legitimate. ET rejected justification defence on basis that number of compulsory dismissals could have been minimised by other means (career breaks, part-time working, volunteers) and by reference to decision making process.

CA held: ET erred

- 1) in not respecting the implications of the aim: . *“It is not open to a tribunal to reject a discrimination case on the basis that the respondent should have pursued a different aim which would have had a less discriminatory impact.”*(Underhill LJ para41)(para48)
- 2) in assuming that dismissals must be minimised and the force’s decision reviewed against that assumption ( esp. Elias LJ para 48. Also Bean LJ paras 30-31)

ET’s criticisms of manner of decision taking not treated as material to justification