EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/24 Claimant required to show the ‘reason why’ the underlying reason behind a practice was indirectly discriminatory (UK)

<p>The Court of Appeal (‘CoA’) has held that there was no indirect discrimination where the underlying reason behind a ‘provision, criterion or practice’ (‘PCP’) operated by an employer was not discriminatory. The claim of indirect discrimination was brought by Mr Naeem, who is employed by the Prison Service as a full-time imam at HMP Bullingdon. Until 2002, the Prison Service employed only Christian chaplains full-time due to a lack of demand for chaplains of other faiths (who were employed on a sessional basis only). From 2002, it started to hire full-time Muslim as well as Christian chaplains due to an increase in the number of Muslim prisoners.<lb/>The prison system’s pay scale rewards length of service and pay rises are linked to both performance and length of full-time service. Mr Naeem argued that this had a disproportionate negative effect on Muslims, as they could not have been employed for as long as Christians. The CoA rejected this claim, based on the fact that the underlying reason for the difference was the lack of demand for Muslim chaplains before 2002, and that this was not discriminatory.<lb/>This case follows the 2015 CoA case of Essop v Home Office [2015] EWCA Civ 609, which was the first case to add in this extra layer to the indirect discrimination test. According to these cases, a claimant must now show not only that a particular practice

particularly disadvantaged them, but also why this is the case. In both cases, appeals have been made to the Supreme Court and these are expected to be heard together later this year.</p>

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Background

The EU Racial Discrimination Directive 2000/43/EC has been implemented in the UK by the Equality Act 2010 (the 'EQA'). Section 39(2) EQA makes it unlawful for an employer to discriminate against an employee, either directly or indirectly. Section 19(1) sets out that indirect discrimination occurs when a person (A) operates a PCP which is discriminatory in relation to a relevant protected characteristic of another person (B). Section 19(2) goes on to state that a PCP is discriminatory if it places both B and persons with whom B shares the protected characteristic at a particular disadvantage when compared with persons with whom

B does not share that characteristic. Such a set of facts will give rise to a prima facie case of indirect discrimination. If a prima facie case is made out, a respondent will have to show that the PCP is objectively justified as a proportionate means of achieving a legitimate aim to avoid it being indirectly discriminatory.

This case concerned the test for making out a prima facie case of indirect discrimination. In June 2015, the CoA case of Essop v Home Office held that to establish a successful prima facie indirect discrimination claim a claimant must show not only that the relevant PCP disadvantaged them and others on the basis of a protected characteristic but why this is the case. Where there is no underlying discriminatory reason there will be no prima facie case. This decision appeared to introduce a new layer into the test for indirect discrimination, and one which is not present on the face of the law.

Facts

Mr Naeem was an imam employed as a chaplain by the Prison Service. He was initially employed in June 2001 on a sessional basis, and was taken on as a full-time chaplain in October 2004. At the time of his appointment as a full-time chaplain he was assigned to 'Chaplaincy Payband 1', a payband consisting of various spines, of which Mr Naeem started on the lowest spine.

Like other public services the Prison Service pay structure rewards longevity of service. To progress up the pay scale, individuals are assessed both on their performance and on their length of service at the Prison Service. Mr Naeem, when he brought his claim, was less than half-way up the scale and earned a basic salary of £31,606. Those at the top of the scale earned £39,735.

Until 2002, the Prison Service had employed only Christian full-time chaplains. Those of other faiths were employed on a sessional basis due to a lack of demand for full-time cover. However, from 2002 they also hired full-time Muslim chaplains due to an increased Muslim population in prisons. Due to this difference, the average length of service of a Christian chaplain was higher than that of a Muslim chaplain – 9.43 years and 5.76 years respectively. Muslim chaplains, on average, were therefore paid less than Christian ones. The Claimant brought a claim of indirect religious discrimination and race discrimination arising out of the pay progression scheme.

At the first instance hearing, the Employment Tribunal ('ET') held that Mr Naeem had established a prima facie case of discrimination as the pay progression scheme did place Muslims at a particular disadvantage, but that this was justified as a proportionate means of achieving a legitimate aim. They found that rewarding those who had served for a long period

by increasing their pay was wholly legitimate and that it was proportionate to do so, discussing the benefits of salary as a motivating task for a work-force. Mr Naeem's claim therefore failed at the first instance. The tribunal also held that there was no underlying discriminatory reason for which Muslim chaplains had not been hired as full-time employees before 2002: it was simply due to a lack of demand. Until 2002 the number of Muslim prisoners was not such that there was an need for full-time Muslim chaplains by an objective judgement. This point proved to be crucial to the reasoning of the Employment Appeals Tribunal ('EAT') and the CoA.Mr Naeem appealed to the EAT, and the Prison Service cross-appealed on the basis of the comparator group which had been used; it argued that Mr Naeem should not have been compared against Christian chaplains who had started work in or after 2002, as their situation was materially different from that of Muslim chaplains. The EAT upheld this cross-appeal, holding that the fact that no Muslim chaplains had been required pre-2002 meant that their situation was in fact materially different and could not be used as a comparator for Mr Naeem. He had been treated in the same way as any Christian (or other) chaplain appointed at the same time as him and there was therefore no finding of discrimination. This formed the basis of the EAT's reasoning. The EAT also went on to comment that, had it found a prima facie case of discrimination, it would not have found that this had been justified. In short, the two tribunals came to the same conclusion but with completely difference reasoning.

Essop was decided after the EAT's judgment in Naeem, but before the CoA's.

Judgment

The CoA agreed with the findings of both the ET and the EAT and held that the claimant's claim should fail. However, its reasoning was different again from both of the tribunals.

In considering the prima facie case of discrimination, the CoA disagreed with the EAT's assessment that Mr Naeem should be compared only to chaplains appointed in or after 2002. It held that to take such an approach rendered the question of discrimination redundant. However, it agreed with its conclusion that there was no prima facie case of discrimination, disagreeing with the ET.

The CoA held that the requirement under section 19(2) did not require a claimant just to show just that a PCP had an effect in order for the onus to move to the respondent to prove justification. Following Essop, to establish a prima facie case of indirect discrimination the CoA held that it was also necessary for the claimant to show why the PCP was discriminatory, i.e. that the underlying reason was discriminatory.

The CoA accepted the ET's conclusion that the average shorter length of service of Muslim chaplains was not the result of any discriminatory practice on the part of the Prison Service.

The reason behind the disadvantage was not the practice of linking pay to service; it was a historical difference in the demand for Muslim chaplains. Assessing the size of the Muslim population in prisons (which rose from 2,745 in 1995 to 7,216 in 2002, it was an objective fact that there was an increased demand for Muslim chaplains. The later start dates of Muslims was not reflective of any characteristic specific to them based on their faith. Given that the Court found an entirely non-discriminatory reason for the PCP's impact on a particular population, it therefore held that section 19(2) had not been made out, and there was no prima facie case of indirect discrimination.

Commentary

This case is notable as one of the first to explore this extra layer to the indirect discrimination test; a claimant must now show not only that a particular practice particularly disadvantaged them, but also why this is the case. In Naeem, in the absence of an underlying discriminatory reason for the PCP, there was no discrimination and the claim failed. This follows the logic employed in the 2015 case of Essop.

This new requirement has received mixed responses. Indirect discrimination occurs when an apparently neutral provision in fact disadvantages a group with a particular protected characteristic when applied in practice. On the plain facts of it, that appears to apply in this case. The law does not include any wording suggesting that the underlying reason behind a PCP should be taken into account at the stage of establishing a prima facie case of indirect discrimination, or that this burden should fall on the claimant. Instead, an employer is given the opportunity to show at a later stage that the indirect discrimination was justified as a proportionate means of achieving a legitimate aim. This might seem like a more natural route to the CoA's conclusion.

While in Naeem it was straightforward to establish the underlying reason behind the PCP, this will not always be the case. It is possible to envisage a situation where a claimant finds him or herself unable to make out a prima facie case of indirect discrimination on these grounds for the simple fact that the underlying reason cannot be easily established. It is unclear how such a situation would play out following Naeem.

It has been suggested that the reasoning the CoA applied – stating that the underlying reason did not reflect any characteristic particular to them as Muslims – might be better applied to a claim of direct discrimination. This would be a more suitable argument against a claim that Mr Naeem was discriminated against 'because of' his protected characteristics of being Muslim and of Pakistani origin. However, this was not the question before the CoA.

Permission to appeal has been granted for both this case and Essop, and they are due to be

heard together at the Supreme Court later this year. The differing reasoning given by each of the tribunals and the CoA suggests that the judges did not find this to be a straightforward area, and we should look to the Supreme Court for clarification.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes, BarentsKrans): I have difficulty squaring the 'extra layer' to the indirect discrimination test, as established in this case by the UK Court of Appeal, with my understanding of EU anti-discrimination law. A Dutch court would, I expect have reasoned either as the EAT did (briefly: chaplains hired from 2002 are not comparable for pay progression purposes with pre-2002 chaplains) or as the ET did (briefly: even if the pay progression scheme did place Muslims at a particular disadvantage, that was objectively justified).

In fact, I am not sure what this 'extra layer' precisely is. The Court of Appeal held that, in order to establish a prima facie case of indirect racial discrimination, "it would be necessary to show why the PCP was discriminatory, i.e. that the underlying reason was discriminatory". What are the PCP and the 'underlying reason' referred to here? The report of this judgment does not specify this unequivocally. I expect that the PCP was the pay progression scheme (in combination with the fact that no Muslim chaplains were hired full time before 2002) and not, for example, the practice of putting starting chaplains on the bottom spine of the payband. In this assumption, I interpret the 'underlying reason' as being the reason why Muslim chaplains were not hired on a full time basis until 2002. If that is the case, does it mean that, in order to establish presumptive discrimination, the claimant has to prove that not hiring full time Muslim chaplains before 2002 was discriminatory? That would seem to me to place an unreasonably high burden on the claimant.

Hard as I find it to follow the Court of Appeal's reasoning, I have even more difficulty understanding how that reasoning follows from the same court's judgment one year previously in the Essop case (Home Office (UK Border Agency) v Essop and Ors, [2015] EWCA Civ 609). That case strikes me as different from Naeem. Very briefly summarised, Essop concerned an aptitude test which all Home Office staff took as a qualifier for promotion. A study showed that the test was failed relatively more often by BME (black and minority ethnic) staff and by staff aged over 35. The pass rate for BME employees was only about 40% of the pass rate for white employees and that for over 35s was about 37% of the pass rate for under 35s. Both differences were established to be statistically significant. Apparently no one was able to discover any racial or age bias in the test. The issue, as I understand it to be, was whether the differential pass rate in itself was sufficient for a BME or over 35 claimant who had failed the test to establish a prima facie case of racial or age discrimination. The Court of

Appeal held (at § 58) that in indirect discrimination claims, as in direct discrimination claims, "there is also a necessary 'reason why' question but it is of a different nature. It does not go to the employer's motive or intention, whether conscious or unconscious. It is as to why the PCP disadvantages the group sharing the protected characteristic". Now that both Essop and Naeem are pending at the Supreme Court, it behoves me, even as a foreigner, to be careful. All I will say is that a Dutch court would, I expect, be likely to reason, more straightforwardly, as follows: it may be so that no one can explain why BMEs/over 35s fail the test more often than white/under 35 candidates, but the fact that they do fail more often, to a statistically relevant degree, indicates that there must be some sort of a bias in the test or the manner in which it is administered. Therefore there is a prima facie case of bias, which makes the test indirectly discriminatory and the onus is on the employer to justify it.

There is something else. Supposing a Dutch court were to determine that the aptitude test was discriminatory and not justified. According to Dutch law that would make the PCP in question – the requirement to have passed the test in order to qualify for promotion – void. That would, in theory at least, enable a white under 35 to claim promotion without having passed the test. In Essop, the Court of Appeal rather elegantly described this undesirable effect as the 'coat-tailer' phenomenon. I confess that the 'extra layer' to the indirect discrimination test may have the beneficial effect of reducing (but not eliminating) this effect, by limiting the number of cases where prima facie discrimination is established, but it does so at a price.

Subject: Discrimination – general principles

Parties: Mr Naeem – v – Secretary of State for Justice

Court: Court of Appeal

Date: 9 December 2015

Case number: [2015] EWCA Civ 1264

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