

Case Reports

2017/27

Supreme Court clarifies indirect discrimination test (UK)

CONTRIBUTOR Soyoung Lee*

Summary

The Supreme Court has given a clear explanation of how the test for indirect discrimination works, holding that it is not necessary to know why a particular group is disadvantaged by an employer's policy in order to show indirect discrimination. This decision is not particularly helpful for employers as it makes it easier for individuals to make an indirect discrimination claim. However, the Supreme Court emphasised that it is always open to an employer to show that indirect discrimination is justified.

Background

UK law prohibits discrimination in respect of nine specific protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. There are two main kinds of discrimination – direct and indirect.

Direct discrimination is relatively simple. Direct discrimination occurs where a person (A) treats another (B) less favourably than (A) treats or would treat others because of a protected characteristic. Indirect discrimination is not so straightforward.

Indirect discrimination occurs when an employer's provision, criterion or practice ('PCP') puts people sharing a protected characteristic at a particular disadvantage. In other words, it arises where the employer treats everyone in the same way, but this results in disadvantage to a particular group. Where this happens, the employer can

justify the treatment if it is using the PCP to achieve a legitimate aim and has acted proportionately. The Equality Act 2010 provides that:

An employer (A) indirectly discriminates against an employee (B) where:

- A applies a provision, criterion or practice (PCP) to B;
- B has a protected characteristic;
- A also applies (or would apply) that PCP to persons who do not share B's protected characteristic;
- the PCP puts or would put persons with whom B shares the protected characteristic at a disadvantage compared to others;
- the PCP puts or would put B to that disadvantage;
- A cannot show the PCP to be a proportionate means of achieving a legitimate aim.

In establishing whether a PCP places persons with a protected characteristic at a particular disadvantage, the starting point is to look at what impact the PCP will have on people within a defined pool. In many cases, it is clear why one particular group is disadvantaged. For example, a requirement that all employees be at least six feet tall will disadvantage women as a group, as women tend to be shorter than men on average. Similarly, a rule that no employees can wear head coverings will tend to disadvantage Muslims, due to the fact that many Muslim women wear headscarves or veils.

However, what if there is no obvious explanation for why an employer's PCP disadvantages a particular group? That was the issue before the Supreme Court in this appeal, which considered two conjoined cases.

Facts

Essop and others – v – Home Office

The first case concerned the test used for promotion in the Home Office, known as the Core Skills Assessment ('CSA'). All candidates were required to sit the same CSA test to progress to certain civil service grades, but the pass rate for both Black and Minority Ethnic ('BME') candidates and for candidates aged 35 or older was much lower than the pass rate for white candidates and for younger candidates. There was no explanation for why BME and older candidates' pass rate was much lower. At first instance, the employment tribunal had accepted the statistical evidence showed the test had a disparate impact on BME and older candidates but it held that the claimants also needed to show why it had

* Soyoung Lee is an Associate Solicitor at Lewis Silkin LLP (www.lewissilkin.com).

that effect in order to succeed. The claimants appealed and the case eventually came to the Supreme Court. The question for the Supreme Court was whether it was necessary for Mr Essop and others to establish the reason for the lower pass rate in order to succeed in a claim for indirect race and age discrimination. Or was the simple fact of the lower pass rate enough?

Naeem – v – Secretary of State for Justice

The issue in the second case concerned pay scales for chaplains in the Prison Service. The pay scales increased with length of service, so everyone was treated the same. However, Muslim chaplains were only engaged as salaried employees from 2002 onwards. Mr Naeem claimed that the length of service pay scale was indirectly discriminatory against Muslim chaplains, who had lower average basic pay than Christian chaplains. He said this was due to the fact that Muslim chaplains could not be employed before 2002. The employment tribunal found that while Mr Naeem had established a prima facie case of indirect discrimination, this was justified as a proportionate means to achieve the legitimate aim of seeking to retain and reward experienced staff. Mr Naeem appealed based on this justification and the prison service cross-appealed based on discrimination. The question ultimately came before the Supreme Court to consider whether it was necessary to show that the reason for the lower pay was related to the fact that Mr Naeem was a Muslim.

Judgment

The Supreme Court decided that there is no requirement for an employee to establish the reason why a PCP puts or would put an affected group sharing a protected characteristic at a particular disadvantage in order to prove indirect discrimination. What is necessary is a causal connection between the PCP and the disadvantage suffered, both by the group and the individual.

In Mr Essop's case, the Supreme Court's decision meant that it was irrelevant why BME and older candidates who had a lower pass rate were disadvantaged by the CSA test. The fact that they were disadvantaged by the test was sufficient to show indirect discrimination. It was then up to the employer to justify its use of the CSA test, if it could, in order to make the indirect discrimination lawful. The case was remitted to the employment tribunal for it to make a determination following these principles.

In Mr Naeem's case, this meant that it was not necessary to show a direct link between being a Muslim and the reason why the length of service pay scale put Muslims at a disadvantage. It was the Supreme Court's view that this was a more obvious case than Essop, as there was actually some connection between being a Muslim and shorter length of service, due to the inability to be employed as a Muslim chaplain before 2002. As in Mr

Essop's case, the employer was required to justify its pay scale to avoid a finding of unlawful indirect discrimination.

The Supreme Court also set out a range of useful reminders about the test for indirect discrimination:

- Whilst the prohibition of direct discrimination aims to achieve equality of treatment, the prohibition of indirect discrimination aims to achieve equality of results through the creation of a level playing field.
- It is not necessary for a PCP to put every member of the group at a disadvantage. For example, in relation to a requirement that all employees be at least six feet tall, some women may be tall enough to meet this height requirement. However, it will still be indirect discrimination if more women than men are disadvantaged.
- An employee is still required to establish that there is a causal connection between the PCP and the disadvantage suffered by himself/herself as well as the group with whom he or she shares a protected characteristic. For example, in Mr Essop's case, his claim would not succeed if he failed the CSA test because he did not turn up at the right time.
- All workers who are affected by that PCP (whether positively or negatively) should be put in the pool used to consider the PCP's impact. For example, in Mr Naeem's case, the correct pool would be all prison chaplains, rather than just those employed from 2002 onwards.
- It is always open to the employer to show that a PCP is objectively justified and there will be no finding of unlawful indirect discrimination unless the justification fails.

Commentary

The Supreme Court had the challenging task of resolving an issue that had proved troublesome for the lower courts. The complexity of the issue is illustrated by the fact that at every new stage of appeal, the decision of the preceding court was reversed on the question of whether it was necessary to show why a particular group is disadvantaged by an employer's policy in order to prove indirect discrimination. The Supreme Court has given a clear answer to the conundrum.

The Supreme Court stated in its judgment that the purpose of the law against indirect discrimination is to remove hidden barriers for different groups and to level the playing field. In other words, the concept of indirect discrimination is concerned with equality of results rather than equality of treatment. In light of this purpose and concept of indirect discrimination, the Supreme Court's decision makes sense. The reason why an employer's particular practice causes a disadvantage to a particular group should not be relevant. What matters is the fact that a particular practice puts a particular group at a disadvantage. It is then open to the employer

to try to objectively justify the particular practice in order to avoid a finding of unlawful indirect discrimination.

This decision will make it easier for individuals to make an indirect discrimination claim against their employer. However, the Supreme Court emphasised in its judgment that it is always open to the employer to show that a PCP is justified. If the employer can prove objective justification for the PCP, there will be no unlawful discrimination. Further, the judgment provided in particular that “the requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question.” In Mr Naeem’s case, Mr Naeem was able to establish disparate impact; however, the Supreme Court was not prepared to overturn the original finding of the Employment Tribunal that the employer’s pay scale was justified. Consequently Mr Naeem’s claim was not successful.

The Supreme Court’s decision will have a significant implication on key employment decisions such as recruitment, pay reviews, promotions and disciplinarys. In accordance with the Supreme Court’s comments, a “wise employer” will monitor how its policies and practices impact on various groups, and try to modify them if they do have a disparate impact.

128

Comments from other jurisdictions

Finland (Kaj Swanljung and Janne Nurminen, Roschier Attorneys Ltd): According to the Non-Discrimination Act (21/2004, as amended), an employee-claimant must provide the facts on which a discrimination claim is based. If it concerns indirect discrimination, the employee must demonstrate with statistics or otherwise that a provision, criterion or practice has either put him or her in a less favourable position compared to others, or is likely to do so. The employee must also show that the different treatment is based on prohibited grounds of discrimination. If, based on the presented information it can be presumed that there has been unlawful discrimination, the employer must try to rebut that presumption, and demonstrate that the different treatment had a reasonable basis in law.

Thus, for a presumption of discrimination to arise, the employee is required to provide evidence. A mere suspicion that there has been a breach of the law is not enough to reverse the burden of proof to the employer. Full evidence is not required, however. What is needed is just enough for a presumption of discrimination to arise.

In addition, a presumption of discrimination cannot arise before the employer has been heard and therefore given the chance to provide counter-evidence. After the hearing, the employer will try to show that the difference in treatment is justifiable, for example, that it was not unfavourable or that there was a good reason for any positive discrimination in favour of others.

However, there is a case for saying that the burden of proof on the claimant should be lightened, particularly for claims of indirect discrimination, if the difficulties claimants face are likely to endanger the effectiveness of anti-discrimination law. The Supreme Court of Finland has stated that the usual burden of proof requirements can be deviated from if the claimant has no effective way to prove their claim of unequal treatment. Employees are often not in a position to demonstrate discrimination because they might not have access to the evidence.

Italy (Caterina Rucci, Bird and Bird): In the case of direct discrimination, the reason for it is irrelevant, but whether unlawful indirect discrimination has taken place usually hinges on the reasons for the action. To this end, the employer is entitled to try to explain and justify what it has done. The practice itself will have been neutral and so it is a matter of the court’s judgment as to whether the reasoning behind it is sufficient to exonerate the employer.

Netherlands (Peter Vas Nunes, BarentsKrans): To a Dutch reader it comes as a surprise that this issue “had proved troublesome for the lower courts”. Article 2 of Directive 2000/43 defines indirect discrimination based on race or ethnic origin. It occurs where – barring justification – an apparently neutral PCP would put (A) persons of a certain racial or ethnic origin (B) at a particular disadvantage (C) compared with others. This definition does not require there to be a reason for the disadvantage, let alone for the claimant to demonstrate that reason. As the Supreme Court put it, “the arguments put forward by the respondent do not justify importing words into the statute (and the Directives which lay behind it) which are simply not there”.

Given the fact that the lower courts held otherwise, my reasoning is obviously overly simplistic. Nevertheless, I have difficulty understanding the arguments in favour of requiring the claimant to demonstrate a reason for the alleged disadvantage. In the *Essop* case, the Home Office seems to have put forward two main arguments, neither of which are easy to grasp. The first is, ‘ow can one know what the disadvantage is unless one knows the reason for it?’ The second argument was ‘that “undeserving” claimants, who have failed for reasons that have nothing to do with the disparate impact, may “coat tail” upon the claims of the deserving cases.’ To my simple mind, it is surprising that it took a Supreme court to demolish these arguments. I expect that, had a Dutch court adjudicated *Essop*, it would have found indirect unequal treatment without further ado (without, for example, going into the precise nature of the

disadvantage: failure versus likelihood of failure), and would have focussed on the objective justification.

In *Essop*, the question was whether the claimant must prove the reason for the disadvantage. In *Naeem*, this reason was known. The question was a different one: should the reason be related to the protected characteristic? In other words, should the reason why the length of service criterion puts Muslim chaplains at a disadvantage have something to do with the Muslim faith? The answer was negative (although Mr Naeem's appeal was dismissed). A Dutch court would have reasoned likewise, I expect.

In brief, the Supreme Court's judgment seems logical. The reason why an employer's particular practice causes a disadvantage to a particular group is not relevant. The debate needs to be resolved in the context of objective justification.

In *Naeem*, there was another, more difficult issue. It related to the pool with which the comparison is made. Should this pool include all chaplains or only those hired since 2002? The answer was: all chaplains. I do not know how a Dutch court would have dealt with this issue. Perhaps it would have used the 'not in a comparable situation' card.

Subject: General discrimination, indirect discrimination

Parties: Essop and others – v – Home Office (UK Border Agency)

Naeem v Secretary of State for Justice

Court: Supreme Court

Date: 5 April 2017

Case number: [2017] UKSC 27

Internet publication: <http://www.bailii.org/uk/cases/UKSC/2017/27.html>