DIFC DISCRIMINATION SEMINAR

The implications of remedies for discrimination in the DIFC Courts and an update on discrimination law concepts

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ABOUT THE SPEAKER

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Peter gives seminars on various aspects of employment law regularly around the UK and has published numerous articles on employment law, both in specialist publications and the wider legal press. He has made several television appearances to comment on employment law aspects of current news stories (in particular on BBC News and Sky News). He is a member of the Employment Lawyer's Association, the Employment Law Bar Association, the Discrimination Law Association and the Employment Law Appeals Advice Scheme.

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1. The background for this seminar is an anticipated new DIFC Employment Law. It is believed that the draft will be released for consultation very soon.

2. It is understood that the new law it is likely to include within its scope remedies for discrimination. If this does indeed become the law, it will be a significant development as despite entertaining claims for discrimination, DIFC Courts decisions deny the existence of any remedy:

> "*Furthermore, there is no entitlement under DIFC Law to statutory damages for breach of Article 56*[1] *of the unamended Employment Law. I accept the Respondent's submissions that a claim for discrimination has not been established on the facts and that there is no breach of the discrimination provisions in the unamended Employment Law. Nor is there any entitlement to damages, statutory or otherwise, and there is no authority under DIFC law principles that offers a statutory right to damages arising from a breach of the DIFC Employment Law*".
> *Hana Al Hertz v The Dubai International Financial Centre Authority* [2013] para 79

3. This paper considers the scope of claims for discrimination within the DIFC Courts, potential areas of development and recent developments in UK employment law which might be relevant.

4. The law prohibiting discrimination is set out in DIFC Employment Law No 4 of 2005 (as amended in 2012[2]) ("DIFCL 4") Article 58, which prohibits discrimination on grounds of

   (a) sex
   (b) marital status
   (c) race
   (d) nationality
   (e) religion

[1] This is now article 58 of the Amended Employment Law
[2] By Employment Law Amendment Law No. 3 of 2012

(f) mental or physical disability.

5. Reference will be made to equivalent provisions in the Equality Act 2010("EqA").

Direct Discrimination

6. By Art.58(2)(a) "an employee is treated less favourably than others would be treated in the same circumstances on one of the prohibited grounds in Article 58(1)".

Causation

7. There is probably no substantive difference between "on one of the prohibited grounds" in DIFCL 4 and "because of a protected characteristic" in s.13 EqA.

8. The DIFC Courts appear to have acknowledged that the test for causation involves showing that the prohibited ground need not be the sole cause of the relevant conduct; it is enough if it is a significant influence on the decision.

9. In *Hana Al Herz v The Dubai International Financial Centre Authority* [2013] DIFC CA 004 the Judge at first instance said that "it must be proved that…the employer was relying either exclusively upon, or was influenced by, one or more grounds from (a) to (f), or was relying upon, or was influenced as much by, one of those grounds as by any other grounds". This was quoted without apparent disapproval by the DIFC Court of Appeal ("CA").

10. The appeal was argued partly on the basis that the correct test was whether the prohibited grounds was a significant factor, citing the test in *Nagarajan v London Regional Transport* [1999] IRLR 572 which requires a "significant influence on the outcome". The CA held that the correct test had been applied in that the judge specifically stated that "her marital status was not a material consideration" (see [129-130]).

11. The English courts in fact go further, *Barton v Investec* [2003] ICR 1205 (EAT) holding that the treatment should be "in no sense whatsoever" on grounds of the protected characteristic (approved by the Court of Appeal in *Igen v Wong* [2005] ICR 931)[3].

Direct discrimination in the UK courts

12. Causation becomes more complex where the employer contends that it is simply applying a rule or policy but that rule is not neutral because in effect it targets those whose choices are closely related to their protected characteristic. A recent example is provided by the facts of the 2017 ECJ cases of *Achbita* and *Bougnaoui*[4] where "neutrality" rules led to Muslim women being dismissed for wearing a headscarf. A requirement for everyone to dress the same is not neutral because it is eliminates those who dress differently because of their belief.

13. The Supreme Court decision in the joined appeals in *Essop v Home Office (UK Border Agency) / Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] IRLR 558) was primarily concerned with indirect discrimination. However, with reference to direct discrimination, Lady Hale observed "even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used … exactly corresponds with a protected characteristic … and is thus a proxy for it." [17]

14. This basic principle was recognised by the DIFC CA in *Marwan Lutfi v The Dubai International Financial Centre Authority* [2013] DIFC CA 003. Judge Roger Giles[5] doubted that the first instance Judge was correct to hold that there was no discrimination on grounds of marital status in dismissing the claimant who had married another employee in implementation of a policy which prohibited the employment of relatives ("EOR"). However, ultimately Mr Lufti did not succeed because the EOR policy was found to be a bona fide occupational requirement under Art 58(4).

[3] This focus on bringing any discriminatory motivation within the scope of unlawful discrimination flowed from interpreting the Sex Discrimination Act 1975 in line with the European Equal Treatment Directive 76/207 which refers to "no discrimination whatsoever".
[4] [2017] CJEU C-157/15 and [2015] CJEU C-188/15
[5] At [98]; he was one of the two CA Judges who gave a judgment

Burden of proof

15. In DIFC law there is no equivalent of the reversal of the burden of proof provision at s. 136 EqA whereby:
    - At the first stage, a tribunal must consider whether there are "facts from which the court could decide, in the absence of any explanation, that a person (A) contravened the provision [of the EqA 2010] concerned." If there are such facts, "the court must hold that the contravention occurred." (Section136(2).)
    - At the second stage, that conclusion may be displaced "if A shows that A did not contravene the provision" (section136(3)). The burden therefore shifts to the respondent, who will have to show that there is a wholly non-discriminatory explanation.

16. The burden of proof provisions matter in practice because discrimination tends to be very difficult to prove and tribunals must often decide cases on the basis of inference from primary facts.

How is the burden of proof applied by the DIFC Courts?

17. The DIFC CA carried out a limited examination of the burden of proof in *Hana Al Herz v The Dubai International Financial Centre Authority* [128]. The claimant contended that the employer had produced no evidence from the Audit Committee to support its contention that the Audit Committee's reason for termination related to issues predating the claimant's marriage and therefore could not be on grounds of her marital status. She relied on the passage in *King v GB China Centre* [1992] IRLR 516 (CA) which said:

    "*..a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the Tribunal will look to the employer for an explanation. If no explanation is then put forward or if the Tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the Tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May LJ put it in Noone [1988] lRLR 195, 'almost common sense'... It is unnecessary and unhelpful to introduce the concept of a shifting burden of proof."*

18. On appeal, Justice Roger Giles held that a finding as to the place of the claimant's marital status in the decision to terminate her employment did not require the process of inference which had to be rebutted by evidence from the Respondent. He said the inference should be drawn from the whole of the evidence with a conclusion being

reached on the balance of probabilities. According to this test he said the first instance judge had weighed up the evidence appropriately.

How much does the reversing burden of proof matter?

(i) inference

19. Even if the burden of proof is not reversed, that does not prevent the drawing of inferences from primary facts. In *Geller & Another v Yeshurun Hebrew Congregation* EAT 0190/15[6] Mr Geller began employment with Yeshurun in 2011. Around a year later he married Mrs Geller and shortly afterwards she started working for Yeshurun. At the time, she was not considered to be an employee, but working on an ad-hoc basis, submitting time sheets for work done. It was then agreed that Mr and Mrs Geller would work for a joint salary of £12,500. At that stage, Mrs Geller had not been paid for the work that she had done to date. Mr Geller was informed that he was being provisionally selected for redundancy. Mrs Geller said that she considered herself to be an employee and that she should also be involved in any redundancy exercise but her employer initially refused to treat her as an employee (ultimately both were terminated).

20. Mrs Geller brought a claim for sex discrimination, arguing that the deductions and not treating her as an employee were both because of her sex , in particular becasue she was treated as the wife of Mr Geller, rather than independently.

21. The tribunal reasoned that because the employer's witnesses they had heard from were honest and believed the treatment was based on non sex-related factors, the treatment was not related to sex. On appeal, the EAT criticised this as it overlooked the very important point that discrimination can be unconscious or subconscious. It was a misdirection not to consider this and the case was remitted to the employment tribunal.

(ii) hypothetical comparators

22. As was recognised by the House of Lords *in Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, in such cases it may be helpful for the Tribunal to begin with an analysis of the reasons why the Claimant was treated as she was, before considering how a hypothetical comparator would be treated (paras 7 – 12, per Lord

[6] In which Paul Livingston from Outer Temple Chambers acted for the successful appellant

Nicholls). It will certainly not be an error of law to do so: see *Madarassay v Nomura* [2007] IRLR 246 #83-84.

23. Indeed, in cases involving hypothetical comparators it is often not necessary to construct a comparator: Stockton on Tees Borough Council v Aylott [2010] I.C.R. 1278, at paras 42-44 . Later in the same judgment Mummery LJ went on to warn tribunals of the danger of placing too much emphasis on the construction of a hypothetical comparator. Such a construction may ultimately be best considered as a 'cross check' against which the Tribunal tests its conclusions on the motivation for the Respondent's actions (rather than a fundamental element of finding liability) (#45):

> "*I am not saying that a hypothetical comparator can be dispensed with altogether in a case such as this: it is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical comparator. But there are dangers in attaching too much importance to the construct and to less favourable treatment as a separate issue, if the tribunal is satisfied by all the evidence that the treatment (in this case the dismissal) was on a prohibited ground*."

Could the DIFC Courts be persuaded to apply the reversing burden of proof*?*

24. The suggestion that the reversing burden of proof should apply has not been directly argued. In other areas, the DIFC Courts have demonstrated reluctance to fill a void created by the absence of a statutory provision on a particular issue.

25. There is no reference in DIFCL 4 to the generally applicable burden of proof, albeit some provisions specify the burden in particular instances[7].

26. However, it is at least arguable that the courts should consider reversing the burden.

27. *DIFC Court Law*[8] Art 50 provides:

> **<u>Application of Evidence</u>**
>
> **Where proceedings are instituted in the DIFC Court, the rules of evidence to be applied in the proceeding will be the rules that:**
>
> **(a) are prescribed in DIFC Law; or**
>
> **(b) are applied in the courts of England and Wales; or**

[7] for example, under Art 51 an employer can defend an allegation that it is vicariously liable for acts of its employee if it "proves that it took reasonable steps to prevent the employee from doing that act".

[8] DIFC Law No 10 of 2004

(c) the DIFC Court considers appropriate to be applied in the circumstances.

28. Clearly the burden of proof is a rule of evidence.

29. This provision on the rules of evidence places a more immediate focus on English law than the rules which determine a jurisdiction under which a dispute will be heard. The means whereby English law has application in the DIFC is provided for in the *Law on the Application of Civil and Commercial Laws in the DIFC*[9]. Article 8 of that Law provides:

> **(1) Since by virtue of Article 3 of Federal Law No.8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).**
>
> **(2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:**
>
> **(a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,**
>
> **(b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,**
>
> **(c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,**
>
> **(d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,**
>
> **(e) the laws of England and Wales.**

30. This ensures that there will be no situation in which there is no applicable law – the question is whether or not one of the laws in the hierarchy above the laws of England and Wales is an exclusive code, in which case reference to the latter is impermissible[10] and

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9 DIFC Law No. 3 of 2004

10 *Dutch Equity Partners Limited v Daman Real Estate Capital Partners Limited* CFI 1/2006 per Hwang J at paragraph 88

the matter must be resolved in terms of the applicable law[11]. But if there is a need to apply a default law, the whole of the law of England and Wales, not just the common law, is applicable.

Latest developments in the burden of proof in the UK courts

31. In *Efobi v Royal Mail Group Ltd* UKEAT/023/16 the EAT held that the Employment Tribunal had misdirected itself on the burden of proof. The wording of section 136 imposed no requirement at the first stage that the relevant facts be proved on the basis of the claimant's evidence in particular. Rather, a tribunal is to "look at the 'facts' as a whole", including facts supported by the respondent's evidence. These facts may also include inferences from a respondent's failure to adduce evidence (at [86]).

32. The ET had concluded that Mr Efobi had not "got to first base". This conclusion was unsafe, because the ET had not properly considered whether it ought to draw inferences adverse to the respondent from its failures to adduce or explain evidence. Had it done so, the facts available at the first stage might, in the absence of an adequate explanation, have supported a finding of discrimination.

33. This flies in the face of the Court of Appeal's guidance in *Igen v Wong* [2005] I.C.R. 931 that it is for the Claimant to prove facts from which the tribunal *could conclude* that the Respondent had committed an act of discrimination and any explanation offered by the Respondent must not be taken into account in determining whether the Claimant has established such facts.

34. However, even before the EqA 2010 it was clear that the respondent's evidence was to be considered at the first stage, as well as the claimant's evidence. In *St Christopher's Fellowship v Walters-Ennis [2010] EWCA Civ 921* Mummery LJ held that "[t]he important words 'could conclude' mean that 'a reasonable ET could properly conclude' from all the evidence before them …That includes all the evidence given by the respondent, as well as by the claimant" [16].

[11] *Forsyth Partners Group Holdings Limited and in the matter of DIFC Insolvency Law No. 7 of 2004* CFI 5/2007 per Hwang J at paragraphs 35-47

35. At Supreme Court level in *Hewage v Grampian Health Board* [2012] UKSC 37 the approved the guidance in *Igen v Wong* but noted that:

> "*It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*." (Lord Hope at [32])

36. This matters in practice as respondents may be tempted not to adduce relevant evidence in their control, taking a "you prove it" stance. An example is provided by *EB v BA [2006] EWCA Civ 132* in which the claimant was a transitioning transsexual who alleged she had not been given projects (affecting her billability) on grounds of her gender reassignment. BA declined to make disclosure of all its projects, instead asking the claimant to point to specific projects, about which it would then provide an explanation.

37. The Court of Appeal held that a fundamentally wrong approach had been adopted to the litigation which had deprived EB of a fair trial. Having found that the burden of proof shifted to BA to disprove discrimination, the tribunal did not in fact shift the burden, but looked to EB to disprove what were otherwise "plausible" explanations by BA. This was something EB was unable to do in the absence of adequate disclosure or a schedule of all the projects being worked on during the relevant period.

38. The court rejected BA's contention that it would have been disproportionate to have listed all the projects taking place over the relevant period and set out the reasons why EB was not allocated to each of them. The firm's contention that "if we weren't asked about [a project], we weren't required to prove it", rendered section 63A[12] meaningless. If BA had produced a schedule summarising all or at least a substantial number of the projects during the relevant period with the reasons why EB was not chosen, she could have concentrated on those which supported her case. As it was she had to take from memory a "shot in the dark" about which project(s) might support her case.

[12] The reverse burden of proof provision under the Sex Discrimination Act 1975 / now s.136 EqA

A questionnaire procedure in the DIFC?

39. It is understood that one of the proposals likely to be included in the proposed consultation is the use of questionnaires in discrimination cases. It may be helpful to consider the changing role of questionnaires in the UK and some tactical considerations.

(i) Up to 2014

40. Prior to 6 April 2014 the claimant could serve a statutory questionnaire on the respondent in accordance with regulations made under the Equality Act 2010 s.138. A parallel procedure was created for equal pay claims. That questionnaire should have been served within 21 days following presentation of the Claim form, or before proceedings had been started but within 3 months following the alleged discrimination: see the Equality Act (Obtaining Information) Order 2010[13]; the Order also enabled the tribunal to give permission for a further questionnaire to be served in the course of the proceedings, or extend time for service of the initial questionnaire.

41. There was no obligation on the respondent to reply and the tribunal had no power to order answers. The sanction for not answering adequately within a reasonable time (set as 8 weeks) or answering inadequately or evasively, was that in certain circumstances the tribunal hearing the case could draw adverse inferences against the respondent: EqA s.138(4) (pre amendment). A tribunal was not however obliged to infer discrimination from a deficient response: inferences could only be drawn if it was justified in the particular circumstances[14].

42. The Government (according to its consultation paper) considered that many employee hours per year were being spent in answering questionnaires and that in many cases they amounted to a fishing expedition and repealed s.138 by the Enterprise and Regulatory Reform act 2013.

(ii) April 2014 to date

43. In its place, Acas has produced non-statutory guidance (the guidance) addressing how individuals should ask questions regarding discrimination and equal pay and how

[13] SI 2010/2194
[14] See, for example the EAT guidance in *D'Silva v NATFE* [2008] IRLR 412 and *Deer v Watford* (UKEAT/0283/101)

employers should respond (www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf).

44. The guidance sets out six steps for individuals (referred to as questioners) to follow when requesting information in a discrimination context. These echo the existing prescribed questionnaire forms and include:
    - Giving the questioner's own name and address and those of the person or organisation (and others) that the questioner thinks may have discriminated against him.
    - Identifying the protected characteristic in question.
    - Providing a brief factual description of the treatment considered to be discriminatory and the circumstances leading up to it.
    - Identifying the type of discrimination suffered (for example, direct or indirect discrimination, harassment or victimisation).
    - Explaining why the questioner considers the treatment to be discriminatory.
    - Asking any additional questions that the questioner considers might be relevant, including a request for statistical information to show how other people with his protected characteristic are treated in the organisation.

45. For equal pay, the guidance sets out only three steps for a questioner to follow when making a request for information: identification of a comparator; why the questioner thinks he is doing equal work; and a sweep up question for other pay-related issues.

46. Questioners should ask the employer to respond by a set date. There is no guidance on how long this should be. Employers may, therefore, be faced with deadlines much shorter than the existing eight weeks and be left trying to negotiate an extension or missing the deadline. The guidance does not repeat the previous statutory rules regarding the stage at which questions can be asked, but assumes that the questions will be asked at the pre-claim stage.

47. The guidance for employers is much shorter. Acas emphasises the need for the employer to treat the request seriously and deal with it promptly. It suggests that the employer should talk to the individual (or his representative) about ways to resolve the dispute at

the outset. In its view, many disputes can be resolved in this way. The overall message is not to ignore the request.

48. It is still open for a claimant to argue that adverse inferences can be drawn from the failure to answer a particular question. In *Dattani v Chief Constable of West Mercia Police* [2005] IRLR 327 the EAT held that a power to draw adverse inferences from equivocal or evasive responses applied in discrimination cases in relation to questions where there was no statutory procedure.

49. In practice, prior to April 2014 some respondents had to devote significant time and resources to answering questionnaires. Conversely, for a potential claimant who had no information about the internal workings of an employer, they were a useful means of obtaining that information. Although non-statutory questionnaires are still sometimes served by claimants, anecdotally, their use is far less frequent since the abolition of their statutory status.

Harassment

50. Art 58(2)(c) of DIFCL 4 prohibits harassment, although it is not named as such[15]. "Discrimination" includes where an employee on one of the prohibited grounds is "subjected to unwanted treatment or conduct which has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive workplace".

51. This is similar to s.27 EqA but there are a number of differences:

51.1. the EqA s.27(2)(a) has created separate provision for sexual harassment. As a result the position in the DIFC is equivalent to the pre 2010 position in the UK, where claims for sexual harassment would need to be brought under the main provision[16];

51.2. s.27 EqA refers to engaging in unwanted conduct "related to a relevant protected characteristic". The wording under Art 58(2)(c) is "on grounds of one of the prohibited grounds… an employee is subjected to unwanted conduct which has the

[15] Though see Art 40(2): "shall maintain workplace that is free of harassment, safe and without risks to the employee's health"

[16] There is plenty precedent in UK law for bringing sexual harassment claims under general harassment provisions, eg *Reed v Bull* (1999) IRLR 299

purpose or effect of…". It is arguable that this requires an actual intention to harass, although the effect of this is mitigated by the words "purpose or effect".

51.3. However, the EqA provides further definition of "effect", which is entirely absent from DIFCL 4:

> **"s.27(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account-**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect."**

51.4. Another important difference is that DIFCL 4 Art 58(2)(c) requires that the "employee is subjected to unwanted treatment" whereas the EqA relates to the effect of the unwanted treatment engaged in by the employer , which must have the purpose or effect of violating the employee's dignity. Hence in the UK an employee could claim harassment on the basis of being in an environment where others were being harassed, or there were offensive conduct not in any way aimed at the employee, which could found the basis of a claim.

EqA s.40(2) formerly made employers liable for harassment of employees by third parties, but that was repealed by section 66 of the Enterprise and Regulatory Reform Act 2013.

Disability discrimination and reasonable adjustments

52. By Art 58(5)(b) an "employer discriminates against an employee with a mental or physical disability within the meaning of Article 58(1)(f) if the employer fails to make reasonable adjustments to any physical feature of the workplace or applicable provision, criteria or practices that would, if made, enable the employee to otherwise meet the bona fide occupational requirement". In other words the reasonable adjustment must enable the employee to meet the GOR, in contrast with the UK where it has to be one which is reasonable for the employer to have to take to prevent the PCP placing the employee at a substantial disadvantage in comparison with persons who are not disabled (see s.20 EqA).

53. It is interesting to consider whether the English case of *G4S Cash Solutions (UK) Ltd v Powell* UKEAT 0243/15[17] might have any application in the DIFC. Back problems meant that the claimant could no longer work as a skilled engineer and he was moved to a lower paid role and given pay protection for a year, before his employer decided his salary would have to be reduced to the going rate. HH Judge Richardson noted that in individual cases, the cost of taking a particular step was a matter that tribunals could properly consider. Here the employer's main concern seemed to be that other staff might object to the preferential treatment being accorded to Mr. Powell. This was given short shrift and the tribunal's finding that he was entitled to pay protection as a reasonable adjustment was upheld.

Indirect Discrimination

54. Discrimination under Art 58(2)(b) includes where "the application of the same provision, criteria [sic] or practice" puts an employee "at a disadvantage not faced by others who are not of that sex, marital status, race..", etc. Further under Art 58(3)

> **For the purposes of Article 58(2)(b), a provision, criteria or practice is discriminatory in relation to any of the grounds specified in Article 58(1) as relevant, if:**
>
> **(a) an employer applies, or would apply it, to persons who do not share the characteristics of such employee;**
>
> **(b) it puts, or would put, persons with whom the employee shares the characteristic at a particular disadvantage when compared with persons with whom the employee does not share it;**
>
> **(c) it puts, or would put, the employee at that disadvantage; and**
>
> **(d) the employer cannot show it to be a proportionate means of achieving a legitimate aim.**

55. The wording is, to all intents and purposes, identical to s.19 EqA.

Recent developments in the UK

56. In *Essop and others v Home Office (UK Border Agency)* and *Naeem v Secretary of State for Justice* [2017] UKSC 27 *("Essop")* the Supreme Court ("SC") gave welcome clarity on two areas: establishing group and individual disadvantage and choice of pool. *Essop*

[17] Heard in the EAT in February 2017

concerned the requirement to pass a core skills assessment to gain promotion to certain civil service grades. A report revealed that black minority ethnic (BME) candidates and older candidates had lower pass rates than white and younger candidates, and no-one knew why. *Naeem* concerned the pay for prison service chaplains which incorporates pay progression over time. Mr Naeem was a Muslim chaplain who argued that this placed him at a disadvantage as the prison service had not employed Muslim chaplains on a salaried basis until 2002.

57. In both cases the employer had successfully argued in the Court of Appeal that in order to establish prima facie indirect discrimination, the claimants had to establish why a particular PCP put the group at a particular disadvantage compared with others, and that the reason was related to the particular characteristic. Hence in *Naeem*, it was common ground the Muslim chaplains were at a disadvantage because of their shorter length of service, but the Court of Appeal held that was not sufficient. In *Essop* it was common ground that the disadvantaged ground suffered an actual disadvantage. However, in the SC, Lady Hale held that:

> "*[i]n order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual. This may be easier to prove if the reason for the group disadvantage is known but that is a matter of fact, not law."*

58. As to the choice of pool for comparison, in *Naeem* the employer argued that the correct pool should be just those chaplains employed after 2002, rather than all chaplains. Lady Hale said "there is no warrant for including only some of the persons affected by the PCP for comparison purposes." She held all the workers affected by the PCP should be considered so comparison can be made between the impact of the PCP on the group with the relevant characteristic and its impact on the group without it.

59. Some thoughts on the impact of *Essop*:
    (i) the focus of litigating indirect discrimination claims will now be on justification; hopefully some of the tortuous debates of the last few years about showing disadvantage have come to an end;
    (ii) Lady Hale suggested it was good practice for employers to actively monitor the disparate impact of their policies on particular groups and anticipate the need to

objectively justify them. She said that objective justifications may well be "very good reasons";

(iii) whilst there will still be discretion in the choice of pool for comparison, the SC's decision militates against employers relying on narrow pools which will make disparate impact harder to show.

Indirect discrimination claims in the DIFC?

60. An area in which potential claims[18] might arise is women who want part time or flexible working arrangements on returning from maternity leave or because they have childcare responsibilities. DIFC law has no concept of discrimination against part time workers or arrangements to request flexible working (contrast Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and Employment Rights Act 1996 s.80F-I)[19].

61. For example:

- A woman asks to work part time so she can attend to child care responsibilities and is refused;
- A woman asks for a late start or early finish to her work day, so that she can take children to/from school.

62. In this scenario, it would first need to be established that the employer applied a PCP that employees were required to work full time or to follow standard office hours. Depending on the facts this might be straight forward.

63. The next practical issue is showing that the PCP put or would put women at a particular disadvantage when compared with men. There are a number of points to note.

64. First, there is no necessity for the PCP actually to apply to others. It is possible to establish the disadvantage by reference to a hypothetical comparator pool (see the statutory language "would put"): *British Airways v Starmer [2005] IRLR 862* para 18. Further, a one off decision in relation to a single employee, which does not apply to anyone else, can amount to a PCP: see *Starmer* paras 17.1, 17.2 and 18.

[18] Albeit no judgments in this area on the DIFC Courts website, even at SCT level
[19] There are protections around pregnancy and maternity leave in DIFCL 4 Art 39

65. Secondly, under the wording of the EqA, C is not required to use statistical evidence as it is no longer necessary to show that the requirement is to the detriment of a considerably larger "proportion" of women (as it was under the original wording of the SDA 1975). That said, the reported cases almost invariably relate to statistics. The exception is *Shackletons v Lowe* UKEAT/0161/10/JOJ where the EAT found that an Employment Tribunal had been entitled to come to the following conclusion as a basis for their finding of disparate impact, in the absence of any actual evidence:

> "*It is well recognised that significantly more women than men are primarily responsible for the care of their children. Accordingly the ability of women to work particular hours is substantially restricted because of those child care commitments in contrast to that of men*."

66. If the claimant relies on statistics[20], she will then need to identify the appropriate pools for the purposes of comparison. Whilst in theory the pools could be the population at large, in practice unless hypothetical comparators are used, the pool is generally limited to the relevant workforce. The starting point is said to be all those to whom the PCP is applied, from both the advantaged and disadvantaged groups: *Jones* [1993] ICR 474 / *Chaudhary* [2007] IRLR 800.

67. Once particular disadvantage is shown both to the disadvantaged group and to the claimant, the question of justification arises. That is, can the employer show the relevant measure to be a proportionate means of achieving a legitimate aim? In light of *Essop*, this is likely to become an important battleground in indirect discrimination cases in the UK.

67.1. "*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 - fitness levels in fire-fighters or policemen spring to mind*." *Essop* para 29

[20] given that there is uncertainty about whether a tribunal would accept generalised propositions about the workforce, it is safer for a claimant to bolster a claim by getting statistical evidence

67.2. The requirement of proportionate has been taken to mean "no more than necessary" *Constable of West Yorkshire v Homer* [2012] ICR 704.

67.3. In *Naeem* [2017] UKSC 27, applying this criterion, the tribunal found the prison service could justify its pay scale but this was on the basis that the scale being applied was a transitional one as they moved towards one which was based on performance more than long service. The objective was "*the single one of rewarding length of service and increasing experience, while at the same time managing an orderly and structured transition, over a period of time, to the shorter, single pay scale … That is clearly a serious objective, which represents a real organisational need …*"

68. The next important local question is the claimant's access to remedies in the DIFC courts.

Declaration and recommendation

69. In UK law, Employment tribunals have power to make declarations and recommendations in discrimination cases.

70. Under EqA s.124(2) (as amended by s.2 Deregulation Act 2015) the tribunal can make a declaration as to the rights of the complainant and respondent in relation to the matters to which the proceedings relate.

71. In addition a tribunal is allowed to make a recommendation to take certain steps within a specified period "for the purpose of obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate". Accordingly recommendations can help prevent similar types of discrimination against the claimant occurring in future.

72. Since October 2015, the recommendation must be to counter the adverse effect *on the claimant* of any matter to which the proceedings relate[21]. This reverses a change made by

[21] the non-exhaustive examples given in para 406 of the Equality Act Explanatory Notes still seem applicable, ie recommendations that the employer:
1. introduces an equal opportunities policy;
2. ensures its harassment policy is more effectively implemented;
3. sets up a review panel to deal with equal opportunities and harassment/grievance procedures;

the EqA 2010, which originally permitted recommendations to benefit other employees. In practice, the change means that a recommendation will not normally be made if the claimant has resigned or been dismissed.

73. Unreasonable failure by the employer to comply with a recommendation as regards the claimant can result in increased compensation (under EqA s.124(6)).

74. There is clearly a power to make declarations in the DIFC Courts[22]. In the examples we are considering that may be limited to declaring that a particular policy pursued by the employer is indirectly discriminatory. It is possible that the new law will introduce a power to make recommendations.

Compensation for Discrimination

75. It understood that the new draft law will specify (or at least cap) damages for discrimination. There is currently no guidance, and no legislation on this issue in DIFC law.

Injury to feelings

76. In UK law, the employment tribunal has a qualified power to award compensation for indirect discrimination, including injury to feelings (see EqA s.124(4),(5)). If satisfied the employer intended the discriminatory consequences of the PCP, compensation can be ordered. If the employer can prove that it had no intention of treating the complainant unfavourably on discriminatory grounds, the tribunal is first required to consider whether if it had no power to order compensation, it would make a declaration or recommendation. If it decides that it would not do so, it can move on to consider compensation. If it would do so, it must first make that declaration or recommendation and then ask itself whether it is just and equitable to make an award of compensation as well.

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4. re-trains staff; or
5. makes public the selection criteria used for transfer or promotion of staff

[22] The Law of Damages and Remedies 2005 DIFC Law 7/2005 Art 37 contains a general power to make "binding declarations on points of law or fact"

77. Under DIFC law, in the absence of these complex statutory provisions, there is clearly scope to argue that DIFC courts should follow the historic practice of the UK courts and refuse to award any compensation if discrimination was not intended. Before the EqA, if discrimination was not intended by the employer, compensation could only be awarded where the discrimination was on grounds of sex or marital status. The discrete treatment of these forms of discrimination resulted from the Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996[23].

78. However, note that there is a distinction between motive and intention. In *London Underground v Edwards* [1995] IRLR 536, the EAT held that where a PCP was applied with knowledge of its unfavourable consequences for a particular class, an intention to produce those consequences could also be inferred. See to the same effect *JH Walker Ltd v Hussain* [1996] IRLR 11, concerning the refusal on the basis of genuine business needs to grant employees time off to celebrate Eid.

Injury to feelings in the UK Courts – the latest

79. On 5 September 2017 the Presidents of the Employment Tribunals in England and Wales and in Scotland published a Presidential Guidance following the consultation launched in July 2017 on uprating the bands of compensation for injury to feelings in discrimination cases. The Presidents have decided that the appropriate bands are now: a lower band of £800 to £8,400 for less serious cases; a middle band of £8,400 to £25,200 for cases that do not merit an award in the upper band; and an upper band of £25,200 to £42,000 for the most serious cases, with the most exceptional cases capable of exceeding £42,000. This is a significant increase on the bands set out by the Court of Appeal in 2002 in Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318.

80. The proposal to uprate the bands came as a result of the Court of Appeal's decision in De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 that employment tribunals must increase compensation for injury to feelings and personal injury in discrimination cases by 10%, in line with the Court of Appeal's decision in Simmons v Castle [2012] EWCA Civ 1039. The new bands will apply to claims presented on or after 11 September 2017. For claims presented before that date, it is open to the tribunal to adjust the bands

[23] the reason for this amendment was that it would be contrary to the EEA Equal Treatment Directive 76/207 to make reparation of damage suffered as a result of discrimination subject to the requirement of fault

to reflect inflation, and the Presidential Guidance has provided the methodology for doing so.

Damages for discrimination in the context of dismissal

(i) An aside: wrongful dismissal in the DIFC courts

81. Under Art.59A an employer or employee may terminate for cause where "conduct of one party warrants termination and where a reasonable employer or employee would have terminated the employment".

82. Hence an employer has the option of terminating on notice or terminating for cause.

83. If termination is on notice no claim can be made about the reasonableness or otherwise of the dismissal any disciplinary procedure will be deemed not to apply[24].

84. If termination is purportedly for cause, prima facie there is no remedy even if a dismissed employee persuades the court that the employer has not shown cause. However, Art.62 provides an employee with a right to a (generous) gratuity payment if terminated after more than one year service. That right is lost on termination for cause. An employee can argue that where an employer fails to prove "cause" they should be entitled to that sum[25]. If so the financial consequences of this for an employer could be exacerbated by Art 18 of DIFC 4 (as amended) which provides for payment of any amount owing on termination to be paid within 14 days, failing which the employer shall pay a penalty equivalent to the daily wage for every day in arrears. This clause includes amounts owing by virtue of termination and was clearly intended to protect the employee and punish the employer[26] and could apply even in cases where the employer has genuinely disputed an entitlement to termination payment.

[24] *Hana Al Herz* (CA)
[25] *Frontline Development Partners Ltd v Asif Hakim Adil* [2016] DIFC CA 006,
[26] Per the Court of Appeal in *Asif Hakim Adil*, in upholding an Art 18 penalty payment of USD 1.63 million, and a notice and gratuity payment of USD 359,411

(ii) Discrimination damages

85. At present, showing that a dismissal was motivated by discrimination will not give rise to any remedy.

86. If the possibility of capped compensation is introduced, whether a termination motivated by discrimination is purportedly for cause or on notice, there should be a remedy if loss flows from the dismissal. This is most likely to apply to loss of earnings following dismissal. In an indirect discrimination claim, damages might be sought on the basis that an employee had been forced to resign as a result of the discriminatory treatment, or dismissed because they refused to comply with a PCP.

87. The same analysis is likely to apply in where the employee has resigned in response to discriminatory treatment during the employment. Art.59A allows the employee to terminate the employment where a reasonable employee would have done so. There is clearly scope for a claim where an employee is subject to an act or act of discrimination which are also repudiatory breaches of the contract and resigns in response, thereby accepting those breaches. It might assist this argument to make the point that in English law most acts of discrimination are a breach of the implied term of trust and confidence[27]. For example

87.1. in *Shaw v CCL* UKEAT/0512/06 the female claimant made a request to work part time and for flexible working. The Respondent's refusal of that request was found to be both directly and indirectly discriminatory and it was found that her resignation was a response to that refusal (albeit at the time she did not allege that the refusal was an act of discrimination). The EAT found that the rejection of the claimant's request because she was a woman *or* the application of a condition which adversely impacted on women was capable of amounting to a fundamental breach of her contract;

87.2. In two other EAT cases it was found that a failure to make reasonable adjustments for disability over a period of time amounted to a repudiatory breach (*Nottinghamshire CC v Meikle* [2005] ICR 1 and *Greenhof v Barnsley Metropolitan*

[27] See Shaw v CCL UKEAT/0512/06/DM para 18

Borough Council [2006] IRLR 98). But note in *Greenhof* it was stated that there could be a breach of the duty to make reasonable adjustments which would not be a repudiatory breach of contract.

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