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A new class of claimant in discrimination law

British Airways Plc v Rollett & Others ✦ [2024] EAT 131; August 15, 2024

Implications for practitioners

It is no longer a requirement for a claimant bringing an indirect discrimination claim to have a relevant protected characteristic. All that is needed is a provision, criterion or practice (PCP) which puts a group with a relevant protected characteristic at a particular disadvantage, and for the claimant to be put at the same disadvantage as the group.

Facts

The claimants, who numbered 49 at the time of the original preliminary hearing, were Heathrow-based cabin crew. Their claims arose out of restructuring and scheduling changes undertaken by BA in response to the Covid-19 pandemic.

The claimants alleged that the scheduling changes put those (predominantly non-British nationals) who lived abroad and commuted to Heathrow from abroad, at a particular disadvantage compared to those who commuted from within the UK. Likewise, the claimants alleged that the changes put those (predominantly women) with caring responsibilities at a particular disadvantage compared with those who did not have caring responsibilities.

The claims were pursued both by claimants who had the relevant protected characteristics (from the examples above: non-British nationals and women), and those who did not.

Those who had the relevant protected characteristics brought claims for what could be described as 'ordinary' indirect discrimination. Those without the relevant protected characteristics brought claims for what could be described 'same disadvantage' indirect discrimination.

Employment Tribunal

EJ Anstis concluded that the tribunal had jurisdiction to consider indirect discrimination claims under s19 Equality Act 2010 (EA) where a PCP applied by an employer puts people with a particular protected characteristic at a disadvantage, and where the claimant suffers that disadvantage but does not have the same protected characteristic as the disadvantaged group. He came to this conclusion by relying on the decision of the Court of Justice of the European Union in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashita ot diskriminatsia* Case C-83/14; [2015] IRLR 746; [2015] Briefing 762. (He rejected any other type of unlawful discrimination based on 'association').

Employment Appeal Tribunal

BA appealed the ET's decision, contending that its interpretation went *'against the grain of the legislation'*, and created *'an entirely new category'* of claimant. The appeal was heard by Mrs Justice Eady, then President of the EAT.

The EAT dismissed BA's appeal, holding that the ET made no error of law in concluding that it had jurisdiction to consider indirect discrimination claims under s19 EA.

In her judgment, Eady P first set out the history and context of domestic equality legislation and the associated EU directives, up to and including the introduction of

✦ [2024] IRLR 891

the EA. She cited the observation of Baroness Hale in *Essop & Others v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice* [2017] UKSC 27; [2017] 1 WLR 1343; [2017] Briefing 830 that the *'whole trend of equality legislation since it began in the 1970s has been to reinforce the protection given to the principle of equal treatment.'* [para 18]

Eady P then observed that there was 'little dispute' between the parties that the effect of *CHEZ* (a judgment concerning the interpretation of the Race Directive) was to extend indirect discrimination to those who did not share the same protected characteristic as the disadvantaged group [para 23].

Next, Eady P set out the well-known 'Marleasing principle': that member states are required to interpret national law *'as far as possible'* in accordance with the wording and purpose of the relevant EU directives [para 24]. She outlined the limits on the interpretive obligation: namely, that the proposed interpretation should *'go with the grain of the legislation'* and should be *'compatible with the underlying thrust of the legislation'*. It should not be *'inconsistent with a fundamental or cardinal feature of the legislation'.* [para 25]

... the effect of *CHEZ* ... was to extend indirect discrimination to those who did not share the same protected characteristic as the disadvantaged group.

In drawing these threads together, Eady P noted that the 'grain' of the EA is clear: *'it seeks to harmonise discrimination law and to strengthen the law to support progress on equality'.* [para 53] While acknowledging that allowing a claimant without a relevant protected characteristic to bring a claim under s19 *'would undoubtedly amount to an extension of the protection'*, Eady P concluded:

> *I am unable to see that the extension to that protection arising from the ET's construction of section 19 can be said to go against the grain of the legislation; on the contrary, it seems to me to be entirely consistent with a statute that seeks to harmonise discrimination law and to strengthen the law to support progress on equality…* [para 61]

Comment

Claimants can rely on *Rollett* to bring 'same disadvantage' claims for indirect discrimination where the cause of action arose before January 1, 2024. From that date onwards, the supremacy of EU law (and therefore claimants' ability to rely on *CHEZ*) has been removed by the Retained EU Law (Revocation and Reform) Act 2023.

However, crucially, 'same disadvantage' indirect discrimination has been preserved in the new s19A EA, inserted by the Equality Act 2010 (Amendment) Regulations 2023 on January 1, 2024. S19A EA reproduces the effect of *CHEZ*, as applied in *Rollett*, to allow a claimant to bring a claim where a PCP puts them at *'substantively the same disadvantage'* as persons who share the relevant protected characteristic (s19A(1)(e)).

The most obvious beneficiaries of *Rollett* and s19A EA are male carers who wish to bring 'same disadvantage' indirect sex discrimination claims (for example, where restrictions on flexible working put them at a particular disadvantage because of childcare responsibilities). But the protection is extended to age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, and sexual orientation too (see s19A(2) EA). There is scope for creative thinking.

Adapting some examples of 'ordinary' indirect discrimination from the Equality and Human Rights Commission's employment code of practice, the following scenarios might give rise to 'same disadvantage' indirect discrimination claims:

- A hairdresser refuses to employ stylists who cover their hair, believing it is important for them to exhibit their haircuts. This is a PCP which puts or would put Muslim

women and Sikh men who cover their hair at a particular disadvantage. Could an applicant who is self-conscious about their alopecia and wants to wear a head covering bring a 'same disadvantage' religion claim?

- An employer invites its seasonal workers employed during the previous summer to claim a bonus within a 30-day time limit. The employer informs the workers by writing to them at their last known address. The PCP of writing to the workers puts or would put (predominantly non-British) migrant workers at a particular disadvantage, because these workers normally return to their home country during the winter months and are unlikely to receive the message in time. A British worker, who also lives abroad and who returned home for Christmas, misses the message too. Could the British worker bring a 'same disadvantage' race claim?

As lawyers become familiar with s19A EA, we are likely to see many more of these claims and creative ways of bringing them. It will be particularly interesting to see how courts and tribunals apply the notion of *'substantively the same disadvantage'* without any guidance – just yet – from higher courts.

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