In indirect discrimination the reason why is not relevant says the Supreme Court

An important Judgment from the Supreme Court has removed one line of argument which had been available to employers in an indirect discrimination claim. In the joined cases of *Essop v Home Office (UK Border Agency)* and *Naeem v The Secretary of State for Justice*, the UK’s highest Court has held that a claimant does not need to show some reason *why* the relevant provision, criterion or practice places people who share their protected characteristic at a disadvantage, before an indirect discrimination case can be pursued (overturning the Court of Appeal decisions in the two cases being considered).

What is indirect discrimination?

As the Supreme Court acknowledges in this Judgment, Indirect discrimination is “not so simple” as direct discrimination. Indirect discrimination occurs when an apparently neutral practice in fact has an adverse impact upon a group sharing a protected characteristic, usually demonstrated statistically. So, for example, a rule requiring employees to be at least six feet tall would have an adverse impact upon more women than men, even though the rule would not specifically differentiate between genders and even though some women would be taller than the height requirement. For an individual to bring a claim they personally must be disadvantaged (so personally be less than six feet tall themselves). Importantly indirect discrimination can be justified by the employer, unlike a direct discrimination claim which can never be defeated by showing a good or laudable motive.

What happened in the cases?

In *Essop*, the Home Office had a practice of requiring all staff to pass a generic ‘core skills’ assessment to become eligible for promotion. Statistics produced indicated that BME candidates and older candidates were disproportionately likely to fail the test (albeit no one really knew why and many BME and older candidates did in fact pass the test). Relying on the statistical evidence a group of employees who had failed the assessment brought claims of indirect age and race discrimination against the Home Office.

*Naeem* involved a Muslim prison chaplain who complained of indirect religious and race discrimination. He pointed to the fact that the prison service operated a pay scale with increments based on length of service. The prison service only began employing Muslim chaplains in 2002 (as there was insufficient need for their services before that date). Mr Naeem alleged
that the practice of linking pay to length of service meant that Christian chaplains (many of whom had been employed prior to 2002) generally received higher pay and placed Muslims including himself at a disadvantage (and he drew a similar contrast on racial grounds). His employer argued that the reason for the disadvantage simply had nothing to do with his race or religion.

The key question common to both cases was: did the claimants have to show some reason why they and those sharing their protected characteristic had suffered the disadvantage (or was the statistically demonstrated disadvantage enough)?

The Supreme Court decision

The Supreme Court has answered no to this question. It held that the definition of indirect discrimination does not contain any express requirement for an explanation of the reason why a particular provision, criterion or practice puts one group at a disadvantage compared to others. It is enough that it does.

In the Essop case, the claimants simply needed to show that the core skills test presented a greater risk of failure to BME and older candidates as a group. The fact that each individual claimant had actually failed the test showed that they had suffered individual disadvantage. The Supreme Court said that it did not matter that some BME and older candidates had in fact passed the test, stating that “it is a typical feature of indirect discrimination that some members of the disadvantaged group will not in fact suffer the disadvantage”.

One of the concerns raised at the hearing of these cases was that ignoring the ‘reason why’ question would allow ‘undeserving claimants’ who had failed for reasons that have nothing to do with the disparate impact of the policy (e.g. because they were late or failed to prepare) would be able to "coat tail" on the back of more deserving claims. The Supreme Court proposed a number of ways around this problem and stressed that, when a tribunal is considering individual disadvantage, “it must be permissible for an employer to show that an employee has not suffered harm as a result of the provision, criterion or practice in question”.

In the Naeem case, the Supreme Court held that, unlike in Essop, the reason for the disadvantage was clear. The pay scale put Muslim chaplains at a disadvantage because they had, on average, shorter lengths of service than Christian chaplains. This was enough to establish that the pay practice put Muslim chaplains at a particular disadvantage. However, the Supreme Court agreed with the earlier decision of the Employment Tribunal that the practice was objectively justified as a means of rewarding experience and skill.

What does this mean for me?

This Judgment does not require any immediate changes to your usual practices. Indeed the whole point of it is that indirect discrimination can occur when you haven't identified that it might do so – as the Supreme Court explains indirect discrimination is about “dealing with hidden barriers which are not easy to anticipate or spot”. What that means is that you must not dismiss out-of-hand complaints raised which assert indirect discrimination, just because you can't see any link between the practice complained of and the protected characteristic relied upon. You must also ensure that for all policies, procedures and practices you implement or have in place, you have thought-through why they are being applied and the rationale for doing so. As the Court observed “a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they have a disparate impact, will try and see what can be modified to remove that impact whilst achieving the desired result”. In other words if something you do seems to adversely impact upon
men/women (including particularly those with primary childcare responsibilities), younger or older workers, those of a particular race or ethnicity, those sharing a sexual orientation, or employees who hold a particular religious belief, look at why you do it and whether you can change what you do (without losing what it is aimed to achieve).

The decision undoubtedly makes it easier for claimants to demonstrate that a policy or practice has a disparate impact as it has removed the first hurdle for establishing indirect discrimination. Statistics may show that your carefully designed policy or practice in fact has a disparate impact on a group sharing a protected characteristic, which you may not have anticipated. This decision makes it more likely that, on the basis of statistics alone, an Employment Tribunal will find that your policy potentially discriminates indirectly. However, it is important to remember that, even if a policy or practice is found to be potentially indirectly discriminatory (which may be for many reasons – what the Court calls “context factors”), this can be justified if you can show that it was a proportionate means of achieving a legitimate aim. The issue of whether a policy or practice can be objectively justified will often be your most important consideration when implementing change or defending a later claim. The Supreme Court stressed in this Judgment that there is no “shadow or stigma” in seeking to justify a policy or practice. There may be very good reasons why a particular measure has been put in place.

Comment

Previous decisions in these cases (particularly by the Court of Appeal) seemed to introduce an extra layer into the test for indirect discrimination. In clarifying that a claimant does not need to demonstrate the ‘reason why’ they have suffered disadvantage, the Supreme Court has effectively stripped back the test and restored the previous position. This arguably restores a clearer distinction between the concepts of direct and indirect discrimination, which might have been contended to have become blurred over time. If a policy or practice is challenged by a member of staff, or you are unsure whether a workplace rule or procedure may potentially have discriminatory effect or an adverse impact on those sharing a protected characteristic, it is important to seek specialist legal advice at an early stage and to record the reasons why something is being done and what has been taken into account in doing it. For those of you dealing with equal pay issues, this Judgment may also have ramifications for one of the arguments upon which employers have been able to rely (which will inevitably be tested in future appeal cases).

Phil Allen (phil.allen@weightmans.com) is a Partner in the Employment, Pensions and Immigration Team and is based in Manchester. If you have any questions, please do not hesitate to contact Phil or speak to your usual Weightmans advisor.

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