

Significant discrimination cases  
2016–2017  
NI Employment Lawyers' Group

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# key themes

- ▶ access to justice
  - ▶ proving indirect discrimination
  - ▶ sex discrimination
  - ▶ worker status
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# Lord Reid: *R (on the application of UNISON) v Lord Chancellor*

*Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other. Access to the courts is not, therefore, of value only to the particular individuals involved. [para 68–69]*

# *Essop and Ors v Home Office (UK Border Agency)* [2017] UKSC 51

- ▶ no express requirement in indirect discrimination to show reason why the provision puts the claimants at the disadvantage
  - ▶ sufficient to show it has that result
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# S19 Equality Act 2010

S19 (1) A person (A) discriminates against another (B) if A applies to B a PCP which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a PCP is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

## A3 Race Relations (NI) Order 1997

(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in paragraph (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but—

- (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;
  - (b) which puts or would put that other at that disadvantage; and
  - (c) which he cannot show to be a proportionate means of achieving a legitimate aim.
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# *Essop and Ors v Home Office*

1. no need to explain why PCP has the discriminatory effect
  2. causal link between the PCP and the particular disadvantage suffered must be established
  3. many reasons why groups cannot comply
  4. no requirement for every member of the group to be unable to comply
  5. statistical evidence can establish disparate impact
  6. employer has a justification defence
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# *Naeem v Secretary of State for Justice*

- ▶ not necessary to show that the PCP which has a disparate impact on Muslim chaplains, is related to them as Muslims
  - *The same could be said of almost any reason why a PCP puts one group at a disadvantage. There is nothing peculiar to womanhood in taking the larger share of caring responsibilities in a family. Some do and some do not.... All that this means is that the employer may have to justify the PCP.'* Lady Hale
- ▶ pool for comparison includes all those affected by the PCP

# prohibition on wearing an Islamic headscarf

- ▶ *Achbita v G4S Secure Solutions NV*; Case C-157/15
  - may be objectively justified indirect discrimination if it is part of a policy of religious ‘neutrality’ in the workplace.
- ▶ *Bougnaoui and ADDH v Micropole SA* Case C-188/15A
  - cannot be justified on the basis that customer preference is a genuine occupational qualification

*HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426

- ▶ gender segregation in the school was less favourable treatment
- ▶ potential negative impact on boys' and girls' chances to develop into socially confident individuals with peers from the opposite gender

# dissenting judgment, LJ Gloster:

*'... where girls are not allowed to mix with boys or to be educated alongside them, notwithstanding they are studying the same curriculum and spending their days on the same single school site, is bound to endorse traditional gender stereotypes that preserve male power, influence and economic dominance. And the impact of that is inevitably greater on women than on men.'*

## LJ Gloster:

- ▶ *'... in my judgment, the segregation by sex on a mixed sex educational campus necessarily endorses and perpetuates, or at the very least risks endorsing and perpetuating, stereotypes about girls and women that are still pervasive in society and which are widely recognised as detrimental and unduly limiting. And that in turn results in expressive harm to girls.'*

*R (Coll) v Secretary of State for Justice*  
[2017] UKSC 40, [2017] 1 WLR 2093

▶ direct sex discrimination

- *'... all the women who would be required to live in an AP when released suffered the much greater risk than the men that they would be sent to an AP further from their homes and families. The fact that some of them would not suffer this detriment does not mean that those that who do suffer it have not been discriminated against.'*

*Gareth Lee v Colin McArthur, Karen McArthur  
and Ashers Baking Company Limited [2016]*

NICA 19

- ▶ direct discrimination on grounds of
  - sexual orientation
  - religious and political belief
- ▶ appealed to the Supreme Court:
  - the correct compactor for direct discrimination?
  - ‘freedom of commercial’ speech?

## *FirstGroup Plc v Paulley* [2017] UKSC 4

- ▶ failure to provide RA where transport provider's policy requires bus drivers to request non-wheelchair users to vacate the wheelchair space and do nothing further if the request rejected

# *McCorry and Ors v McKeith* [2016] NICA 47

- ▶ CA upheld finding of direct associative disability discrimination
- ▶ *'... if this is not a case where the burden of proof should shift, no such case exists'*

*In the matter of an application by Joanna Toner for judicial review [2017] NIQB 49*

- ▶ failure to comply with S75 NIA
- ▶ *‘at no stage in the [public realm scheme’s] development, was the issue of the public sector equality duty subjected to a section 75 compliant process’*
- ▶ judicial review of the failure was appropriate

*In the matter of an application by Denise Brewster for Judicial Review* (Northern Ireland) [2017] UKSC 8

- ▶ SC scrutinises social–economic policy
- ▶ applicable legal principles:
  - state’s duty to secure entitlement to equal treatment under Article 14
  - must be a reasonable relationship of proportionality between the means employed and the aim
  - state must be vigilant to secure rights
  - objective assessment of justification required
  - Is the justification ‘*manifestly without reasonable foundation*’?

# Michalak v General Medical Council [2017] UKSC 71, November 1, 2017

- ▶ claimant who wishes to complain of unlawful discrimination by a qualification body can take their complaint to the Employment Tribunal in all cases, unless there is a specific alternative right of appeal against the impugned decision or conduct
- ▶ overrules *Jooste v GMC* [2012] EQLR 1048

# worker status: both cases to be appealed to SC

- ▶ *Pimlico Plumbers v Smith* [2017 EWCA Civ 51, February 14, 2017
  - self employed contractor is a worker under Employment Rights Act 1996
    - performed work personally
    - was not in business on his own account – was required by PP contract to work 40 hours weekly
    - subordinate to PP
    - PP imposed restrictive covenants post-contract
- ▶ *Aslam & Farrar v Uber* UKEAT 0056/17, November 10, 2017
  - Uber drivers are workers and can bring claims under the ERA, Working Time Regs 1998 and National Minimum Wage Act 1998

# EAT disability cases

- ▶ *Taylor v Ladbrookes Betting and Gaming Company* [2017] UKEAT/0353/15, December 2016
  - Type 2 diabetes could be a disability
  - potential for progressive deterioration of condition
- ▶ *Peninsula Business Services Ltd v Baker* [2017] IRLR 394
  - claimed harassment on grounds of disability
  - disability asserted but not proven
  - query: could it be asserted that his disability was a 'perceived' disability?

# EAT disability cases

- ▶ *Guinness Partnership v Szymoniak*  
UKEAT/0065/17, July 2017
  - adverse effect of the impairment needs to be long-term (not the impairment)
- ▶ *Government Legal Service v Brookes*  
UKEAT/0302/16, March 2017
  - reasonable adjustment to recruitment test refused for applicant with Asperger's Syndrome
  - not justifiable and was indirect disability discrimination
    - test was not the only way to achieve legitimate aim of finding the best candidates

# Finally...

- ▶ *UNITE the UNION v Nailard* UKEAT/0300/15; September 27, 2016
  - Unite held vicarious liable for sexual harassment of its employee by full-time elected officers
- ▶ *Asda v Brierley* UKEAT/0011/17, August 2017
  - Article 157 TEEC is directly effective in equal value as well as like-work claims
  - comparisons across departments can be made where pay is attributable to a single source

# upcoming

- ▶ SC judgment in abortion case: *R on application of A&B v SS for Health* 2017 UKSC 41
  - appeal re unsuccessful challenge under A14 & A8 ECHR regarding right of UK citizen resident in NI to free abortion service in NHS in England
  - heard in October 2017
- ▶ Fawcett Society's sex discrimination law review, reporting January 2018
  - NI sex equality legislation regime included