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Ten Years of the Equality Act 2010: Some Key Employment Cases

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What we will cover

As part of Chambers' webinar series examining the first ten years of the Equality Act 2010 ("EqA"), Employment Team members review some of the most noteworthy cases concerning employees, in particular:

- The scope of the "religion or belief" protected characteristic;
- The protection of disabled employees via the duty to make reasonable adjustments and s.15 EqA claims;
- The development of the concept of indirect discrimination; and
- Whether discrimination because of a person's immigration status is covered by the EqA.

Religion or belief

- S.10 EqA 2010.

(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.

*(2) Belief means **any religious or philosophical belief** and a reference to belief includes a reference to a lack of belief.*

(3) In relation to the protected characteristic of religion or belief—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

Grainger plc and others v Nicholson *[2010] I.R.L.R. 4*

- Employment Equality (Religion or Belief) Regulations 2003.
  - Reg.3: discrimination on grounds of religion or belief.
  - Reg.2(1)(a) and (b): "religion" means any religion and **"belief" means any religious or philosophical belief**.

Grainger plc and others v Nicholson *[2010] I.R.L.R. 4*

- Criteria for philosophical belief (at [24]):
  - Genuinely held.
  - Not opinion / viewpoint based on present state of information.
  - Weighty and substantial aspect of human life and behaviour.
  - Certain level of cogency, seriousness, cohesion and importance.
  - Must be worthy of respect in democratic society, not incompatible with human dignity, and not conflict with fundamental rights of others.

Grainger plc and others v Nicholson *[2010] I.R.L.R. 4*

- Other factors increasing flexibility:
  - Not required to be belief shared by others [26].
  - Not required to be life-governing [27].
  - Not disqualified if based on political philosophy [28].
  - Not disqualified if based on science [30].

Forstater v CGD Europe *UKEAT/0105/20/JOJ*

- Issue for EAT: does C's belief as to immutability of sex amount to a philosophical belief under s.10 EqA?
- Not in dispute that *Grainger* criteria are the touchstone [22].
- Particular criterion = *Grainger* (v): is the belief "*worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others*"?
- Bar not to be set too high [57].

Forstater v CGD Europe *UKEAT/0105/20/JOJ*

- *Grainger* (v) derived from ECHR case law (ECtHR and domestic) [57]-[61].
- Relevance of Art.17 ECHR – prohibition on use of ECHR to **destroy** rights of others [62].
- More recent ECtHR examples – *Ibragimov* / *Lilliendahl* [63]-[65].
- Outside the protection – Nazism / totalitarianism / "*espousing violence and hatred in the gravest of forms*" [70]; [79].
- Manifestation of the belief – only part of the analysis [72]-[78].

Forstater v CGD Europe *UKEAT/0105/20/JOJ*

- Irrelevant that:
  - ET itself considers some tenets of belief to be unfounded [85].
  - C dogmatic in belief [86].
  - ET considers scientific foundations of belief to be weak [87].
- Relevant in this case that:
  - Gender Recognition Act did not "*erase memories of a person's gender before the acquired gender*" or "*impose recognition of the acquired gender in private, non-legal contexts*" [97].
  - C wasn't the only one to hold belief [113].
  - C's belief consistent with current law [114].

Forstater v CGD Europe *UKEAT/0105/20/JOJ*

- No balancing exercise between competing rights [102].
- So where is the line to be drawn?
- Finally – note on procedure [119].

Disability discrimination

- Cases involving allegations of disability discrimination are an increasing feature in employment tribunals. Two key cases under the EqA are *Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216* and *Pnaiser v NHS* England & another *[2016] IRLR 170.*
- *Griffiths* concerned the duty to make reasonable adjustments and *Pnaiser* a claim under Section 15 (Discrimination related to disability).

Griffiths v Secretary of State for Work and Pensions

- This case concerned a claimant with post viral fatigue and fibromyalgia. Following a 62 day absence she was given a formal improvement warning and sought two adjustments – discounting her previous disability related absence and extending the target period in future.
- A reasonable adjustment claim requires the ET to identify the relevant PCP, whether it caused the disabled claimant a substantial disadvantage compared to non-disabled employees and, if so, was there any reasonable adjustment that might ameliorate the disadvantage.
- R contended there was no substantial disadvantage as the sick policy applied to everyone. If anything, they said it favoured disabled staff as their targets could be extended. This was accepted by the ET and EAT.

Griffiths (2)

- However, the CA overturned this finding. Relying on *O'Hanlon v Commissioners for HMRC (2007) ICR 1359*, Elias LJ stated it was no answer to a reasonable adjustment claim to say the PCP applied to everyone. Common rules may well disadvantage a disabled person. The PCP was the requirement to maintain a certain level of attendance and this did disadvantage the disabled claimant compared to non-disabled employees.
- Elias LJ went on to reject that the comparison was akin to that in *Malcolm v London Borough of Lewisham (2008) 1 AC 1399,*

> **"If the approach in *Malcolm* were adopted, it would mean that the court should be indifferent to the reasons for absence just as it would be indifferent to the reason why the blind man wanted to take a dog into the restaurant. The fact that both the blind and sighted man who wished to take a dog into the restaurant were subject to the same disadvantage was enough. Similarly here; the employer treats disabled and able-bodied the same on the basis of the length of their absence and need not be concerned why the absence has occurred." per Elias LJ at para 57**

Griffiths (3)

- However, it was not all good news for the claimant. Elias LJ and the CA rejected her appeal on the ground that the ET had been entitled to find the adjustments she contended for were not reasonable.
- What is reasonable is a question of fact for the ET.

Pnaiser v NHS England & Another

- *Pnaiser* concerned the provision of a poor verbal reference based on a disabled person's sick record and the subsequent withdrawal of the offer of employment based on this.
- Section 15 claims require a claimant to show they have been subject to unfavourable treatment because of 'something arising in consequence of their disability' which the respondent cannot show was a proportionate means of achieving a legitimate objective.

Pnaiser (2)

- The EAT found the ET had erred in law when applying the burden of proof.
- Simler P went on to say that, based on the findings by the ET, the poor reference and withdrawal of the job offer were unfavorable treatment which arose in consequence of her disability.
- The EAT had to identify whether there was unfavourable treatment and by whom. No question of comparison arose.

Pnaiser (3)

- The ET must determine what caused the impugned treatment or what was the reason for it. An examination of the conscious or unconscious thought process is likely to be required. The 'something' need not be the sole or main reason but must have a significant (more than trivial) influence.
- Motive is irrelevant.
- The casual link may include more than one link. In other words, more than one relevant consequence of the disability may require consideration.

Indirect discrimination

Before considering the leading authority on indirect discrimination, a reminder of the elements of the s.19 EqA definition:

- Application of a provision, criterion or practice ("PCP");
- To those who do and do not share C's protected characteristic;
- The PCP puts, or would put, persons with whom C shares the characteristic at a particular disadvantage when compared with those who do not;
- It puts or would put C at that disadvantage; and
- R cannot show it to be a proportionate means of achieving a legitimate aim.

Essop & Ors v Home Office (Border Agency); Naeem v Secretary of State for Justice *[2017] UKSC 27*

In *Essop* and *Naeem* the Supreme Court ("SC") addressed some fundamental questions about indirect discrimination, holding at [30] – [33] that the statutory definition did not require:

- The *reason* for the group disadvantage to be identified;
- The claimant to have experienced the disadvantage for the *same reason* as others sharing the protected characteristic; and
- The reason for the disadvantage to be *causally linked* to the protected characteristic relied on.

How the issue arose: Essop (2)

Mr Essop was the lead claimant for Home Office employees who alleged an internal promotion test (the CSA) was indirectly discriminatory in terms of race and age.

Agreed statistics showed that proportionately BME and older candidates had a significantly lower pass rate. Neither party knew why. The claimants had failed the test.

The Court of Appeal ("CA") held that the statistical disparity was insufficient to show *prima facie* discrimination; the nature of the disadvantage shared by the group and by the claimants had to be identified.

How the issue arose: Essop (3)

Naeem (heard by the SC at the same time) concerned the Prison Service's pay scheme whereby employees progressed up pay bands based on length of service and appraisals.

Until 2002 no Muslim chaplains had been employed (due to insufficient numbers of Muslim prisoners). Group disadvantage was shown for Muslim chaplains, including the claimant recruited in 2004, because of longer serving Christian chaplains.

The CA agreed with the CA's reasoning in *Essop* and went further; it was fatal that the reason for the disparity was non-discriminatory and did not relate to a characteristic specific to Muslims.

The key reasoning: Essop (4)

Baroness Hale's reasons for disagreeing with the CA included:

- The statutory definition did not expressly require that it be shown *why* a PCP put one group at a disadvantage [24];
- Direct discrimination did require a link between the treatment and the protected characteristic; whereas indirect discrimination required a causal link between the application of the PCP and the particular disadvantage suffered [25];
- The reason for the disadvantage could be many and varied, including genetic factors, societal expectations or traditional employment practices. The reason need not be unlawful nor under the control of the employer [26];

The key reasoning (cont.): Essop (5)

- That some members of the disadvantaged group could meet the PCP (e.g. pass the CSA) was irrelevant; the PCP did not have to disadvantage *all* members of that group [27];
- It remained open to the respondent to show that the PCP was justified [28];
- The fact that a PCP did not arise from any attribute peculiar to the protected characteristic was not significant ("there is nothing peculiar to womanhood in taking the larger share of caring responsibilities in a family".) [39].

The SC also confirmed that the pool should include all those affected by the PCP [41].

Outcome and implications: Essop (6)

- In *Essop* the appeal was allowed and the case remitted to the ET.
- In *Naeem* the appeal failed; although the other elements of the s.19 test were satisfied, the ET's finding on justification stood.
- The SC's decision made proof of *prima facie* discrimination simpler and less technical. Baroness Hale deprecated a judicial reluctance to reach the point of justification; the requirement to justify a PCP did not place an unreasonable burden on respondents; nor should it be seen "as casting some sort of shadow or stigma" [29].

Discrimination and immigration status

"Race" is one of the protected characteristics: s.4 EqA. It "includes – (a) colour; (b) nationality; (c) ethnic or national origins": s.9(1).

In *Onu v Akwiwu; Taiwo v Olaigbe* [2016] 1 WLR 2653 the SC held that less favourable treatment because of a person's precarious immigration status could not be equated with less favourable treatment because of nationality.

The facts and the outcome

- In both cases the claimant was a Nigerian migrant domestic worker who, while employed in London, was exploited and badly treated by her employer.
- In each case the ET decided she was not treated badly because she was Nigerian or because she was black, but because her migrant status made her vulnerable, given her dependency on her employer for continued employment and residence in the UK.
- Claims for direct race discrimination and indirect discrimination under the EqA failed.

The decision: no direct discrimination

The SC held that immigration status was not so closely associated with nationality that the two were indissociable for this purpose [22] - [30]:

- There were many non-British nationals living and working in the UK who did not share the claimants' vulnerability and accordingly would not have been treated badly;
- The concept of indissociability usually requires an exact correspondence between the category of those suffering the less favourable treatment and the relevant protected characteristic.

Implications

This did not rule out a finding of indirect discrimination if a PCP was applied that disadvantaged those of a particular nationality. However, no-one could identify a relevant PCP in the instant cases, given the treatment entailed exploitation of particularly vulnerable workers, rather than something applied to all employees [31] – [33].

The decision emphasises that, unlike Article 14 ECHR, the EqA list of characteristics that may give rise to unlawful discrimination is not open-ended.

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Questions?