



INDIRECT DISCRIMINATION REVISITED

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INTRODUCTION

1. The indirect discrimination cause of action has long been the generator of much consternation and confusion, both academically and in practice. As advisers, the ability to descend from the fence when it comes to an assessment of the prospects of success for such a claim (or the defence of it) has been significantly hampered by the range of concepts involved and ongoing developments in the correct understanding and/or application of those concepts.
2. Under s.19 EqA 2010, the correct “*provision, criterion or practice*” (PCP) must first be identified. Then, the correct method must be deployed for ascertaining whether that PCP puts people sharing the relevant protected characteristic at a “particular disadvantage”. As Sedley LJ noted in ***Eweida v British Airways [2010] IRLR 322 (CA)***, earlier incarnations of the legislation required “*the isolation of ‘pools’ within which the proportion of disadvantage could be gauged, a task which defeated three decades’ judicial attempts to find a workable formula*” (para.14). While the EqA 2010 no longer formally requires the task to be carried out in that way so as to establish “disparate impact” (following instead, the approach of the Framework Directive 2000/78/EC requiring identification of particular disadvantage), a mechanism for identifying and carrying out the correct comparison is still required, and there has often remained significant room for argument as to the proper approach on the facts of any given case.
3. ***Eweida*** itself saw the articulation of the requirement for “group disadvantage”, which ostensibly remains good law and on the face of it rules out establishing particular disadvantage by reference to a group of hypothetical persons besides an individual claimant, adding a further hurdle to be overcome.
4. Then of course the Court of Appeal in ***Essop v Home Office (UK Border Agency) [2015] IRLR 724***, imposed the further burden of having to establish *why* the PCP in question puts the relevant group (and the individual claimant) at the relevant particular disadvantage.
5. And those difficulties all had to be overcome, before the respondent would even be called upon to make out the objective justification defence, which might well then turn out to provide a further reason to doubt the prospects of success for the claim envisaged in any event.
6. Add the availability of other causes of action to that list of problems, and it is easy to see why indirect discrimination has not been the claim of choice for many litigants. With regard to disability cases in particular, reasonable adjustments claims under s.20 and – more recently – claims under s.15 have understandably been much more popular.
7. However, a range of recent developments in the area, including the Supreme Court’s judgment in ***Essop/Naeem [2017] IRLR 558*** (overturning the Court of Appeal), have arguably lifted the fog of difficulty to a significant degree, which may encourage more frequent use of s.19 in future. What follows is a consideration of those developments.

The terms of s.19 EqA 2010

8. Whilst considering those developments, it is important to keep the statutory language in mind. Section 19 provides as follows:
 - (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.*



(2) For the purposes of subsection (1), a provision, criterion or practice 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 protected 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.

Identifying PCPs

9. Framing the PCP correctly is the starting point of any indirect discrimination claim. It has been understood for some time now – at least insofar as a “provision” is concerned – that the words are broad enough to cover a discretionary management decision relating specifically to the claimant and not applying to others. In ***British Airways Plc v Starmar [2005] IRLR 862 (EAT)***, a female pilot’s application to work 50% of her full-time hours was rejected, and she was instead told that she would be required to work 75% of her full-time hours. The EAT held that that decision amounted to a “provision”, but there is no obvious reason why it could not also constitute a “criterion”: in order to have a reduction of hours agreed, the criterion was that there would have to be agreement to a minimum of 75% of full-time hours. Importantly, the EAT concluded that there was no requirement for the provision actually to have been applied to others (although *quaere* whether the EAT’s conclusion in this respect can withstand the “group disadvantage” requirement articulated in ***Eweida***, on which see further below).
10. By contrast, in relation to the concept of a “practice”, the EAT decided in ***Nottingham City Transport v Harvey [2013] EqLR 4*** that a dismissal that was unfair because of a flawed investigation and procedure, was a one-off act in relation to the claimant, such that it could not be said to constitute a “practice”. Indeed, there was no evidence that the employer’s practice was to ignore mitigation evidence and to fail to carry out a proper investigation. An “element of repetition” is required.
11. That is not to say however, that evidence is required of the matter said to constitute a “practice” having occurred before, as is made clear by the more recent EAT judgment in ***Pendleton v Derbyshire County Council and anor [2016] IRLR 580***.
12. In that case, a Christian claimant who viewed her marriage vows as sacrosanct, was made to choose between her continued employment as a teacher and her relationship with her husband, who had been convicted of sex offences. The tribunal had accepted that the respondent applied a policy of dismissing those who chose not to end a relationship with a person convicted of making indecent images of children and voyeurism. What had been pleaded as the PCP however, was:

“The practice of regarding as gross misconduct/SOSR a choice not to end a relationship with a person convicted of making indecent images of children and voyeurism”.
13. The respondent cross-appealed at the EAT, contending that the tribunal had wrongly found that the PCP was a “policy”, when that was not the pleaded case. Moreover, in the light of ***Harvey***, the practice that had been pleaded could not amount to a PCP, since it was a one-off decision.



However, the EAT pointed to findings of fact made by the tribunal on the basis of the evidence of the Chair of Governors, which was:

“As far as I was concerned we would treat anybody else in the same way regardless of whether they were married, unmarried but living with someone as a partner or simply co-habiting but supporting someone with convictions for sexual offences against children.”

14. The EAT concluded that this was evidence of a “practice” as well as a “policy”: it was evidence that the same thing would be done in future. HHJ Eady QC drew attention to the fact that s.19 would bite where the PCP is applied *or would apply*, in the course of reaching that conclusion.
15. In a similar vein, more recently still in **Chief Constable of West Midlands Police and ors v Harrod and ors [2017] IRLR 539 (CA)**, Bean LJ made some *obiter* observations to the effect that pinning down whether something is a “provision” or a “criterion” or a “practice” is not entirely necessary, so long as what is alleged can properly be said to constitute one or a combination of them.
16. The case concerned cuts to Police budgets following the 2010 general election. Police forces had powers under reg.A19 of the Police Pensions Regulations 1987, to impose compulsory retirement for the “general interests of efficiency” of the force. Reg.A19 allowed for such compulsory retirement of officers who would be entitled to receive a pension equivalent to 2/3 of their “average pensionable pay” (2/3 APP). In order to reduce the numbers affected, various forces across the country decided to overlay an approach to the effect that all officers with 2/3 APP would be required to retire, unless their skills were such that they could not easily be replaced. The officers who retired pursuant to this approach, were all 48 or over. The Court of Appeal held that there had been no indirect age discrimination (on grounds that will be considered further below), but in the course of doing so the Court had to address arguments between the parties as to whether what was at the root of the claim was a “policy” or a “practice”. Bean LJ quoted with approval (at para.23), the words of Langstaff J in the EAT in **Harrod**:

“I think it is in general unhelpful to analyse s.19 of the Equality Act 2010 as if it were critical whether that which produces discrimination is a “provision” on the one hand, a “criterion” on the other, or a “practice” on the next: the question for the tribunal is whether apparent discrimination results from something which might properly be described by any or all of those labels, and if so whether it can be justified...”
17. Instead, in Bean LJ’s view, it is perfectly permissible to use the general umbrella term “PCP”.
18. The effect of these recent developments in **Pendleton** and **Harrod** therefore, is likely to be a reduction in the scope for pleadings points to be taken successfully by respondents in relation to the PCP, and by the same token a reduction in the need to agonise over whether to allege a “provision”, a “criterion” or a “practice”. Claimants may now find it preferable simply to plead “the PCP”, and to focus on articulating factually, the particular apparently neutral feature of the case that is said to create particular disadvantage.
19. Stepping back from the terms of s.19, as Lady Hale put it in **Essop/Naeem** in the Supreme Court, what is at issue in an indirect discrimination claim, are *“rules and practices which are not directed at or against people with a particular protected characteristic but have the effect of putting them at a disadvantage”* (para.1).
20. It is important to keep in mind however, that the comments of Bean LJ/Langstaff J in **Harrod**, are only expressed as a general observation. In some cases, it will still be necessary to identify which type of PCP is at issue. It is suggested that this is most likely to be the case where “practices” are concerned, because of the need for an element of repetition (whether actual repetition of something that has already occurred, or hypothetical repetition in future). If something is alleged to be simply a “PCP” which can only realistically constitute a “practice”, it



will still be open to a respondent to challenge that contention by pointing to an absence of the element of repetition. What **Harrod** does not signify, is an ability to call things “PCPs” that are not PCPs.

“Application” of the PCP?

21. Aside from identifying the PCP in the abstract, a further interesting and potentially significant question that may arise, is whether the PCP has been “applied” to the claimant, and whether it also “applies, or would apply” to others not sharing the relevant protected characteristic.
22. This question is especially likely to arise in the context of PCPs consisting of policies, or the employer’s requirements that underlie them: if a policy sits on a shelf or in a drawer, is it being “applied” to the workforce that is subject to it, or is it only “applied” when action needs to be taken pursuant to it in respect of a particular employee?
23. It might be argued for instance, that an attendance management policy (or underlying requirement to attend work at an acceptable level) “applies” when action is taken pursuant to it in the form of warnings. If that is when “application” occurs, and bearing in mind the “group disadvantage” requirement, it might be said that it is necessary for a claimant to point to other actual people who have received warnings and the like, and to demonstrate that of those employees to whom the policy is “applied”, a disproportionate number are disabled employees. The employer would argue of course, that anyone having a level of absence sufficient to trigger action under the policy, is treated the same, whether disabled or not.
24. Again, it is contended that recent developments indicate that such a restrictive approach is wrong.
25. The view that such a policy does not create comparative disadvantage because disabled and non-disabled are treated alike at the point of accruing sufficient absence for triggering a sanction was discredited by the Court of Appeal in **Griffiths v Secretary of State for Work and Pensions [2017] ICR 160**, which analysis held true for s.19 as well as for s.20 (paras.58-63). Moreover, there is no suggestion anywhere in Elias LJ’s judgment, that a claimant is required to point to other disabled persons in the same position and to establish statistically that more of those people in respect of whom action is taken are disabled.
26. The PCP is “applied” continuously at all times to all staff (per Elias LJ at para.47):

“In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the ET framed it in this case: the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal.”
27. Indeed, it is evident that the disadvantage (there “substantial” disadvantage for the purposes of s.20 rather than “particular” disadvantage for the purposes of s.19, but Elias LJ did not consider there to be any meaningful difference between the two) could be established in an abstract way by means of logical extrapolation by reference to hypotheticals, because if the disability is of a kind likely to give rise to increased absence, then the disadvantage exists by reason of that likelihood, not only when the increased absences actually occur. That being the case, it must be that the PCP is “applied” at all times to all employees that are subject to it, so that pre-emptive adjustments can be made. This is important conceptually since it widens the field in terms of the boundaries of the groups for comparison, and militates against the need for statistical evidence, making life easier for the claimant.
28. This approach is also echoed in **Pendleton**, in terms of the EAT’s emphasis on whether the PCP “would put” persons sharing the claimant’s protected characteristic at a particular disadvantage: either the PCP applies at all times, so that it “would put” others at a disadvantage if the relevant circumstances arose, or it “would put” them at that disadvantage if the PCP is said to be applied in the event of the circumstances arising.



“Particular disadvantage”

22. This latter issue leads on to the question of how to establish “particular disadvantage”, because the two issues are very much intertwined.
23. The broader approach to the application of the PCP, entails a broader view of the group of people that should be under consideration when assessing comparative particular disadvantage.
24. Previously, as Maurice Kay LJ put it in **Somerset County Council v Pike [2009] IRLR 870 (CA)**, “[t]he comparative exercise is crucial but the identification of appropriate groups has given rise to recurrent difficulty” (para.1).
25. Following the Supreme Court’s judgment in **Essop/Naeem**, the exercise has been clarified and simplified, in a manner that is consistent with the **Griffiths** and **Pendleton** approaches discussed above.

The pool: *Essop and ors v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] IRLR 558*

26. In **Essop**, the claimant was employed by the Home Office as an immigration officer. It was common ground that there was a PCP of a requirement to pass a “Core Skills Assessment” as a pre-requisite to promotion. Mr Essop (and other claimants) had failed that assessment. A report showed that BME candidates and older candidates had higher failure rates, although the reason was unknown.
27. In **Naeem**, the claimant was an imam who worked as a chaplain in the prison service. Before 2002, imams were employed on a sessional basis, due to perceived lack of demand for their services. Subsequently, they were employed in the same way as other chaplains. The effect of the change however, was that Muslim chaplains tended to have shorter periods of continuous service. Because of the application of the PCP of the pay scheme for chaplains – which linked pay to length of service – Muslim chaplains tended to have lower rates of pay than Christian chaplains.
28. As regards the identification of the “group” or “pool” to which the PCP applies, **Naeem** is particularly instructive. Lady Hale was clear that while there is no formula for identifying the pool, there are guiding principles.
29. She cited with approval, Sedley LJ in **Grundy v British Airways Plc [2008] IRLR 74 (CA)**, where he said that the pool chosen “*should be that which suitably tests the particular discrimination complained of*”, and in **Allonby v Accrington and Rossendale College [2001] IRLR 364 (CA)** where he said that the pool should not be drawn so as to include the disputed condition.
30. She also referred to the EHRC Statutory Code of Practice (2011) at para.4.18, to the effect that “*all the workers affected by the PCP in question should be considered*” (para.41). She went on to say that:

“There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison”.
31. In **Naeem** itself, the PCP of the incremental pay structure based on length of service, affected *all* the chaplains employed by the Prison Service. It did not only affect those chaplains employed after 2002 (when imams began to be permanently employed) as contended by the Prison Service: the Prison service sought to exclude from the pool, those Christian chaplains



who had been employed pre-2002, so that Muslim and Christian chaplains employed post-2002 would be in exactly the same position. That argument was roundly rejected, so that Muslim chaplains were at a particular disadvantage because of their inability to count any service accrued pre-2002, which was not a problem for Christian chaplains.

32. In **Essop**, Lady Hale appears to have defined the overall group, as all those who might take the test (paras.34-35). The disadvantaged group within that, would be those who actually did, or would, fail the test. That group was shown disproportionately to consist of BME candidates. While by no means would all BME candidates fail the test, the disadvantage remained failure of the test, which was disproportionately experienced by them. Those BME candidates who did or would pass the test, would not have a claim of indirect discrimination because they would not be able to show that they personally suffered the disadvantage caused by the PCP for the purposes of s.19(2)(c).

Group disadvantage

33. A further significant point arises out of Lady Hale's analysis in **Essop/Naeem**, when it comes to establishing particular disadvantage. The Supreme Court was not referred to the Court of Appeal's judgment in **Eweida**, which established that claimants must be able to demonstrate "group disadvantage".
34. According to Sedley LJ in **Eweida**, there is a requirement that "*some identifiable section of the workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares*" (at para.15).
35. He goes on to say at para.16, that:

"The use of the conditional ('would put persons ... at a particular disadvantage'), whether in the alternative, as in the domestic legislation, or on its own, as in the Directive, does not in my view have either the purpose or the effect with which Ms Monaghan seeks to invest it. Her contention is that 'would put' requires the tribunal to aggregate the claimant with what may be – and in the present case would be – an entirely hypothetical peer group to whom the same disadvantage is to be attributed.
36. In Sedley LJ's view, "would" is referring to those to whom the PCP *potentially* applies, but that at the very least appears to have required, to his mind at least, some evidence of there being other actual people who might have wished to wear a cross in a visible place (the PCP was a rule prohibiting visible manifestations of religion). Somewhat unhelpfully, Sedley LJ considered that it was not necessary for him actually to resolve what was required to establish "group disadvantage", or the precise effect of the words "would put" (para.19). It was sufficient that he was satisfied that there was not any group disadvantage in this case.
37. The baton of group disadvantage was taken up again in **Mba v Mayor & Burgesses of the London Borough of Merton [2014] IRLR 145 (CA)**, where Elias LJ considered that it was not possible to read domestic law in a way which does not require group disadvantage to be made out, even though art.9 ECHR does not require it. Unfortunately however, nothing more is said by the Court to shed further light on how exactly group disadvantage is to be established, because the presence of group disadvantage had been conceded.
38. **Mba** was referred to by the EAT in **Pendleton**, but there is no suggestion by HHJ Eady QC in that case, that it was necessary in order to establish "group disadvantage", to identify other actual persons sharing similar beliefs as to the sanctity of marriage, who would also be affected by the PCP in the event of their spouse being similarly convicted on sexual offences. Indeed, she said specifically at para.45:



“Specifically, given the findings the ET had made as to the claimant's belief – the tensions that she suffered given the difficulties arising from her belief and the election forced upon her in the circumstances in which she was placed – that would inevitably mean that there would be a particular (collective) disadvantage for others holding the same belief. The finding as to the claimant's belief, and the particular disadvantage to which this gave rise, answered the question of disadvantage on a collective level as well: once the ET had found a sufficiently close nexus with the relevant belief – which it had in its findings in respect of the claimant's own case – it was bound to find that the members of the group sharing that belief inevitably faced an additional dilemma of conscience”.

39. Plainly, that reasoning has in mind hypothetical other persons who might not actually exist – at least in the employ of the respondent – who can be pointed to in order to establish the requisite “group disadvantage”. The basis for that reasoning was that some PCPs inherently create particular disadvantage, such that there can be only one answer to the question: the EHRC Code acknowledges as much (at para.4.10).
40. It has to be said, at first blush it is difficult to see how **Eweida** and **Pendleton** can be reconciled. The answer, it is contended, is that the particular circumstances of **Eweida** were such that evidence was required of the group: it could not simply be assumed that all Christians would want to wear a cross proclaiming their faith in public, whereas in **Pendleton** the relevant assumptions could be made without evidence.
41. The Supreme Court in **Essop/Naeem**, arguably reinforces this view by taking an approach very similar to that of the EAT in **Pendleton**. Firstly, although Lady Hale did not refer to either **Pendleton** or **Eweida**, she did stress the change introduced by the Race Directive 2000/43/EC and the Framework Directive 2000/78/EC, making it sufficient that the PCP “would put” persons sharing the claimant’s protected characteristic at a particular disadvantage (para.21), thereby paving the way for group disadvantage to be established by reference to hypothetical “others”.
42. She further went on to say that defining the relevant group would include those who might experience potential disadvantage (ie BME candidates who might or might not fail the test in the event of actually taking it) (para.35), as well as those actually experiencing disadvantage, albeit that only those actually experiencing the disadvantage would be able to bring a claim. The idea that Lady Hale was clearly deciding that group disadvantage may often be established without evidence cannot be taken too far however, because the groups of claimants in both **Essop** and **Naeem** rather made the point without anything needing to be said expressly about it.
43. Such an approach would also be consistent with **Starmar** (as noted above), in that a provision (as opposed to a practice) applied once to an individual claimant, can still constitute indirect discrimination on the basis that other hypothetical individuals in the same position would have been treated in the same way.
44. It seems therefore, that the balance of authority (particularly following **Pendleton** and **Essop/Naeem**) is moving away from what appeared to be the full extent of the position as articulated in **Eweida**, or else is confining the full **Eweida** approach to its own or similar facts.
45. Indeed, most recently in **Trayhorn v Secretary of State for Justice (1.8.17, UKEAT/0304/16/RN)**, the EAT (Slade J) held as follows:

*“Having regard to the interpretation of s.19(2)(d), in my judgment a claim may surmount the s.19(2)(b) hurdle if, adopting the language of Lord Justice Maurice Kay [in **Mba**], some individuals of the Claimant’s religion are disadvantaged by the relevant PCP. To this extent it may be said that the threshold of s.19(2)(b) is not a high one. ... Whether it has been surmounted is a question of fact in each case.”*



46. On the facts of **Trayhorn**, the claimant was a Pentecostal Christian, employed as a gardener at a prison, but who also served as a volunteer at the prison chapel.
47. On more than one occasion, he decided to speak at services, quoting passages from the Bible, condemning homosexuality and opposing same sex marriage (amongst other things). The matter was investigated, and Mr Trayhorn went off sick. After it was decided that he would face a disciplinary hearing in respect of his conduct, he resigned and claimed constructive dismissal, together with claims of indirect religion or belief discrimination.
48. Two PCPs were found to have existed, namely the Conduct and Disciplinary Policy, and the Equality of Treatment for Employees policy, which led to the proposed disciplinary action.
49. The tribunal found that the claimant had not led any evidence of group disadvantage in respect of those PCPs: it could not simply be assumed that other Christians, or specifically Pentecostal Christians, would feel compelled to say the things he had said on the occasions he had said them. The EAT upheld that conclusion.
50. Accordingly, the overall position would appear to be that in cases where it stands to reason, uncontroversially, that hypothetical “others” sharing the protected characteristic would suffer the same disadvantage, “group disadvantage” may be made out by reference to those hypothetical others. On the other hand, in cases where that is not the position – such as in **Trayhorn** or **Eweida** – some evidence of others that would be affected in the same way is required, even though it is a low threshold. If, for instance, Mr Trayhorn had been able to point to some kind of doctrinal text revered by Pentecostal Christians, requiring them to speak and recite particular passages of the Bible on all similar occasions whether at work or in their private lives, then it is conceivable that the position might have been different. The real issue in his case was how he had behaved, not his Pentecostal beliefs.

Evidence of particular disadvantage

51. In terms of the evidence required to establish particular disadvantage generally (leaving aside the “group disadvantage” issue), it is now well established that under the formulation of the test now contained in s.19, it is not necessary to establish disparate impact by means of statistical proof: **Homer v Chief Constable of West Yorkshire [2012] IRLR 601 (Sup Ct)**.
52. While statistical evidence is not required, it will often continue to be useful (**Essop/Naeem**, para.28).
53. No particular level or threshold of seriousness is required to establish “particular disadvantage”: **CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia [2015] IRLR 746 (ECJ)**. **CHEZ** was applied in **Pendleton**, which illustrates the point: while other people in a long-term relationship would be disadvantaged by being given the same ultimatum as Mrs Pendleton was, because of her religious beliefs concerning the sanctity of marriage, that disadvantage was more pronounced.
54. Moreover, as already indicated by **Pendleton** in particular, often the nature of the PCP will be such that it inherently gives rise to obvious particular disadvantage, such that “evidence” as such is not required.
55. The ECJ can be seen recently to take a similar view, in **Jyske Finans A/S v Ligebehandlingsnaevnet (acting on behalf of Huskic) [2017] IRLR 665**. In that case, Mr Huskic applied with his wife for a car loan in Denmark. Mr Huskic was born in Bosnia-Herzegovina, but moved to Denmark in 1993 and became a Danish citizen in 2000. When his driving licence showed up his ethnic origin, he was asked to supply further documentation proving his identity, including his passport or residence permit. Mr Huskic objected to that



request, considering it to be discriminatory. The Danish Equal Treatment Board agreed, and awarded him compensation. That decision was upheld by the district court, but Jyske Finans challenged that decision, resulting in a reference to the ECJ.

56. The ECJ gave its ruling on the interpretation of both art.2(2)(a) (direct discrimination) and 2(2)(b) (indirect discrimination) in this context. In relation to indirect discrimination, the ECJ fell back on an established principle that “it is necessary to carry out, not a general abstract comparison, but a specific concrete comparison, in the light of the favourable treatment in question” (para.37). It went on to say that in this case, the practice of asking for more identification documentation from persons born in a non-EU/EFTA country, could not be assumed to affect persons of a “given ethnicity” more than “other persons”. On the face of it, the practice would affect persons from every non-EU/EFTA country on the planet, in exactly the same way. It could not therefore be said, that it affected those born in Bosnia-Herzegovina disproportionately, without actual evidence to that effect.
57. Essentially, drawing an analogy with the domestic case law, this was not one of those cases where the PCP could be said inherently to give rise to particular disadvantage, which it had been treated as by the domestic courts in Denmark.

“Puts” the claimant at that disadvantage: reason for the disadvantage?

58. Finally, before moving on to consider the defence of justification, perhaps the most widely reported aspect of the Supreme Court’s judgment in **Essop/Naeem**, was that it emphatically overturned the requirement imposed by the Court of Appeal in the same case, for claimants to be able to show *why* the relevant PCP puts them at the relevant particular disadvantage.
59. This was a significant additional hurdle, which all but killed indirect discrimination as a discrete cause of action for a time.
60. The reasoning of the Court of Appeal, particularly in **Essop**, was that it was surely not enough for the claimants to demonstrate that BME/older candidates were more likely to fail the test, and that each individual claimant was him or herself a BME or older candidate who had failed the test, in order for the respondent to be required to justify the PCP of the test. Any individual candidate might have failed the test for any number of reasons that had nothing whatsoever to do with their BME/older status, such not turning up on time
61. In Underhill LJ’s view, those who had failed the test also had to show that the reason why they had failed the test was in some way tainted by their BME/older status.
62. Similarly in **Naeem**, Underhill LJ had applied the earlier reasoning in **Essop** in concluding that “*the material cause of the pay disparity was the more recent start dates of Muslim chaplains*”, and because “*this was not reflective of any characteristics peculiar to their religion*” (para.22), the claims failed.
63. Lady Hale roundly rejected this reasoning. None of the various definitions of indirect discrimination that had been in force over time, had ever imposed such a requirement. The reasons why one group might face increased difficulty in relation to PCP might be many and various. She called the reasons “context factors”.
64. The context factor (the reason for the disadvantage) need not be unlawful in itself or even under the control of the employer. The PCP and the context factor will be “but for” causes of the disadvantage, so that removing one of them will resolve the problem. For example, a requirement to work full time may disadvantage women, because of the context factor of women traditionally having a greater role in child care. If that factor is removed, or if the PCP is removed, there is no disadvantage. There is no requirement to establish that the context factor



is tainted by the protected characteristic. The disadvantage may be easier to establish if it is, but that is a matter of fact not law.

65. As regards the potential claimant in **Essop** who might have failed the test for wholly extraneous reasons, the answer was that it remains open to a respondent to show in any individual case, that the particular claimant was not personally disadvantaged by the PCP for the purposes of s.19(2)(c) even if persons sharing his protected characteristic as a group, can be shown to be so disadvantaged for the purposes of s.19(2)(b). A recent example of an employer attempting (unsuccessfully) to deploy such a challenge, can be seen in **Government Legal Service v Brookes [2017] IRLR 780 (EAT)**, where the respondent argued that an Asperger's sufferer was not personally adversely affected by the conditions for a psychometric test.
66. When it came to **Naeem**, Underhill LJ's view that the reason for the pay disparity "*was not reflective of any characteristics peculiar to their religion*" was met with Lady Hale's response that "*this cannot be right. 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*" (para.39).
67. Fundamentally following **Essop/Naeem**, if there is group and individual disadvantage (by reference to a protected characteristic) which the PCP is a "but for" cause of, there will be *prima facie* indirect discrimination requiring justification.

Objective justification

68. When it comes to justification, some recent judgments have perhaps provided some cheer for potential claimants of indirect discrimination, and salutary lessons for employers seeking to make out the justification defence.
69. It is well established that the defence requires the PCP to be a proportionate means of achieving a legitimate aim. To be proportionate, "*a measure has to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so*" (per Baroness Hale in **Chief Constable of West Yorkshire Police and anor v Homer [2012] ICR 704**, at para.22). The discriminatory effect of the treatment has to be balanced against the employer's reasons for it.
70. There is often a tendency amongst respondents to take justification for granted, and they would be well advised to pay close attention to the Court of Appeal's judgment **O'Brien v Bolton St Catherine's Academy [2017] IRLR 547**.
71. There, a long-term absentee was dismissed for incapability. By the time of the appeal hearing, there was medical evidence that the claimant was fit to return to work immediately. That evidence was rejected and the dismissal was confirmed. The tribunal held that dismissal had not been proportionate for the purposes of the justification defence to a s.15 claim, and the Court of Appeal upheld that conclusion.
72. There had been a legitimate aim, which is not normally a problematic aspect of the defence. But what the employer had failed to do, was to adduce any adequate evidence as to the impact the claimant's continued absence was having on the respondent. This was especially important, in light of the position as it was at the appeal hearing, to the effect that the claimant would be able to return to work.
73. The tribunal considered that the respondent had made only "vague assertions", and no explanation had been given as to how dismissing the claimant would resolve any of the problems that had been vaguely asserted.



74. The lesson for employers is not to take anything for granted in relation to the defence, and to take the time to give properly particularised evidence as to why (in the indirect discrimination context) the PCP is an appropriate and reasonably necessary means of achieving the relevant aim.
75. To similar effect, are two recent ECJ judgments.
76. In ***Achbita and anor v G4S Secure Solutions [2017] IRLR 466***, a prohibition on wearing an Islamic headscarf as part of a general rule against the wearing of any visible political, philosophical or religious sign in a private sector workplace, was potentially indirect discrimination. While the Belgian referring court had only asked whether it amounted to direct discrimination, the ECJ nevertheless offered its views in relation to indirect discrimination. Plainly there was a neutral rule, which might conceivably put a group of a particular religion or belief at a particular disadvantage.
77. However, any such *prima facie* discrimination might well also be objectively justified. There was plainly a legitimate aim of keeping an image of neutrality for customers, but the referring court would need to decide whether the measure was a proportionate means of achieving that aim. In the ECJ's view, what would need to be established by means of evidence, was whether the prohibition did or did not apply only to workers who actually interacted with customers, since that is what would be required for the policy to be proportionate in view of its stated aims.
78. It follows that any employer running such a case, and not adducing evidence establishing the proportionality of the policy, would be in some difficulty. It would not be enough to make vague assertions as to the need for the rule. Of course, evidence that the rule is applied more widely than the stated aim requires, would be likely to lead to the defence failing.
79. Finally in ***Ypourgos Esoterikon v Maria-Eleni Kalliri (Case C-409/16, 18.10.17)***, a height requirement for the Police (1.7m) was found to constitute indirect sex discrimination that could not be justified.
80. The problem for the justification defence, was again the inadequacy of the evidence as to the reasons why a blanket requirement was necessary. It was noted that the government had previously used different minimum heights for men and women up to 2003, which tended to suggest that a more nuanced approach was possible. Also, there was no obvious reason why the height requirement could not differ according to the specific role. What the Greek government had not done, was explain why it had adopted the rule in question. Some roles do not require the physical aptitude which the PCP envisaged, and even if a certain physical aptitude is required across the board, it did not follow that height was a reliable means of assessing that aptitude. The ECJ considered that the measure was not justified, because the pursuit of the aim of ensuring operational effectiveness could be achieved by selecting candidates based on tests allowing for their physical qualities to be assessed.

Conclusion

81. As has been seen, in light of recent developments there is cause for a renewed optimism on the part of claimants, with respect to the option of the indirect discrimination claim. For respondents, the task of defending such claim has perhaps been made simpler, in that the cause of action can be regarded as more straightforward. The focus is likely to shift more readily in claims of this type, to the objective justification defence, and as highlighted by recent cases therefore, time and effort should be invested by respondents in seeking to make out that defence, in order to maximise the prospects of a successful outcome.

