

Michael Connolly, University of Portsmouth

This was a rare claim of equal pay brought under the ‘orthodox’ discrimination regime (as religious discrimination), rather than the established equal pay regime (confined to male-female comparisons). The case was also notable for the continuing attempt by the Court of Appeal to establish a new ‘reason why’ theory of indirect discrimination, and the EAT’s ‘schoolboy error’ over the comparison required. Sense and orthodoxy was restored by 48 crisp paragraphs provided by Lady Hale in the Supreme Court. But, the Court of Appeal’s questionable interpretation of a raft of Equal Pay precedents was left unaddressed.

In *Naeem*, Muslim prison chaplains were paid less than Christian ones. There were two standout reasons for this: first, a length of service pay criterion, and second, no Muslim chaplains were employed before 2002. Hence, Muslim chaplains tended to have a shorter length of service and registered lower on the pay scale. Using significant statistic as evidence, a Muslim chaplain made a claim of indirect (religious) discrimination under the Equality Act 2010, section 19.

Section 19(1) provides that an employer discriminates if it applies a provision, criterion or practice (PCP) that ‘puts’ the claimant, and those sharing his/her protected characteristic, at a ‘particular disadvantage’ when compared with those not sharing the protected characteristic. If the claimant establishes this prima facie case, the burden shifts to the employer to show that the challenged practice is objectively justified.

The case history

The employment tribunal, the EAT and Court of Appeal each rejected Naeem’s claim, albeit for different reasons. At first instance, the tribunal held that ‘the claimant need not show *why* the PCP put him at a disadvantage, but *whether* it does’ (see [2016] ICR 289 (CA) [31]). Thus, the bare facts were enough to establish the prima facie case. But the claim failed because the employer objectively justified the practice. In the EAT and the Court of Appeal, the case fell at the prima facie stage, but for different reasons. For the EAT, the case foundered on the comparison. For the Court of Appeal, the case centred on another element of indirect discrimination, the *cause* of the disparity, which was held not to be the pay scale. The Supreme Court overruled the EAT and Court of Appeal findings, but restored

the employment tribunal's decision in full.

The Correct Pool for the comparison

Section 23(1) of the Equality Act 2010 provides that for a comparison under 19, 'there must be no material difference between the circumstances relating to each case.' The EAT held that a 'like-for-like' comparison could not include chaplains employed before 2002, as that would be a 'material difference' between the groups (see [2016] ICR 289 [31]). The 'schoolboy error' here was defining the pool for comparison by the length-of-service criteria of the pay scale, a challenged factor. Reciting the principle that 'the pool should not be so drawn as to incorporate the disputed condition', Lay Hale rejected this. Instead, 'all the workers affected by the PCP in question should be considered' ([40]-[41]). Only by including all chaplains in the pool, could the comparative effects of the pay scale on Muslim and non-Muslim chaplains be assessed.

The relevance of Essop v Home Office

Given that the Court of Appeal's decision was rooted in the *reason why* theory, it was no surprise that in his leading judgment, Underhill LJ cited the Court's first offering of the notion, *Essop v Home Office* [2015] ICR 1063 (also overturned [2017] UKSC 27). Here, it was not enough that an employer's challenged practice *put* the claimant's group (and the claimant) at a disadvantage. Now, the claimant had to show *why* this was, for instance, by explaining *why* a disproportionate number of black and ethnic minority candidates failed a promotion exam, *and* why each claimant had failed.

At first blush, citing *Essop* seems inappropriate. The Court in *Essop* wanted to know the precise cause of the disparity: the *reason why*. One might suppose in a case where the precise reason *was* known, such as the length of service criterion, *Essop* would have no application. But for Underhill LJ, *Essop* established that 'it is permissible to consider the reason for the disparity complained of, in the sense of the factors which caused it to occur' ([30]); this tallied with section 19's requirement that the challenged practice 'puts' the claimant's group at a disadvantage: 'The concept of "putting" persons at a disadvantage is causal, and, as in any legal analysis of causation, it is necessary to distinguish the legally relevant cause or causes from other factors in the situation ([22]).'

Thus, it was open to the employer ‘to go behind the bare fact that Muslim and Christian chaplains have different lengths of service and seek to establish the reason why that was so’. Allied to his reasoning, Underhill LJ contrasted Naeem’s case with ‘conventional’ equal pay cases where ‘a length of service criterion had an inherent tendency to put women at a disadvantage because women are liable to start their careers later than men and/or to take career breaks because of family and childcare responsibilities’ ([24]). Upon this, Underhill LJ concluded, ‘In my view the only material cause of the disparity in remuneration relied on by the claimant is the (on average) more recent start-dates of the Muslim chaplains’ ([22]).

Lady Hale stated simply, ‘this cannot be right’. Noting that ‘The same could be said of almost any reason why a PCP puts one group at a disadvantage,’ she too invoked the parallel equal pay scenarios where length of service benefits disadvantaged women, but for her, there ‘is nothing peculiar to womanhood in taking the larger share of caring responsibilities in a family’ ([39]). She might have added that by suggesting that there was nothing inherent in the pay scale that disadvantaged Muslims *as Muslims*, Underhill LJ confused direct and indirect discrimination.

The Equal Pay precedents

In support of the decision, Underhill LJ drew upon a raft of Equal Pay cases. He cited *Glasgow CC v Marshall* [2000] ICR 196 (HL) to verify a notion that the claimant had to show sex discrimination to establish the prima facie case. In *Marshall*, Lord Nicholls had said, ‘if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity’ (203). This was intended to demonstrate that Naeem’s employer could defeat his prima facie case by pointing to a non-discriminatory cause of the pay disparity, presumably, the later recruitment. In the context of the equal pay legislative regime at the time (Equal Pay Act 1970), where the concepts of direct and indirect discrimination were not explicit, *Marshall* simply held that a single-comparator, or ‘direct discrimination’, claim can be defeated by showing (with statistics) that the lower pay was not because of sex. In *Marshall* seven female instructors compared themselves with a male teacher (teachers were paid more). At the same time, a male instructor compared himself with a female teacher. However, there was no sex disparity between the two groups, with females making up about 96-97 per cent of each occupation. Hence, this was a mere ‘fair pay’ claim. *If* the claims had been expressed as indirect discrimination, they would have failed for want of a disparity.

With a blind eye to this, Underhill LJ went on to cite more recent Court of Appeal authority. In *Armstrong v Newcastle upon Tyne NHS* [2006] IRLR 124, it was suggested that the ‘*Marshall* defence’ applied to indirect discrimination. For Underhill LJ, ‘the point was put beyond doubt’ ([27]) in *Gibson v Sheffield CC* [2010] ICR 708 (CA). In fact, in *Gibson*, only Maurice Kay LJ fully endorsed *Armstrong* [75]. Pill LJ dissented on the point [49], while Smith LJ offered only a heavily qualified approval [68], and highlighted the ‘mistake’ below of confusing indirect with direct discrimination ([58], [69]-[70]), a mistake resurrected by Underhill’s judgment. Moreover, *Gibson* refused to follow *Armstrong* and allowed the claimant’s appeal. Overshadowing all of this is *Enderby v Frenchay* Case C-127/92, where the ECJ held that significant statistics will produce an irrebuttable presumption of discrimination for the employer to objectively justify. Underhill LJ did not discuss *Enderby*, a case which completely undermines his interpretation of equal pay case law.

Although it is implicit from her judgment that Underhill LJ misinterpreted the equal pay cases, Lady Hale did not address this expressly.

Summary

With a brevity to suggest disdain for the (appellate) decisions below, the Supreme Court restored the law of indirect discrimination to its previous understanding. Rather than engage with each and every detail of its logic, this was perhaps the best way to deal with the convoluted reasoning: Lady Hale’s speech focussed on what the law should be. But it would have been helpful for the law of equal pay if her judgment made it clear that the *Enderby* principle prevailed, or better still, if it had addressed the confusion produced by *Armstrong* and its dalliance with the ‘*Marshall* defence’. As such, this has left the door ajar for a so-minded judge to mount another assault on equal pay law.