

# Indirect discrimination - objective justification defence requires employer's need be weighed against group disadvantage

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## [NSL Ltd v Mr P Zaluski \[2024\] EAT 86](#)

### Facts

1. Mr Zaluski (C), a Polish national, was employed by NSL Ltd (R) as a parking enforcement officer. R operated a policy whereby employees must return from leave on the authorised date, the policy required employees to factor any mandatory quarantine periods into their authorised leave. Under the policy, an unauthorised absence of more than three days may be treated as gross misconduct.
2. In early 2021, during the pandemic, C requested three weeks of leave to organise his late father's affairs and funeral. C was unexpectedly required to quarantine on arrival in Poland and this combined with the time he needed to organise his father's affairs and the requirement to quarantine on return to the UK resulted in C exceeding the authorised leave by approximately three weeks.
3. During this period C's line manager sent several emails referencing disciplinary action. When C returned a disciplinary procedure was conducted and a final written warning was imposed.

### The Employment Tribunal

4. At first instance, the ET found:
  - a. R had the following PCPs:
    - i. The requirement for staff to return promptly from annual/authorised/compassionate leave during the Covid pandemic.
    - ii. The requirement that quarantine be covered as part of authorised leave and/or any continuing absence due to quarantine would be unauthorised absence.

- b. The PCPs put persons who were not UK nationals at a disadvantage given they would be more likely to need to travel overseas for family matters than someone of UK origin.
- c. R had the legitimate aim of ensuring it had sufficient staff to fulfil its own contractual obligations.
- d. The PCPs were not a proportionate means of achieving that legitimate aim. R's objective justification defence therefore failed.
- e. C's line manager had made repeated threats of disciplinary action he would not have made if C were a UK national.
- f. C should be awarded aggravated damages of £484 because he had to take unpaid leave to attend the remedy hearing whereas his line manager had been paid for his attendance at the remedy hearing.

## The Employment Appeal Tribunal

- 5. R did not appeal the discriminatory nature of the PCP, rather its appeal centred on the ET's finding that R had failed to justify its PCPs as a proportionate means of achieving a legitimate aim per section 19(2)(d) Equality Act 2010. In this regard, R relied on three grounds.
- 6. **Ground A1:** The ET focused too heavily on what happened in the particular circumstances of C's case and gave insufficient consideration to the more general group impact.
- 7. The EAT found this ground succeeded, and noted the following references by the ET indicating the ET considered C's particular circumstances rather than the PCP impact on the non-UK nationals generally:
  - a. The requirements put C at a disadvantage "particularly as the respondent did not approve sufficient leave in the first place" [90].
  - b. The amount of leave agreed made it impracticable for the C to accomplish what the compassionate leave was requested for [90].
  - c. The specific references to the situation at the particular time C took leave, including that it was the end of the leave year [92].
- 8. **Ground A2:** The ET erred by applying an inadequate level of analysis to the issue of justification.

9. The EAT noted that two points of consideration emerge repeatedly from authorities:
  - a. The PCP must be appropriate to the aim which means it must be rationally connected to and logically capable of furthering the aim (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC; [2012] ICR 705).
  - b. The PCP must be reasonably necessary (*Hardy & Hansons plc v Lax* [2005] EWCA Civ 846; [2005] ICR 1565).
10. The ET must balance the impact of the PCP on the affected group against the importance of the employer's need [77].
11. "A critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal". Rather than applying a 'range or reasonable responses test, "the tribunal has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary" (*Hardys & Hansons plc v Lax*).
12. While R does not have to show that the PCP is the only way to achieve the aim, the existence of alternative methods can form part of the balancing exercise. The EAT noted that the employer should be in possession of evidence concerning potential alternative approaches that it maintains are not reasonably practicable or viable.
13. R's case was that the ET had not engaged in a sufficiently critical evaluation of, for example, the potential cost implications of using agency staff. However, there was no suggestion from R that there had been specific evidence presented that the ET had failed to consider. The EAT concluded that there was "some force" in R's arguments, albeit potentially not enough force to uphold the appeal on its own footing [98].
14. **Ground A3:** The ET impermissibly speculated that there was a good chance that applying the PCPs would push employees to resign, and risk unfair dismissal claims.
15. The EAT concluded this view formed a significant part of the ET's reasoning, as it was essentially the ET's conclusion that that the PCPs undermined the aim rather than achieving the aim. The EAT concluded it was not a view that could properly be founded on judicial notice, rather it must be built on an evidential platform. There was no such evidence before the ET to form the basis of this view and therefore the EAT found this ground succeeded.
16. **The EAT directed remission to a different ET panel on the issue of justification for indirect discrimination.**

17. The EAT dismissed R’s appeal of the harassment claim, finding that the ET did not err in law in finding that the conduct complained of related to race because it found that C’s race materially influenced the conduct. The EAT upheld R’s appeal concerning aggravated damages holding that the line managers paid attendance at the remedy hearing could not properly be regarded as aggravating conduct applying the guidance in *Zaiwalla & CO v Walia* [2002] IRLR 697.

## Comment

18. Given that it was only the “proportionate means” element of the justification defence that formed the basis of the appeal in relation to the indirect discrimination claim, this EAT decision is particularly useful in refining understanding of how the ET should approach the balancing exercise it must undertake.

19. On one side of the scale, the ET should place the employer’s business need. This should be based on a detailed analysis of the working practices and business considerations involved. In this regard a sensible respondent will wish to provide evidence showing alternative approaches were not reasonable or viable.

20. On the other side should sit the impact of the discriminatory PCP on the affected group. It is an error to confuse this with the impact of the discriminatory PCP on the individual.

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