Not a walk in the park: pleading and proving indirect discrimination

By Daniel Brown
3PB Barristers

***Boohene & Others v The Royal Parks Ltd* [2024] EWCA Civ 583**

[ ] paragraph number of Court of Appeal judgment

In this judgment Underhill LJ highlights that claims of indirect discrimination require a particularly careful analysis of the issues and what evidence each party will need to adduce to prove its case [102]. This case offers a salutary lesson about what can go wrong when that does not happen, as well as a useful analysis of the scope of s.41 Equality Act 2010 ('EqA 2010') (liability of principals in relation to contract workers).

The facts

The Respondent is a charity responsible for the management of the Royal Parks. At the material time, it had 160 direct employees who mainly did office work. The Respondent outsourced manual work including: cleaning and maintenance of toilets, landscape maintenance and horticulture, gate locking and building and maintenance and repairs.

At all material times, the Respondent paid the London Living Wage ('LLW') to its direct employees.

In 2014 Vinci Construction UK Ltd made a bid for a toilets and buildings cleaning contract. It was invited to provide alternative tenders based on LLW and non-LLW rates. The Respondent accepted the non-LLW tender (this involved an hourly rate of £7, in contrast to LLW which was £9.15 at the time).

The Respondent entered into an agreement with Vinci Construction UK Ltd for toilets and buildings cleaning services on 1 November 2014 ('the Vinci contract').

At the material time, there were about 50 Vinci employees carrying out work for the Respondent indirectly, under the Vinci contract. This 'represented only a comparatively small proportion of the total indirectly-employed workforce' [8].

Over time the Respondent came under pressure from trade unions to pay the LLW to its outsourced workers/indirect employees and on 5 November 2019 it decided that all its contractors should pay LLW to all staff as soon as possible after their contracts came up for renewal and by April 2023 at the latest [13].

On or about 12 December 2019, an agreement was reached that those on the Vinci contract would be paid LLW with effect from 1 November 2019 (the renewal date of the original contract).

All the Claimants were employees or former employees of Vinci Construction UK Ltd, who worked on the Vinci contract. All but one of the employees were of black or other minority ethnic ('BME') origin [14]. They claimed indirect discrimination (s.19 EqA 2010).

The pleaded PCP

The Claimants pleaded that the Respondent was the 'principal' for the purpose of s.41 EqA 2010 and that they were 'contract workers' [25].

The pleaded PCP was:

> *Up until 11th December 2019, the Respondent maintained the practice of a double-standard on the acceptable minimum rate of pay for staff – hereafter, 'the minimum pay PCP'. It was a double standard because the Respondent adopted a different minimum depending on whether the staff were direct employees (a minimum not less than LLW) or outsourced workers (a minimum of [National Minimum Wage]). Put another way, it adopted a selective approach to upholding the LLW*

The Employment Tribunal's judgment

The Employment Tribunal ('ET') upheld the claim [29-39]. In short, the ET concluded that:

1) the Claimants were contract workers (this finding was not challenged on appeal);

2) the decision by the Respondent to accept the non-LLW tender constituted the application of the PCP that 'its employees would be paid the LLW as a minimum but those working on the cleaning contract with Vinci would not' [33];

3) the pool for comparison was all those employed by the Respondent and all Vinci's employees working on the Vinci contract;

4) the application of the PCP put the BME members of the pool at a particular disadvantage compared with non-BME members

    a. there was no material difference between the circumstances of the BME and non-BME members of the pool or between the directly employed members and those employed on the Vinci contract because the LLW applies equally to office-based workers and manual labourers and to private and public sector employees; and

    b. Of the Respondent's 160 employees about 20 were BME and 140 non-BME. In contrast, at least 40 of the 50 employees on the Vinci contract were BME. Out of the total pool of 210, the PCP resulted in 20 BME workers receiving the LLW and 40 not receiving it. In contrast, 140 non-BME workers received LLW or above while only 10 did not.

5) the ET found that the claimants were put to the relevant disadvantage by the PCP; and

6) no justification for the discrimination was established (this point was not challenged on appeal).

The Employment Appeal Tribunal's judgment

The Respondent relied on several grounds of appeal before the EAT [40-44]. It argued that: the ET had failed to apply s.23 EqA 2010 (which requires the circumstances of those in the comparison pool to be the same in all material respects); the ET had erred in defining the pool

for comparison; the ET should not have found that the PCP was applied to the Claimants within the meaning of s.19 EqA 2010; and/or the failure to pay the LLW did not constitute discrimination within the meaning of s.41(1)(a) EqA 2010.

Ultimately, the EAT allowed the appeal. The ET had chosen the wrong pool. It was wrong to treat the PCP as applying only to the workers on the Vinci contract. The relevant pool included employees from the whole of the Respondent's indirect workforce [37;43-44].

The EAT either dismissed, or proceeded on the basis that it was unnecessary for it to decide, the remaining grounds of appeal.

The Court of Appeal's judgment

Defining the PCP and identifying the correct pool for comparison

The Court of Appeal's judgment referred to the principle confirmed by Lady Hale in *Essop v Home Office (UK Border Agency)* [2017] UKSC 27 that 'all the workers affected by the PCP in question should be considered… 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' §41 [18]. The Court also noted the observation by Choudhury P in *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699 that 'once that PCP is identified then the identification of the pool itself will not be a matter of discretion or of fact-finding but of logic' §22 [18].

Underhill LJ concluded that there was no doubt about what the correct PCP was: the Respondent had a policy or practice of paying LLW to its own employees but not requiring or funding its contractors to pay LLW to the indirectly employed workforce [78]. The evidence demonstrated that this policy was applied generally, not simply to Vinci's employees on the Vinci contract. 'The PCP must be defined accordingly' [78]. It follows that the ET was wrong to confine the pool to the Respondent's employees and those engaged on the Vinci contract [91].

Moreover, the Claimants did not prove their pleaded case (which was in fact analytically correct) because they did not adduce any evidence about the indirectly-employed workforce apart from those engaged on the Vinci contract; evidence about the ethnic composition of the wider indirectly employed workforce was essential to proving that the PCP had a disparate impact on BME members of the pool [92].

In these circumstances, the EAT was correct not to remit the case to the ET. If the ET had considered the correct pool there was only one possible outcome: the claim would have been dismissed due to the Claimants' failure to adduce the required evidence [93-99].

Underhill LJ warned that [102]:

> *this case provides a useful reminder of the importance of identifying at the case management hearing what issues emerge from the case as pleaded and what kinds of evidence will need to be adduced by each party (and if necessary obtained from disclosure) in order to prove its case on those issues. The primary responsibility lies with the parties, but there is an important role for the judge in analysing the pleadings and teasing out and resolving any aspect on which the parties may be at cross purposes. That is true in any kind of case, but discrimination (and in particular indirect discrimination) cases are liable to be particularly complicated, and particularly careful analysis is likely to be required.*

The scope of s.41 EqA 2010

Underhill LJ noted that while the ET made a finding that the Claimants were contract workers, it did not address the language in s.41(1)(a) or (d) EqA 2010, namely:

> *(1) A principal must not discriminate against a contract worker —*
>
> *(a) as to the terms on which the principal allows the worker to do the work;*
> *(b) by not allowing the worker to do, or to continue to do, the work;*
> *(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*
> *(d) by subjecting the worker to any other detriment.*

The EAT did consider the meaning of s.41(1)(a) and (b), particularly with reference to *Allonby v Accrington and Rossendale College* [2001] EWCA Civ 529. In short, the EAT concluded that the Respondent had exercised control over whether Vinci's employees would be paid the LLW and it held that the 'most natural reading of the ET's judgment is that it treated this as a case falling under section 41(1)(a) but we do not consider the reasoning would change if considered under section 41(1)(d)…In either event, in the present case, we are satisfied that the ET

reached a permissible view as to which entity had in fact determined the terms on which the claimants would be allowed to do their work' [54-55].

Underhill LJ disagreed [56]. His lordship took the view that the mischief to which s.41 EqA 2010 is directed concerns the peculiar fact that, in the case of contract workers, what happens at work is the responsibility not of the employer but of a third party (the 'principal'), resulting in a non-contractual principal-worker relationship; according to Underhill LJ, the 'purpose of section 41 is to proscribe discrimination in the context of that relationship'. The word 'terms' in s.41(1)(a) EqA 2010 does not relate to contractual terms, since the principal has no contract with the worker; it connotes a condition of being allowed to work, such as a prohibition by the principal on the worker wearing clothes or jewellery of ethnic or religious significance, for example [58].

After considering s.41(1)(b)(c) and (d), Underhill LJ concluded that they are all situations in which the principal has the power because of its control of the work or the workplace, to subject the worker to some detriment; they are not to do with the worker's rights under his or her contract with their employer/the supplier [58].

For Underhill LJ's assessment of the EAT's analysis of *Allonby v Accrington and Rossendale College* see [59-69].

In view of the conclusion on s.41 EqA 2010, the Court of Appeal also held that the Respondent did not 'apply' any PCP to the Claimants for the purpose of s.19 EqA 2010 [75]. The Court emphasised that a worker will always have a right to bring a claim in respect of discriminatory terms of their contract against their direct employer [73].

The Court declined to consider the issue of whether the Respondent's direct employees were comparable with members of its indirectly-employed workforce, for the purpose of s.23 EqA 2010. It was unnecessary for the Court to address that matter given its other conclusions, although Underhill LJ suggested it would be a difficult question to grapple with [74].

8 July 2024

Daniel Brown

Barrister
3PB

Telephone: 0330 332 2633
daniel.brown@3pb.co.uk

3pb.co.uk