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The hidden menace – indirect discrimination

Universities are usually very vigilant to ensure parity of treatment of all applicants and students. Successful claims for direct discrimination are therefore rare. Universities, can, however, find that they are unwittingly discriminating indirectly by the application of ill thought-out policies and practices which have a disparate impact on some groups.

Indirect discrimination occurs where an ostensibly neutral policy, criterion or practice (PCP) puts or would put those who share a relevant protected characteristic (e.g. race, nationality, age group) at a disadvantage, puts or would put a particular member of that group at that disadvantage, and the university cannot show that it is a proportionate means of achieving a legitimate aim (i.e. can be objectively justified as going no further than is necessary to achieve the legitimate aim in question). The purpose of the law is to eliminate hidden barriers which are not easy to anticipate or identify.

Indirect discrimination is a complex concept to apply in practice and often eludes the most well-meaning universities. Its key principles are as follows:

1. There is no express requirement for an explanation of the reason why a particular PCP puts one group at a disadvantage when compared with others. A complainant needs only to show that the relevant group sharing a particular protected characteristic of which he/she is a member suffers the disadvantage and that he/she has also suffered it. Sometimes the reason will be apparent, but often it will not.
2. There is no requirement for a causal link between the PCP and the protected characteristic. Consequently, the complainant need not show that there is some quality inherent in being, for example, black or white, that causes the disadvantage. What is required to be demonstrated is that there is a causal link between the PCP and the particular disadvantage suffered by the group and the individual.
3. The reason why one group may find it more difficult to comply with a PCP can be varied e.g. social, genetic, cultural, physical. It need not therefore be unlawful in itself or be something which is within the control of the university.
4. The PCP need not put every member of the group sharing the particular protected characteristic at a disadvantage; e.g. some women can pass tests based on physical strength, but usually the proportion of women who can pass those tests is smaller than the proportion of men who can pass them. The likelihood of failure (i.e. the disadvantage) is greater for women.
5. It is common for the particular disadvantage to be established by means of statistical evidence.
6. A claim can be defeated by demonstrating that the PCP is justified.

Indirect discrimination has been given renewed attention in a recent Supreme Court decision (*Essop & Ors v Home Office (UK Border Agency)* ([2017] UKSC 27)), reported later on in this bulletin. This case involved a challenge to Home Office tests which were required in order to apply for promotion, in which BME and older candidates had a much lower pass rate. The Supreme Court concluded that the disadvantage in question was that members of the group failed the test disproportionately, and that the claimants had suffered that same disadvantage. It also concluded that it was not necessary to establish the reason for low pass

rate in the circumstances. The case has been remitted back to the employment tribunal to determine whether the Home Office can justify its requirement.

The public sector equality duty has sensitised universities to some extent to the need to assess the likely the impact of their policies and practices on groups sharing a particular protected characteristic. The Essop case underscores the need to think about potential impact in advance and, if it is negative, to consider whether there is sufficient justification for the policy, notwithstanding that impact, to warrant its implementation.

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A reminder to be careful when dealing with clauses which exclude liability

In the recent judgment given in *Goodlife Foods Ltd v Hall Fire Protection Ltd* ([2017] EWHC 767 (TCC)), the High Court considered whether a clause which purported to exclude liability for death and personal injury could be saved by removing the "offending part", or whether the drafting of the clause rendered the whole clause unreasonable and therefore unenforceable.

The facts

The claimant sued for compensation for damage caused to its property by a fire and business losses which it suffered as a result of the interruption to its business. It based its claim on the failure of a fire suppression system supplied by the defendant.

The defendant's standard terms and conditions contained the following clause:

"We exclude all liability, loss, damage or expense consequential or otherwise caused to your property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided by HFS for whatever reason.

In the case of faulty components, we include only for the replacement, free of charge, of those defective parts.

As an alternative to our basic tender, we can provide insurance to cover the above risks. Please ask for the extra cost of the provision of this cover if required."

The issue

Section 2 of the Unfair Contract Terms Act 1977 (UCTA) states that:

"(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk."

The court agreed with the claimant that the clause contained in the defendant's terms and conditions sought to exclude liability for death and personal injury in breach of section 2(1) of UCTA. It then needed to consider whether this fact alone rendered the whole clause unreasonable, in breach of section 2(2), and therefore of no effect.

The decision

Section 2(2) of UCTA requires the court to decide whether a contract "term" is reasonable or not. It cannot decide that part is unreasonable while the other part is reasonable. This can of course become complicated when a clause is divided into sub-clauses, as this raises the question of what constitutes the "term".

In its decision the court relied on the unreported judgement of the Court of Appeal in *Trolex Products Limited v Merrol Fire Protection Engineers Ltd* (20 November 1991). This stated that the reasonableness of the clause was to be considered in the knowledge that the part of the exclusion which was in breach of the UCTA was

of no effect (i.e. as though this part had never been included). The remainder could therefore be held to be reasonable.

Reasonableness is assessed on a case-by-case basis, by having regard to various factors which are referred to in UCTA and in case law, such as the relative bargaining power of the parties, the availability of insurance to the supplier and the possibility of entering into the contract without the exclusion but at a higher price.

In the current case, the court stated that the claimant was in the best position to protect itself by taking out adequate insurance. There was no evidence to suggest that insurers would not cover such form of damage at the time. An offer which was made by the defendant to arrange for insurance was enough to warn the claimant of the need to be suitably protected against the losses which could result from the system failing.

The court concluded that the clause was in fact reasonable and that the claimant's action would not therefore succeed. The arrangement constituted a sensible allocation of risk between the parties.

Another issue which the court dealt with in this case was whether the exclusion clause was to be considered an onerous clause. Onerous clauses are only considered to be incorporated into a contract if they have been brought to the attention of the other party before the contract has been concluded. The court stated that the simple fact that the clause excluded liability did not by itself render it an onerous clause, as such clauses were commonplace in the industry. However, it also stated that even if such a wide exclusion had rendered the clause onerous, t was satisfied that in this case it had been sufficiently brought to the attention of the claimant, not by means of a reference to the specific clause but by a general statement that no liability whatsoever would be imposed on the defendant.

Lessons to take away

Universities should not assume that exclusion clauses which are not brought to their attention are unenforceable. Furthermore, the fact that part of an exclusion clause breaches UCTA does not mean that the whole clause is unreasonable and cannot be relied on.

On the other hand, when including a limitation of liability clause in a contract where the university is the supplier, not only should the university make sure that the clause is reasonable, but it should err on the side of caution and draw the other party's attention to the clause.

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Accountability for public bodies: preventing abuses of power

Public policy favours transparency to allow unreasonable public decisions to be challenged and corrected if necessary. This policy strengthens remedies such as judicial review and provides real accountability.

Two recent planning cases considered the duty on public bodies to give reasons for their decisions:

Shasha v Westminster City Council

Shasha v Westminster City Council ([2016] EWHC 3283 (Admin)) highlighted a little-known but useful Regulation which requires officers of certain public bodies to give reasons for decisions when they are using delegated powers. Regulation 7 of the Openness of Local Government Bodies Regulations 2014 requires reasons to be given as soon as reasonably practicable after the decision, and requires the officer to list alternatives considered and rejected. It applies whenever the decision grants a permission or licence, affects the rights of an individual or materially affects the decision-making body's financial position. Examples could include development plans or decisions about public services. This Regulation applies to planning decisions and also decisions of many other public bodies such as local authorities, Transport for London, fire and rescue services and the National Parks Authorities.

Oakley v South Cambridgeshire District Council

In *Oakley v South Cambridgeshire District Council* ([2017] EWCA Civ 71), the Court of Appeal discussed whether a general duty to give reasons for public decisions is emerging. The planning committee granted permission for a new football stadium for Cambridge City FC. The planning officer had recommended refusal to protect the Green Belt and to remain consistent with the Local Development Plan, and so the decision was controversial. A local resident, Karen Oakley, successfully challenged the decision arguing that reasons were needed. The statutory duty to give reasons for planning consent was abolished in 2013, but a common law duty may require reasons. Reasons may now be required where "legitimate" or "reasonable expectations" apply. However the judges disagreed about the basis of a need for reasons and about the desirability of a general duty to give reasons.

Comment

Commentators disagree over whether these cases are evidence of a developing legal trend towards a default duty on public bodies to give reasons for their decisions, or whether Parliament should be allowed to specify when reasons are needed. However, the small number of reported cases relating to the education sector have consistently concluded that universities should give reasons for their decisions and, whilst this can sometimes seem onerous, having to give reasons does generally improve the quality of decision-making and thus the ability to resist subsequent challenges.

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Focus on indirect discrimination

Can you set a blanket test for promotion?

Yes, but you would need to objectively justify it if there are discriminatory consequences, says the Supreme Court.

The facts

In Essop and other v Home Office (UK Border Agency) ([2017] UKSC 27) Mr Essop and 49 others claimed to be disadvantaged by being made to take the Home Office Core Skills Assessment Test in order to apply for promotion to certain civil service grades. A report established that the pass rate was 40.3% for BME candidates against white comparators, and 37.4% for over 35 year olds as against younger comparators. Some of each minority group did pass, but the reason why the pass rate amongst those groups was significantly lower was not determined.

The case was appealed from the tribunal to the Employment Appeal Tribunal where the original decision was overturned. It was overturned again in the Court of Appeal before the Supreme Court again overturned the decision. The Supreme Court concluded that there is a case to answer and sent it back to the tribunal for the next stage, including the Home Office's arguments indicating how they can justify their requirement of a pass in the test to apply for promotion.

The Supreme Court clearly indicated that the reason for the disadvantage is irrelevant. The claimants only needed to show that there was a disadvantage to their group who shared a different protected characteristic, in this case age or race.

What this means for universities

Setting any hurdle for promotion which is applied across all employees needs to be carefully thought through. If there is a risk that this action may disadvantage a group who share a protected characteristic, even if it does not disadvantage all of them, there is now a considerable chance of a claim backed by survey evidence. The university would then need to justify its practice, and if no work has been done to consider this in the first place producing this argument and succeeding will be doubly difficult to achieve.

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