Neutral Citation Number: [2024] EAT 131

Case No: EA-2023-000234-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 August 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

BRITISH AIRWAYS PLC

Appellant

- and -

MR B ROLLETT AND OTHERS

Respondents

MINISTER FOR WOMEN AND EQUALITIES

Intervener

- -
- -

Bruce Carr KC and **Anna Greenley** (instructed by Baker & McKenzie LLP) for the **Appellant**
Martina Murphy and **Jessica Franklin** (instructed by Kepler Wolf Limited and TMP Solicitors LLP) for the **Respondents**
Nathan Roberts (instructed by the Government Legal Department) for the **Intervener**

Hearing date: 23 July 2024

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JUDGMENT

SUMMARY

Sex discrimination - race discrimination - indirect discrimination - section 19 ***Equality Act 2010***

Held: dismissing the appeal.

The Employment Tribunal made no error of law in concluding that it had jurisdiction to consider indirect discrimination claims under section 19 **EqA** where there is a PCP applied by an employer that puts people with a particular protected characteristic at a disadvantage, where the claimant in such a case must also suffer that disadvantage, but where that claimant need not have the same protected characteristic as the disadvantaged group.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT:

Introduction

1. The question raised by this appeal is whether the definition of indirect discrimination under section 19 of the **Equality Act 2010** ("EqA") can extend to claims brought by claimants who do not have the same protected characteristic as the relevant disadvantaged group, albeit they suffer the same disadvantage as a result of a provision, criterion, or practice ("PCP") applied by their employer.

2. In giving this judgment, I refer to the parties as the claimants and respondent, as before the ET. This is the full hearing of the respondent's appeal against the judgment of the Reading ET; Employment Judge Anstis, sitting alone, at a preliminary hearing on 14 and 15 December 2022. By that decision, sent out on 20 January 2023, it was held that the ET had jurisdiction to consider indirect discrimination claims under section 19 **EqA** where there is a PCP applied by an employer that puts people with a particular protected characteristic at a disadvantage, and where the claimant also suffers that disadvantage but does not have the same protected characteristic as the disadvantaged group. The respondent appeals against that ruling. Its arguments on appeal are resisted by the claimants and by the Minister for Women and Equalities ("the intervener").

3. Representation on the appeal is as it was before the ET, save that Mr Carr KC is now assisted by Ms Greenley, and Mr Roberts appears on behalf of the intervener, who did not participate in the proceedings below. The intervener's particular interest in this appeal relates to the potential relevance of the parties' arguments to section 19A **EqA**, introduced with effect from 1 January 2024, which extends the protection against indirect discrimination to those persons who suffer "*substantively the same disadvantage*".

The factual context and the claims of indirect discrimination

4. The respondent is the flag-carrier airline of the United Kingdom. It is headquartered in London, near its main hub at Heathrow airport; it is the UK's largest international scheduled airline, with approximately 30,000 staff. The claimants (who numbered 49 at the time of the ET preliminary hearing) were Heathrow-based cabin crew. Their claims arise out of a restructuring exercise which the respondent undertook as a consequence of the coronavirus pandemic, which had a dramatic effect on air travel from early 2020 onwards.

5. The ET claims, lodged in or around January 2021, were put on a number of different bases, including (as relevant to this appeal) claims of indirect discrimination under section 19 **EqA** arising from scheduling

changes brought about by the respondent's re-structuring exercise. In seeking to illustrate the claimants' arguments in this regard, it is explained (for example) that the scheduling changes in question: (1) put those (predominantly non-British nationals) who lived abroad, and commuted to Heathrow from abroad, at a particular disadvantage compared to those who commuted from within the UK; and/or (2) put those (predominantly women) with caring responsibilities at a particular disadvantage compared with those who did not have caring responsibilities. In these respects, claims are pursued both by claimants who have the relevant protected characteristics (for the examples given: non-British nationals; women) (what might be characterised as claims of "*ordinary*" indirect discrimination), and those that do not (seeking to bring claims of what has been referred to as "*associative*" indirect discrimination, but which, in this context, is more accurately described as "*same disadvantage*" indirect discrimination). By way of particular example, claims are thus brought by:

5.1 Ms Olivia Kerr, a British national who lives in, and commuted from, Chamonix, France. Although Ms Kerr does not share the protected characteristic of non-British nationality, she complains of being put to the same disadvantage as non-British nationals commuting to the UK from abroad.

5.2 Mr Fabio Pettinella, a man with caring responsibilities. Although Mr Pettinella does not share the protected characteristic of being female, he complains of being put to the same disadvantage as women with caring responsibilities.

6. As the respondent has pointed out, the cases of other claimants less obviously demonstrate the requisite "*same disadvantage*"; this is, however, an issue that the ET has yet to determine. I further record that those acting for the claimants have identified that the claims also include complaints of associative indirect disability discrimination, although the respondent disputes that any such claims have been advanced on a "*same disadvantage*" basis (that is, as contended in respect of the complaints of indirect race and/or sex discrimination). The claimants say this is a matter still to be resolved. It is, in any event, not a dispute I can determine at this stage, and the arguments advanced on the appeal have focused on the claims of indirect race and sex discrimination.

The legal framework

Indirect discrimination: context

7. In the joined cases **Essop and ors v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice** [2017] UKSC 27, [2017] 1 WLR 1343, Baroness Hale of Richmond DPSC (with whom the other members of the Supreme Court agreed) began her judgment with the following observations:

> "1. Ideally, discrimination ought to be an easy concept, although proving it may be harder. But we do not live in an ideal world and the concepts are not easy, ... The law prohibits two main kinds of discrimination - direct and indirect. Direct discrimination is comparatively simple: it is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. Indirect discrimination, however, is not so simple. It is meant to avoid 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. It is one form of trying to "level the playing field"."

8. Direct discrimination is defined by section 13(1) **EqA**, as follows:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

This definition thus provides that the reason for the less favourable treatment must be "*a protected characteristic*" (emphasis added); it does not require that the claimant possess that characteristic themselves. The legacy statutes, prohibiting sex and race discrimination (the **Sex Discrimination Act 1975** ("SDA") and the **Race Relations Act 1976** ("RRA")) adopted a similar formulation, which allowed for claims of what might be characterised as "*associative discrimination*" (see, e.g., **Showboat Entertainment Centre Ltd v Owens** [1984] ICR 65, approved by the Court of Appeal in **Weathersfield Ltd v Sargent** [1999] ICR 425). A different approach was, however, taken when defining direct disability discrimination, under what was then the **Disability Discrimination Act 1995** ("DDA") (a point that features in the reasoning of the EAT in **EBR Attridge LLP v Coleman** [2010] ICR 242, as set out at paragraph 29 below).

9. As for indirect discrimination, that is defined by section 19 **EqA**, 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 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."

10. Under EU law, by article 2.1 of **Council Directive 76/207/EEC** of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment,

vocational training and promotion, and working conditions ("the Equal Treatment Directive"), it was made clear that:

> "… the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly ..."

11. The first legislative definition of indirect discrimination under EU law was contained in **Council Directive 97/80/EC** of 15 December 1997, on the burden of proof in cases of discrimination based on sex ("the Burden of Proof Directive"). By article 2(2) it was provided that, for the purposes of the principle of equal treatment:

> "indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."

12. The definition thus provided under the **Burden of Proof Directive** made no reference to individual disadvantage, but, by article 4, required that:

> "… when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish … facts from which it might be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

13. By **Council Directive 2000/43/EC** of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origins ("the Race Directive") it was then provided, by article 2.2(b) that:

> "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

14. The same definition was also adopted in article 2(2)(b) of **Council Directive 2000/78/EC** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation on grounds other than sex or race ("the Framework Directive"), in article 2(b) of **Council Directive 2004/113/EC** of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services ("the Goods and Services Directive"), and article 2(1)(b) of **Parliament and Council Directive 2006/54/EC** of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ("the Recast Directive").

15. Within Great Britain, section 1(1)(b) of the **SDA** had defined indirect discrimination such that a person would discriminate against a woman if:

> "he applies to her a requirement or condition which he applies or would apply equally to a man but- (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and (iii) which is to her detriment because she cannot comply with it."

Similarly, by section 1(1)(b) of the **RRA** it was provided that a person would discriminate against another person if:

> "he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but- (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it."

16. To reflect the definition of indirect discrimination introduced under EU law, however, in 2003 the **SDA** was amended, so as to provide, by section 1(2)(b), that a person would discriminate against a woman if:

> "he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but (i) which puts or would put women at a particular disadvantage when compared with men, (ii) which puts her at that disadvantage, and (iii) which he cannot show to be a proportionate means of achieving a legitimate aim."

At the same time, the **RRA** was similarly amended, to provide (by section 1(1A)) that a person would discriminate against another if:

> "... he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons, (ii) which puts that other at that disadvantage, and (iii) which he cannot show to be a proportionate means of achieving a legitimate aim."

17. By the **EqA**, Parliament sought:

> "to harmonise discrimination law, and to strengthen the law to support progress on equality." (paragraph 10, **Explanatory Notes to the EqA**)

Explaining:

> "The Act does not itself implement EU Directives for the first time. It replaces earlier legislation which has implemented EU Directives." (paragraph 21, **Explanatory Notes to the EqA**)

As for the prohibition against indirect discrimination, section 19 **EqA**:

> "... largely replaces similar provisions in previous legislation. It applies the EU definition of indirect discrimination, replacing pre-existing domestic definitions in the Sex Discrimination Act 1975 and Race Relations Act 1976, to ensure uniformity of protection across all the protected characteristics in all areas where it applies. ..." (paragraph 81 **Explanatory Notes to the EqA**)

18. In her review of the different iterations of the concept of indirect discrimination in **Essop; Naeem**, Baroness Hale considered it:

> "23 … inconceivable that the later versions were seeking to cut it down or to restrict it in ways which the earlier ones did not. The whole trend of equality legislation since it began in the 1970s has been to reinforce the protection given to the principle of equal treatment. ..."

Going on to identify the salient features of the concept of indirect discrimination relevant to the issues in those cases, Baroness Hale further observed, as follows:

> "24 The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. Thus there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. ...
> 25 A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.
> 26 A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various …. [T]he reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). … [But] both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.
> 27 A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. … Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. …
> 28 A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. …. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.
> 29 A final salient feature is that it is always open to the respondent to show that his PCP

is justified …"

19. In **Essop**, in seeking to counter the claimants' case that there was no need to prove the reason why the PCP puts, or would put, the affected group at a particular disadvantage, the respondent had relied on two main arguments: (1) that it was necessary to know the reason for the disadvantage in order to know what the disadvantage was, and (2) that the claimants' approach would allow "*undeserving*" claimants, who had suffered disadvantage for reasons that had nothing to do with the disparate impact, to "*coat tail*" upon the claims of deserving ones. The Supreme Court rejected both arguments, observing that: (1) the language of the protection required "*correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual*", which would "*largely depend upon how one defines the particular disadvantage in question*", and (2) it would always be possible to show that a particular complainant was not put at a disadvantage by the requirement in issue, because there "*was no causal link between the PCP and the disadvantage suffered by the individual*", or that the application of the PCP was justified.

*The ruling of the Court of Justice of the EU ("CJEU") in **CHEZ***

20. In **CHEZ Razpredelenie Bulgaria AD v Komisia za zashita ot discriminatsia** (Case C-83/14) [2015] IRLR 746, the CJEU was concerned with the complaint of a non-Roma shopkeeper who suffered a disadvantage because of the positioning of electricity meters in the area in which her shop was located; the (alleged) reason for the positioning of the meters being the Roma origin of most of the inhabitants of the district. Ten questions were referred to the CJEU concerning the interpretation of the **Race Directive**; relevantly, it was asked:

> "(1) Is the expression 'ethnic origin' used in Directive 2000/43/EC and in the Charter of Fundamental Rights of the European Union to be interpreted as covering a compact group of Bulgarian citizens of Roma origin such as those living in the [relevant district]?
> …
> (7) For a finding that there has been indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/43, is it necessary that the neutral practice places persons in a particularly less favourable position on the ground of racial or ethnic origin, or is it sufficient that that practice affects only persons of a specific ethnic origin? In that context, under Article 2(2)(b) of Directive 2000/43 is a national provision … – according to which there is indirect discrimination where a person is placed in a more unfavourable position because of the characteristics set out in Article 4(1) (including ethnicity) – permissible?…"

21. In considering whether "ethnic origin" within the meaning of the **Race Directive** must be interpreted

as "*covering a compact group of Bulgarian citizens of Roma origin*", such as those living in the district in issue (question (1)), the CJEU observed that:

> "55 As … the wording of the abovementioned provisions does not in itself settle the question whether the principle of equal treatment which that Directive is designed to guarantee is to benefit only those among the class of persons affected by a discriminatory measure based on racial or ethnic origin who actually possess the racial or ethnic origin concerned, it is necessary, for the purpose of interpreting those provisions, to have regard also to their context and to the general scheme and the aim of Directive 2000/43 of which they form part ....
> 56 In that regard, the Court's case law, ... under which the scope of Directive 2000/43 cannot, in the light of its objective and the nature of the rights which it seeks to safe-guard, be defined restrictively, is, in this instance, such as to justify the interpretation that the principle of equal treatment to which that Directive refers applies not to a particular category of person but by reference to the grounds mentioned in Article 1 thereof, so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds (see, by analogy, judgment in Coleman, C-303/06, EU:C:2008:415, [2008] IRLR 722, paragraphs 38 and 50).
> 57 Such an interpretation is, moreover, supported by recital 16 in the preamble to, and Article 3(1) of, Directive 2000/43, according to which the protection against discrimination on grounds of racial or ethnic origin which the Directive is designed to guarantee is to benefit 'all' persons.
> 58 It is also supported both by the wording of ... Article 19 TFEU, a provision which constitutes the legal basis of Directive 2000/43 and which confers on the European Union the competence to take appropriate action to combat discrimination based, inter alia, on racial and ethnic origin (see, by analogy, judgment in Coleman, C-303/06, EU:C:2008:415, [2008] IRLR 722, paragraph 38), and, as the Advocate General has observed ... by the principle of non-discrimination on grounds of race and ethnic origin enshrined in Article 21 of the Charter, to which the Directive gives specific expression in the substantive fields that it covers ...."

22. Subsequently addressing question (7), the CJEU continued:

> "95 … it should be recalled that … if it is apparent that a measure which gives rise to a difference in treatment has been introduced for reasons relating to racial or ethnic origin, that measure must be classified as 'direct discrimination' within the meaning of Article 2(2)(a) of Directive 2000/43.
> 96 By contrast, indirect discrimination on the grounds of racial or ethnic origin does not require the measure at issue to be based on reasons of that type. … in order for a measure to be capable of falling within Article 2(2)(b) of Directive 2000/43, it is sufficient that, although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage.
> 97 It follows from the foregoing that Article 2(2)(b) of Directive 2000/43 must be interpreted as precluding a national provision under which, in order for there to be indirect discrimination on the grounds of racial or ethnic origin, the measure in question is required to have been adopted for reasons of racial or ethnic origin."

23. In the current proceedings, there was little dispute below as to the effect of the court's ruling in **CHEZ**; as the ET recorded:

> "16. ... CHEZ said that indirect discrimination under what is now the Equal Treatment

> Directive extended to those who did not share the same protected characteristic as the disadvantaged group."

*The **Marleasing** principle*

24. Prior to 1 January 2024, courts and tribunals were obliged, as far as was possible, to interpret domestic law in accordance with principles derived from EU law. This obligation was referred to as "*the **Marleasing** principle*", after the ruling of the European Court of Justice in **Marleasing SA v La Comercial Internacional de Alimentación SA** (Case C-106/89) [1993] BCC 421, that:

> "8. ... the member states' obligation arising from a directive to achieve the result envisaged by the directive and their duty under the treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of member states including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter ..."

25. Following the UK's departure from the EU, the application of EU law in this jurisdiction was initially governed by the **European Union (Withdrawal Act) 2018** ("EUWA"), which preserved aspects of EU law in domestic law. With effect from 1 January 2024, the **EUWA** has been superseded by the **Retained EU Law (Revocation and Reform) Act 2023** ("REULA"), but, claims in the present proceedings having been presented in or around January 2021, it is agreed that the issues raised by this appeal are to be determined under the provisions of the **EUWA**. Moreover, it is common ground that, pursuant to the provisions of the **EUWA**, the **Marleasing** principle remained part of domestic law, to be applied by the ET in this case.

26. As for how the **Marleasing** principle was to be applied, in **Vodafone 2 v The Commissioners for Her Majesty's Revenue & Customs** [2009] EWCA Civ 446, the Chancellor (Sir Andrew Morritt), adopting the submissions of counsel for HMRC, explained, as follows:

> "37. ...
> 'In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) It is not constrained by conventional rules of construction (Per Lord Oliver in *Pickstone* [*Pickstone v Freemans* [1989] AC 66] at 126B); (b) It does not require ambiguity in the legislative language (Per Lord Oliver in *Pickstone* at 126B; Lord Nicholls in *Ghaidan* [*Ghaidan v Godin-Mendoza* [2004] 2 AC 557] at 32); (c) It is not an exercise in semantics or linguistics (See *Ghaidan* per Lord Nicholls at 31 and 35; Lord Steyn at 48-49; Lord Rodger at 110-115); (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (Per Lord Oliver in *Litster* [*Litster v Forth Dry Dock* [1990] AC 546] at 577A; Lord Nicholls in *Ghaidan* at 31); (e) It permits the implication of words necessary to

> comply with Community law obligations (Per Lord Templeman in *Pickstone* at 120H-121A; Lord Oliver in *Litster* at 577A); and (f) The precise form of the words to be implied does not matter (Per Lord Keith in *Pickstone* at 112D; Lord Rodger in *Ghaidan* at para 122; Arden LJ in *IDT Card Services* [*HMRC v IDT Card Services* [2006] STC 1252*]* at 114).'
> 38. ...
> 'The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (Per Lord Nicholls in *Ghaidan* at 33; Dyson LJ in *EB Central Services* [*HMRC v EB Central Services* [2008] EWCA Civ 486] at 81) An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 110-113; Arden LJ in *IDT Card Services* at 82 and 113) and (b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 115; Arden L in *IDT Card Services* at 113.)'"

27. In **EBR Attridge LLP v Coleman** [2010] ICR 242 ("**Coleman No. 2**"), the EAT addressed the question of how domestic legislation was to be construed to include associative disability discrimination, following the decision of the ECJ in **Coleman v Attridge Law** [2008] ICR 1128. The ECJ had held that the **Framework Directive** was not limited to persons who were themselves disabled, ruling:

> "50. Although, in a situation such as that in the present case, the person who is subject to direct discrimination on the grounds of disability is not herself disabled, the fact remains that it is the disability which ... is the ground for the less favourable treatment ... Directive 2000/78, which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation, applies not to a particular category of person but by reference to the grounds mentioned in article 1.
> ...
> 56. ... Directive 2000/78, and, in particular, articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. ...
> ...
> 58. Since, under article 2(3) of Directive 2000/78, harassment is deemed to be a form of discrimination within the meaning of article 2(1), it must be held that ... the Directive, and, in particular, articles 1 and 2(1) and (3) thereof, must be interpreted as not limited to the prohibition of harassment of people who are themselves disabled."

28. Ms Coleman's claim of disability discrimination was remitted to the ET, which had determined that it had jurisdiction to hear the case, notwithstanding that Ms Coleman was not, herself, disabled. Dismissing the employer's appeal, the EAT (Underhill P (as he then was) presiding) held that additional words could be written into the relevant provisions of the **DDA** (the relevant legacy statute then in force) so as to make clear:

> "16. ... that the putative victim has suffered adverse treatment on a proscribed "ground", namely disability, and the fact that the disability is not his own is not of the essence ..."

29. Underhill P explained his reasoning for holding that it was permissible to thus add words to the provisions of the domestic statute, as follows:

> "14. ... there is nothing "impossible" about adding words to the provisions of the 1995 Act so as to cover associative discrimination. No doubt such an addition would change the meaning of the 1995 Act, but, as the speeches in **Ghaidan** make clear, that is not in itself impermissible (see, e.g., *per* Lord Nicholls at paras. 32-33). The real question is whether it would do so in a manner which is not "compatible with the underlying thrust of the legislation" (*per* Lord Nicholls at para. 33) or which is "inconsistent with the scheme of the legislation or its general principles" (*per* Lord Rodger at para. 121). In **Ghaidan** the majority were prepared to interpret the words "wife or husband" in Schedule 1 of the **Rent Act 1977** as extending to same-sex partners. That was plainly not the intention of Parliament when the act was enacted, nor does it correspond to the actual meaning of the words, however liberally construed; but the implication was necessary in order to give effect to Convention rights and it went "with the grain of the legislation" (in Lord Rodger's phrase). In my view the situation with which I am concerned is closely analogous. The proscription of associative discrimination is an extension of the scope of the legislation as enacted, but it is in no sense repugnant to it. On the contrary, it is an extension fully in conformity with the aims of the legislation as drafted. The concept of discrimination "on the ground of disability" still remains central. In the case of other kinds of discrimination, the UK legislation, as construed by the courts without reference to EU law, already outlaws associative discrimination: see the decision of this Tribunal in **Showboat Entertainment Centre Ltd v Owens** [1984] ICR 65, approved by the Court of Appeal in **Weathersfield Ltd v Sargent** [1999] ICR 425. The particular route to that result adopted in those cases is not available here because of the specific references in the 1995 Act to "a disabled person", but the conclusion reached in them confirms that as a matter of UK law the policy underlying the anti-discrimination legislation applies to associative discrimination as much as to "primary" discrimination. I can see no reason why there should be a different policy as regards disability discrimination and no reason to suppose that the choice to draft by reference to "a disabled person" reflected a deliberate and different policy judgment."

30. In **Ghaidan v Godin-Mendoza** [2004] UKHL 30, [2004] 2 AC 557, the question of interpretation arose under section 3 of the **Human Rights Act 1998**, requiring that a court should interpret, and give effect to, legislation in a way that is compatible with the **European Convention on Human Rights** ("ECHR"). That, as Lord Nicholls stated, may require a statutory provision to bear a meaning that departs from the unambiguous meaning it would otherwise have, provided that the interpretation is not inconsistent with a fundamental feature of the legislation (**Ghaidan**, paragraphs 31-33). The determination of the correct construction to be adopted was, therefore, not simply a matter of the language Parliament had chosen to use, but required consideration of the "*entire substance of the provision*", having regard to its place "*in the overall scheme of the legislation*": if that was incompatible with the obligation in issue - if it would involve "*turning the scheme inside out*" - the remedy must lie with Parliament, not the courts (*per* Lord Rodger, **Ghaidan**, paragraph 110). Thus, the distinction to be maintained was between interpretation and amendment; as Lord Rodger explained:

> "121 ... it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. When the court spells out the words that are to be implied, it may look as if it is "amending" the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it ...It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."

31. When determining whether a particular interpretation can be said to "*go with the grain*" of the legislation, it has been held relevant to take into account a Parliamentary intention to correctly implement a directive: see **USDAW v Ethel Austin Ltd (in administration); USDAW and anor v UNITE the Union and ors** [2014] 1 CMLR 23, at paragraph 50; **Lock v British Gas Trading Ltd** [2016] EWCA Civ, [2017] 1 CMLR 25, at paragraphs 106-107; **P v Commissioner of Police of the Metropolis** [2017] UKSC 65, [2018] 2 CMLR 4, at paragraph 32. Where, however, legislation specifically provides for an exception to rights that would otherwise ensure protections consistent with those provided under a relevant directive, an attempt to interpret the provision in question so as to avoid that exception would cross the line, notwithstanding a more general legislative intent to achieve harmony with the directive; see **Walker v Wallem Shipmanagement Ltd** [2020] 2 CMLR 25 EAT.

*Section 19A **EqA***

32. On 1 January 2024, the **Equality Act 2010 (Amendment) Regulations 2023** (the "Regulations") came into force. The **Regulations** were made pursuant to the powers of reproduction under sections 12(8) and 13 **REULA**, and, by way of various amendments to the **EqA**, seek to reproduce the effect of the EU equality directives and Article 157 **Treaty on the Functioning of the EU** ("TFEU") by reference to domestic and CJEU cases decided before implementation period completion day (*per* the **EUWA**), on 31 December 2020.

33. Relevant to the present appeal, by way of section 19A(1) **EqA**, regulation 3 introduces a new statutory tort of "*indirect discrimination: same disadvantage*", as follows:

> "(1) A person (A) discriminates against another (B) if— (a) A applies to B a provision, criterion or practice, (b) A also applies, or would apply, the provision, criterion or practice to— (i) persons who share a relevant protected characteristic, and (ii) persons who do not share that relevant protected characteristic, (c) B does not share that

> relevant protected characteristic, (d) the provision, criterion or practice puts, or would put, persons with the relevant protected characteristic at a particular disadvantage when compared with persons who do not share the relevant protected characteristic, (e) the provision, criterion or practice puts, or would put, B at substantively the same disadvantage as persons who do share the relevant protected characteristic, and (f) A cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim."

34. The material difference between section 19A and section 19 **EqA** is at section 19A(e), which provides that if someone does not share the protected characteristic of members of the group who are, or would be, put at a particular disadvantage by a PCP, that person may nonetheless be discriminated against if they have been, or would be, put at "*substantively the same disadvantage*" as those in the affected group.

35. The **Equality Act 2010 (Amendment) Regulations 2023 Explanatory Note** makes clear that section 19A **EqA** was introduced to reproduce the principles established in **CHEZ**.

The ET's decision and reasoning

36. Before the ET, the parties were in agreement that: (1) the **CHEZ** judgment allowed that indirect discrimination extended to those who did not share the same protected characteristic as the disadvantaged group; (2) section 19 **EqA**, on its face, did not extend that far. The dispute between the parties was whether the ET could legitimately interpret section 19 in accordance with the decision in **CHEZ** by reading particular words into it. See the ET's decision, at paragraph 16.

37. Accepting that the wording of section 19 **EqA** was clear and unambiguous in requiring that the claimant in an indirect discrimination claim must share the protected characteristic with the group that is at a disadvantage, the ET observed as follows:

> "21. … it is equally clear after CHEZ that this is not adequate to properly implement what is now the Equal Treatment Directive. I must, "so far as possible" and in accordance with Vodafone 2 [**Vodafone 2 v Revenue and Customs** [2009] EWCA Civ 446] interpret the domestic statute in accordance with the Equal Treatment Directive, even if that requires the notional addition or deletion of words. The relevant restriction is that any changes must "*go with the grain of the legislation*". In Vodafone 2 the grain of the legislation was also spoken of as the "*thrust*" of the legislation. At para 70 Longmore LJ said that "*the boundary between interpretation and legislation will have been crossed if it is proposed to give a statute a meaning which departs substantially from a fundamental feature of the Act … if the proposed meaning would remove the "core and essence" or "the pith and substance" of the Act or if it would insert something inconsistent with one of the Act's "cardinal principles" … Nor can the process of interpretation create a wholly different scheme from any scheme provided by the Act.*""

38. The ET characterised the task it was required to undertake in the present case in the following terms:

> "22. In this case I am being asked to remove a limitation from an Act whose purpose is (amongst other things) to make discrimination in the workplace on the basis of protected characteristics unlawful."

Continuing:

> "I see nothing in what I am being asked to do that goes against the grain of the Act, or changes or removes its core meaning or infringes a "*cardinal principle*". There is no "*wholly different scheme*". There is at most an extension of an existing scheme."

39. On that basis, the ET concluded:

> "23. Given that, I must read s19 of the Equality Act without the requirement for the claimant to share the protected characteristic of the disadvantaged group. CHEZ-type associative discrimination is unlawful. The tribunal has jurisdiction to consider indirect discrimination claims under section 19 of the Equality Act 2010 where there is a PCP applied by an employer that puts people with a particular protected characteristic at a disadvantage. The claimant in such a case must also suffer that disadvantage but it is not necessary for them to have the same protected characteristic as the disadvantaged group."

The appeal and the respondent's submissions in support

40. By its single ground of appeal, the respondent contends that the ET erred in law in concluding that, contrary to its clear and unambiguous wording, section 19 **EqA** should be interpreted so as to dispense with the requirement that it was necessary for a claimant to have the same protected characteristic as the disadvantaged group. That, the respondent contends:

> "… goes against the grain of the legislation and/or infringes a cardinal principle and or creates a wholly different scheme."

arguing that:

> "The interpretation of section 19 as found by the Employment Tribunal, creates an entirely new category of Claimant who has not been directly discriminated against and is not part of a group which is potentially indirectly discriminated against by the application of an apparently neutral PCP. It is the essence of indirect discrimination in accordance with the statutory scheme set out in section 19 EqA, that a remedy is provided to individuals who are members of a protected group that has suffered particular disadvantage from the application of such a PCP. The interpretation applied by the ET to create an entirely new class of Claimant, will apply where that Claimant does not share that characteristic but is able to show personal disadvantage arising from any reason whatsoever."

41. In support of its appeal, the respondent submits that: (i) the language and structure of section 19 **EqA** clearly and unambiguously requires a victim class, created as a result of the disparate impact on, and disadvantage arising in relation to, those with the relevant protected characteristic; (ii) its interpretation of

section 19 is supported by the **Explanatory Notes** to the **EqA**; (iii) the **EqA** adopted a similar approach to the legacy legislation; (iv) that approach was to be contrasted to the wording (and approach) of section 13 **EqA**, defining direct discrimination, and the broader legislative purpose behind that wording as recognised in the case-law and the **Explanatory Notes**; (v) **CHEZ** created an entirely new victim class, based on collateral damage, even if there was no claimant within the protected group; (vi) that gave rise to a radical extension of protection, and would require a domestic provision of the form of the new section 19A.

42. It is the respondent's case that the wording of section 19A **EqA** was fundamentally different from section 19 and demonstrated that the ET's interpretation sat on the wrong side of the boundary, creating an entirely new right and allowing that a claim could be brought even if there was no complainant who possessed the relevant protected characteristic giving rise to the group disadvantage (for example, even if there was no female complainant, a short man could claim indirect discrimination in respect of a PCP to be of a certain height, a requirement that would only have a group disadvantage for women). That, the respondent says, would be entirely contrary to the purpose of the protection. Acknowledging that, at least until 1 January 2024, courts were obliged, as far as possible, to interpret domestic law in accordance with EU law principles, the respondent submits that the present case is very different to **Coleman**: that case involved a straightforward claim of direct discrimination, where the definition provided under the **DDA** differed to other protected characteristics, a difference that was corrected by the EAT's formulation (see paragraphs 14-16), ensuring consistency of approach. As for other cases, where wording had been added to legislation so as to conform with EU law or the **ECHR**, the examples relied on did not require the creation of an entirely new class of claimant.

43. As for the new section 19A **EqA**, it is the respondent's case that: (i) if, prior to the **Regulations**, section 19 could not be read so as to conform with the principles derived from **CHEZ**, the introduction of section 19A was *ultra vires* **REULA**; alternatively (ii) to the extent that the **Regulations** were *intra vires*, they could go no further than to create a right to bring a section 19A claim with effect from 1 January 2024.

The claimants' submissions

44. For the claimants, it is submitted that the application of the **Marleasing** principle required consideration of what constituted the substance of section 19 **EqA**, having regard to its place in the overall

scheme of the legislation (**Ghaidan**, paragraph 110). It was thus relevant that the **EqA** prohibited a broad range of conduct, and the concept of associative discrimination already existed under sections 13 and 26, affording protection to those with protected characteristics but also to those without (albeit the concept of "*association*" was not central to the protection). The purpose of the **EqA** was to strengthen the law to support progress on equality (**EqA Explanatory Notes**); within the scheme of the legislation, the place of the protection against indirect discrimination was "*…to avoid 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…one form of levelling the playing field"* (paragraph 1, **Essop; Naeem**). The ET's construction might extend the scope of section 19 but it could not sensibly be said to "*go against the grain*", to create a "*wholly different scheme*", or turn the scheme of the **EqA** "*inside out*" (*per* **Ghaidan**).

45. As for the respondent's contention that the essence of indirect discrimination under section 19 was that it was restricted to "*individuals who are members of a protected group that has suffered particular disadvantage from the application of such PCP*": (i) the concept of associative discrimination already existed within the **EqA**, it did not purport to protect only those with protected characteristics; (ii) the respondent's analysis assumed that section 19 requires that a claimant show the reason for the individual disadvantage was the protected characteristic, but that was not the case – the essential element was the causal link between the PCP and the disadvantage, the reason for the disadvantage did not have to be related to the protected characteristic (**Essop**); (iii) the respondent's objection was that **CHEZ** created a wholly new scheme, but **Ghaidan** did not prohibit a *new* scheme, only one that was wholly *different* (that turned the scheme "*inside out*"); (iv) the ET's construction still required: (a) that the pool to which the PCP applied is subject to the statutory restriction in section 23 **EqA** that, for the purposes of comparison, the circumstances must not be materially different; (b) group disadvantage; (c) that the claimant must suffer that same disadvantage.

46. The claimants further contend that support for the ET's construction of section 19 (and the claimants' case on appeal) was provided by section 19A **EqA**; introduced under **REULA**. This set out what the Secretary of State considered the law to be prior to 1 January 2024 (otherwise it would be *ultra vires*), and was thus of persuasive support.

The submissions of the intervener

47. The intervener rejects any suggestion that the determination of this appeal could question the *vires* of section 19A **EqA**. That provision was the product of broad powers to reproduce aspects of EU law in the Minister's discretion, under section 13 **REULA**, not simply a statement of the Minister's interpretation of **CHEZ** and its effect in domestic law. In producing the **Regulations**, the exercise undertaken by the government was different (if similar) to the interpretative function of the courts and tribunals. In any event, even if section 19A were treated as the government's interpretation of **CHEZ**, EU law and domestic law, it would still be for the EAT to decide the issue before it by reference to the law at the material time; the subsequent **Regulations** could not be treated as persuasive in that exercise. Moreover, the *vires* of the **Regulations** was not before the EAT, and would (i) require a broad consideration of whether **CHEZ** was capable of being given direct effect in domestic law in any way, even if not in the way found by the ET in this particular case; and (ii) further require consideration of a number of public law matters, including the meaning of section 12(8) and the various powers in section 13 **REULA** (not matters raised by this appeal).

48. Descending to the merits of the appeal, the intervener notes that: (i) **CHEZ** made clear that a claimant may bring a claim of indirect discrimination even if they do not share the protected characteristic of the group put at a particular disadvantage; (ii) although there have been competing interpretations of **CHEZ** as to the circumstances in which such a claim might be brought, the finding of the ET was that a claimant might do so where they also "*suffer that disadvantage*" (ET, paragraph 23); (iii) the common position before the ET was that: (a) the **EqA** (as then drafted) did not expressly recognise this right, and (b) the only way the **EqA** could be interpreted as recognising this right (if at all) was by applying the **Marleasing** principle of indirect effect; (iv) the sole ground of appeal was that domestic law was incapable of being read compatibly with **CHEZ**, as interpreted by the ET, on the basis that to attempt to read it compatibly "*goes against the grain of the legislation and/or infringes a cardinal principle and/or creates a wholly different scheme*". On this question, the intervener agrees with the claimants' position: the **EqA** is well capable of being read compatibly with the equality directives, as interpreted by **CHEZ**; it cannot reasonably be said that the ET's judgment goes against the grain of the **EqA** or that it is incompatible with the underlying thrust of the legislation; moreover, this approach was supported by the willingness of the courts and tribunals to read down domestic legislation on a similar (or even greater) scale to that proposed in the present case, e.g. **Coleman**.

49. More specifically, the intervener submits: (i) the **EqA** (and the legacy legislation) was intended to give

effect to the equality directives (including that under consideration in **CHEZ**); (ii) there was no feature of the **EqA** that would suggest that the thrust or grain of that legislation was actively to deprive people of protection when they suffered disadvantage in the circumstances of **CHEZ**; (iii) an essential feature of the ET's interpretation was that group disadvantage (i.e. *prima facie* discrimination) must still be established, which maintained the thrust and purpose of the indirect discrimination protections. It was thus wrong to suggest (as the respondent did) that the ET's judgment dispensed with the requirement for discrimination, amounting to a plea for fairness. As for the precise terms used, and whether amended language in the form of section 19A was required, the case-law was clear that the precise wording did not matter (paragraph 37(f), **Vodafone 2**).

Analysis and Conclusions

50. The submissions of the parties and the intervener have provided an extensive overview of the relevant legislative history and jurisprudential framework, albeit that all accept that the question raised by this appeal is itself limited in scope. As the ET recorded (see paragraph 16 of its decision), there was no dispute that the CJEU's interpretation of indirect discrimination in **CHEZ** applied across the EU equality directives, and that the effect of that decision was that indirect discrimination extended to those who did not share the same protected characteristic as the disadvantaged group. Equally it was common ground that the language of section 19 **EqA** did not extend that far. In interpreting the **EqA**, it was also agreed that, pursuant to the principle laid down in **Marleasing** (and under the provisions of the **EUWA**), the ET was under an obligation to construe domestic legislation, "*as far as possible*", to comply with EU law; as to determining what was "*possible*" in this context, the approach was that laid down in **Ghaidan** and **Vodafone 2**.

51. In its determination, the ET concluded that section 19 **EqA** must be interpreted so as to permit a claim of indirect discrimination, where there is a PCP applied by an employer that puts people with a particular protected characteristic at a disadvantage, by a claimant who must:

> "... suffer that disadvantage but it is not necessary for them to have the same protected characteristic as the protected group."

52. Although it is not disputed that this construction would provide for the form of indirect discrimination allowed in **CHEZ**, the question raised by the appeal is whether this falls on the wrong side of the boundary between interpretation and amendment: whether it goes with the "*grain of the legislation*" or whether it is inconsistent with "*a fundamental or cardinal feature*" of that legislation (**Vodafone 2** paragraph 38 (a)), or

whether it effectively involves "*turning the scheme inside out*" (**Ghaidan**, paragraph 110).

53. The "*grain*" of the **EqA** is clear: it seeks to harmonise discrimination law and to strengthen the law to support progress on equality (**Explanatory Notes**, paragraph 10); although it did not itself implement the EU equality directives for the first time, it replaced earlier legislation that had done so (**Explanatory Notes**, paragraph 21). Specifically, section 19 of the **EqA** was intended to apply the EU definition of indirect discrimination, "*to ensure uniformity of protection across all the protected characteristics in all areas where it applies*" (**Explanatory Notes**, paragraph 81).

54. In providing protection against other forms of discrimination, the scheme of the **EqA** allows for claims to be brought by those who suffer the relevant treatment because of, or related to, a protected characteristic, even if they do not themselves possess that characteristic; this is often referred to as "*associative discrimination*", although it can be more accurate to characterise such a claim by reference to the shared impact of the treatment in issue (e.g. the less favourable treatment for the purposes of section 13 **EqA**, or the unwanted treatment, as defined by section 26). As Underhill P observed in **Coleman No. 2**, domestic courts and tribunals had long construed British legislation (absent any reference to EU law) as outlawing various forms of associative discrimination (see, e.g., **Showboat v Owens**, and **Weathersfield v Sargent**). Moreover, even where the language of the relevant legacy statute did not expressly allow for such a construction, the EAT saw no difficulty in interpreting the provision in question (the definition of direct disability discrimination under the **DDA**) in such a way as to achieve conformity in the protection provided (**Coleman No.2**, paragraphs 14-16).

55. Accepting that the EAT's decision in **Coleman No.2** resulted in a proscription of associative discrimination that amounted to "*an extension of the scope of the legislation as enacted*" (**Coleman No.2**, paragraph 14), the respondent nevertheless objects that the proposed extension to the protection afforded under section 19 **EqA** cannot be viewed in the same way: it does not merely ensure conformity in the protection against indirect discrimination, but creates an entirely new right, allowing a claim to be brought even if there is no complainant possessing the relevant protected characteristic; that, the respondent says, gives rise to a radical extension of protection, amounting to legislative amendment rather than interpretation.

56. In considering that proposition, it is necessary to have regard to the place of section 19 in the overall scheme of the **EqA** (**Ghaidan**, paragraph 110). As Baroness Hale observed in **Essop; Naeem**, the protection

against indirect discrimination is "*meant to avoid 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*"; it is a way of "*trying to 'level the playing field'*". Although the "*rules or practices*" (the PCP for section 19 purposes) must put people with a particular protected characteristic at a disadvantage, the required causal link is between the PCP and the particular disadvantage, not the protected characteristic (**Essop; Naeem**, paragraph 25). Thus, once the required group disadvantage has been demonstrated (that is, that the PCP places persons sharing a particular protected characteristic at a disadvantage when compared to those who do not share that characteristic), the focus is on whether the complainant has actually suffered the particular disadvantage in issue, not on whether that disadvantage is actually caused by the relevant characteristic.

57. To take the example (postulated by the respondent in argument) of a minimum height PCP, such a requirement may place women as a group at a disadvantage and thus, subject to objective justification, might amount to indirect sex discrimination. It is, however, a feature of indirect discrimination that the PCP in issue need not put everyone who shares the relevant protected characteristic at a disadvantage; so, the fact that some, taller, women may be able to meet the height requirement would not be fatal to a claim under section 19. On the other hand, the claim would necessarily fail if brought by a complainant sharing the relevant protected characteristic (in this example, a woman) who was not in fact put at a disadvantage by the height PCP. The point was underlined by the Supreme Court in **Essop; Naeem**: protection against indirect discrimination requires "*correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual*"; a claim will fail where there is "*no causal link between the PCP and the disadvantage suffered by the individual*".

58. This understanding of the scheme of the protection accords with that under EU law, as explained by the CJEU in **CHEZ**. It was thus, after having regard to the "*context and to the general scheme and the aim*" of the **Race Directive**, that it was held that the protection must extend to "*persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage*".

59. Notwithstanding this focus - in both domestic and EU law - on the causal link between the PCP and the experience of individual disadvantage, the respondent objects that the extended protection allowed by the ET's construction of section 19 **EqA** does more than that which is "*possible*" pursuant to the **Marleasing**

principle. Returning to the example of the minimum height PCP, the respondent points to the potential claim brought by a man who was unable to meet the requirement, notwithstanding that there may be no female claimant. That, the respondent says, would not only extend the protection but would give rise to a radically different scheme, whereby there need be no claimant who actually possessed the protected characteristic that gave rise to the required group disadvantage.

60. Acknowledging that this would undoubtedly amount to an extension of the protection beyond that envisaged by language of section 19 (or, indeed, as intended by Parliament when introducing the **EqA** or its legislative predecessors), the question is whether it would do so in a manner that was incompatible with a fundamental feature of the **EqA** (**Ghaidan**, paragraphs 31-33), or which was inconsistent with the scheme of the **EqA** or its general principles, such as to go against the grain of that statute (**Ghaidan**, paragraph 121). As the claimants submit, it is not enough that the construction in issue would create a wholly new scheme, the question is whether it would be such as would turn the existing legislative scheme "*inside out*" (**Ghaidan**, paragraph 110).

61. Within the **EqA**, the place of the protection against indirect discrimination is to remove *"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*" and to thus "*level the playing field*" (**Essop; Naeem**). As such, I am unable to see that the extension to that protection arising from the ET's construction of section 19 can be said to go against the grain of the legislation; on the contrary, it seems to me to be entirely consistent with a statute that seeks to harmonise discrimination law and to strengthen the law to support progress on equality (**Explanatory Notes to the EqA**). It is certainly consistent with a legislative purpose of seeking to ensure that the EU definition of indirect discrimination (as explained by the CJEU in **CHEZ**) is applied in domestic legislation (and see, e.g., the relevance of this factor in cases such as **USDAW**, **Lock**, and **P**).

62. I also consider it is wrong to suggest that the ET's interpretation is incompatible with a fundamental feature of the legislation, namely that a complaint of indirect discrimination must be brought by a claimant who shares the protected characteristic of the group. In contrast to cases such as **Walker v Wallem**, there is no express exception to this effect. Moreover, although the requirement that there is a demonstratable disadvantage to a group that shares a particular protected characteristic is undoubtedly a fundamental feature of section 19 **EqA**, that continues to be a requirement under the ET's construction of section 19. The protection

thus maintains the fundamental feature of group disadvantage, where that group is defined by a shared protected characteristic. Where - and only where - that feature is in play, the extension to the protection allows that claims may also be pursued by others who share the same particular disadvantage as a result of the PCP in issue, even though they do not share the same protected characteristic.

63. As for the objection that claims may be brought absent any claimant who shares the protected characteristic of the disadvantaged group, I cannot see that this is in any sense "*repugnant*" to the legislative purpose (*per* Underhill P in **Coleman No.2**). Indeed, the existence of an indirectly discriminatory PCP may mean that there are few, if any, employees who possess the relevant protected characteristic who might be able, or willing, to pursue a claim. Having established the relevant group disadvantage, a successful complaint pursued by someone who does not share the same protected characteristic is, however, still likely to achieve the desired equality of result (paragraph 25, **Essop; Naeem**), thus removing the indirectly discriminatory PCP to the benefit of all those put to a disadvantage by its application. Similarly, of course, a successful claim brought by a complainant sharing the relevant protected characteristic is also likely to achieve the same equality of result. To return to the minimum height condition example: a successful challenge to such a PCP by a woman is likely to lead to the removal of any such unjustified requirement to the benefit of both her (shorter) female *and* male colleagues.

64. For all these reasons, I am satisfied that the ET made no error of law, but correctly reached the conclusion that it had jurisdiction to consider indirect discrimination claims under section 19 **EqA**, where there is a PCP applied by an employer that puts people with a particular protected characteristic at a disadvantage, where the claimant in such a case must also suffer that disadvantage but need not have the same protected characteristic as the disadvantaged group.

65. Given my conclusion in this regard, it follows that I do not need to consider any argument as to the *vires* of section 19A **EqA**. As the respondent accepts, if (as I have concluded) prior to the **Regulations**, section 19 was to be read so as to conform with the principles derived from **CHEZ**, the introduction of section 19A could not be said to be *ultra vires* **REULA**.

66. I therefore dismiss this appeal. As for the precise words to be implied to give effect to the ET's (and my) ruling as to how section 19 **EqA** is to be interpreted, to the extent it is considered necessary for further definition to be provided (notwithstanding the observation made at paragraph 37(f) **Vodafone 2**), the parties

are directed that, within 14 days of the handing down of this judgment, they should, if possible, provide an agreed form of words, or, if agreement is not possible, written representations as to the precise wording to be used.