Blurred lines: 'direct', 'indirect' and 'association' following CHEZ

CHRIS MILSOM, Cloisters

The recent European case CHEZ may mark a sea change in discrimination claims. What did it decide and what lies ahead for the evolving concept of 'associative discrimination'?

On paper the divide is straightforward. 'The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria, which appear neutral on their face, may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.

Direct and indirect discrimination are mutually exclusive. You cannot have both at once,' said Baroness Hale at [56]-[57] in *JFS*. The binary distinction has stark effects. An act of direct discrimination is not saved by a benign motive. Once such an act is proved, it cannot be justified.

In practice, however, the overlap gives rise to real difficulties. In her superb article in August 2015's *ELA Briefing*, Kiran Daurka addressed the dubious judgment of the Court of Appeal in *Essop,* which effectively requires a claimant in an indirect discrimination complaint to establish the reason why he or she has suffered the particular disadvantage in issue. The court thus shoehorned the 'reason why' question at the heart of a direct discrimination complaint into the indirect discrimination framework.

CHEZ makes plain that *Essop* is not good law. As the court put it at [96]-[97], Article 2 of the Directive requires only 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'. Indeed, it precludes 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'. It is therefore only a question of time before the good sense of the EAT judgment is restored. What is equally clear, however, is that the blurred line between direct and indirect discrimination vexes the CJEU as much as domestic courts. That haziness in turn gives rise to the ambiguous remit of 'associative discrimination'.

Associative discrimination pre-CHEZ

Coleman boiled down to a single question: could C, the principal carer of her disabled son, pursue a claim of direct disability discrimination in reliance upon his disability? The ECJ held unhesitatingly that she could. It is impermissible for an employer to rely on a protected characteristic to treat an employee less well than others, even if that individual was not a member of the protected class.

AG Marduro distinguished, however, between the 'exclusionary mechanism' of direct discrimination and harassment on the one hand and the 'inclusionary mechanism' of indirect discrimination and the inter-linked duty to make adjustments on the other. Adopting this distinction, the ECJ suggested that it was apparent from the wording of the Directive that the duty to provide reasonable accommodation 'can only relate to disabled people and to the obligations incumbent on their employers [42]'.

'Association' in the *Coleman* scenario, however, risks becoming a distraction. 'Although the phrase "associative discrimination" is a convenient shorthand, on my reading of the decision of the Court of Justice the concept of association is not central to its reasoning. What matters is 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 … In practice it may be uncommon for an employee to be discriminated against on the ground of the disability of anyone with whom he is not in some sense "associated", indeed closely associated, but the fact of the association is not necessary to the unlawfulness; and I should prefer to avoid language which encourages tribunals to become bogged down in discussion of what does or does not amount

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to an "association", when that should not be the focus of the enquiry,' said Underhill P at [16] in *EBR Attridge*.

Subsequent attempts to run with the *Coleman* baton failed. Thus the Scottish EAT in *Kulikaoskas* rejected K's complaint of associative discrimination on the grounds of his partner's pregnancy. This extension would undermine the purpose of pregnancy protection, namely to uphold the autonomy and unique biological features of women. The ratio is questionable: how is the anti-discrimination objective undermined by ensuring decisions are not made on the proscribed ground of pregnancy? Regrettably the matter was resolved before the CJEU addressed reference questions but the question falls to be revisited following *CHEZ*.

Hainsworth marks a bolder attempt to extend. H pursues a reasonable adjustments complaint by reference to the Ministry of Defence's failure to provide a transfer so as to ensure that her disabled daughter is provided with adequate schooling. The failure to make the adjustment gives rise to a disadvantage both to her and her daughter and the duty to make adjustments should as a matter of law be extended. The Court of Appeal, however, found the wording of Article 5 as interpreted in *Coleman* dispositive against her. *Coleman* did not require reassessment whether in the light of the UN Convention on the Rights of Persons with Disabilities or the EU Charter on Fundamental Rights.

Crucially, the court found that the concept of association had a different meaning in the indirect as opposed to direct discrimination scenario. 'In *Coleman* the claimant was, on her case, herself the victim of positive discrimination. Her child's disability was simply the cause of it. Their exact relationship was in those circumstances not critical to proof of the cause. Here, however, the appellant has to assert a duty upon the respondent to act effectively for the benefit of her child. The proximity of the relationship between the appellant and the disabled person therefore becomes critical. But Article 5 … gives no clue as to what degree of proximity might be required … Article 5, on the appellant's approach, would be hopelessly uncertain,' said Laws LJ at [27].

To use AG Marduro's terminology, the Court of Appeal determined that an associative claim based upon the 'inclusionary mechanism' placed emphasis not upon the grounds of the treatment or the fact of disadvantage but upon the relationship between the individual claimant and the protected class.

On 14 July the Supreme Court heard a petition to appeal application at which the request for a reference to the CJEU was renewed: watch this space.

CHEZ: the facts

CHEZ, an electricity distributor, routinely installed its meters 6-7 metres off the ground in Roma districts of Bulgarian towns making it practically impossible for the inhabitants to obtain an accurate reading. While its stated aim was to prevent electricity fraud or abuse, it provided no specific instances of such abuse.

Ms Niklova ran a grocer's shop in one such district. She did not, however, live in the district. Nor was she Roma or explicitly associated with any specific Roma person. She nevertheless pursued a complaint of direct discrimination on the ground of ethnic origin. Having been upheld by the Bulgarian Commission, the matter was ultimately referred to the CJEU.

The AG opinion

By way of context, AG Kokott noted that the Framework Directive simply gave expression to the principle of non-discrimination and did not lay its foundations. Further, in some translations of both the Directive and the EU Charter any reference to discrimination by reason of the applicant's racial or ethnic origin was omitted entirely.

The claim in her view concerned 'the wholesale and collective character of measures which affect an entire community and are liable to stigmatise all the members of that community and their social environment'. In such circumstances there was no need for a personal nexus between the applicant and the protected class. Where a measure was of a wholesale character, persons not possessing a protected characteristic but nonetheless disadvantaged 'as a kind of collateral damage' ought rightly to be protected. On the AG's analysis, which is worthy of further attention on another day, this would include 'legal persons' such as corporations [AG65].

AG Kokott did not accept that N had satisfied the direct discrimination threshold. The contested practice affected individuals on the basis of their residency: Roma who lived elsewhere were not disadvantaged and vice versa.

There was, however, a palpable disadvantage both to the ability to read the meters and to the stigmatising effects of the practice. This predominantly affected Roma people. An 'indirect discrimination by association' complaint could be advanced 'in the

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same way as in connection with direct discrimination'. The example she provided will give employers pause for thought. Assume an employer provides nursery placements to full-time employees only and that it is established that part-time workers were predominantly women (ie the basis of an indirect claim is made out). The effect on the children was as disadvantageous as it would be if the notional employer only made nursery placements available to men: AG Kokott concluded that the children experienced discrimination by association to just the same extent in both scenarios.

While the question of objective justification was a matter for the domestic court the AG (and the CJEU in turn) drew attention to the obvious difficulties CHEZ would have in establishing that the means adopted were proportionate to the legitimate aim of fraud prevention.

The CJEU judgment

The AG opinion was essentially followed by the court. It agreed that the starting point was the fundamental principle of equal treatment rather than a restrictive construction of the Directive. That principle 'refers not to a particular category of person but by reference to the grounds mentioned in Article 1, so that that principle is intended to benefit also persons who, though not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of these grounds … (P)rotection against discrimination … is designed … to benefit all persons' [56]-[57].

The CJEU preferred to view the alleged facts as constituting direct rather than indirect discrimination. This was a practice solely invoked in Roma districts. This, combined with the perpetual non-disclosure of CHEZ, shifted the burden of proof (see *Meister*). Its analysis of associative claims, however, treats 'less favourable treatment' (direct) and 'particular disadvantage' (indirect) interchangeably. Both were, in principle, sustainable.

Implications

CHEZ comes with two caveats. First, it cannot be shorn from its policy context. The CJEU was addressing the entrenched ill-treatment of Europe's largest minority group. As AG Kokott put it in *Belov* [AG3]: 'Many of the estimated 10-12 million Roma in Europe face prejudice, intolerance, discrimination and social exclusion in their daily lives. They are often marginalised and live in very poor socio-economic conditions. The social and economic integration of Roma is therefore one of the stated objectives of the European Union.'

Second, the CJEU decision that this was a matter of direct discrimination must surely be right. AG Kokott's analysis sets the direct discrimination threshold too high. A directly discriminatory measure is no less discriminatory simply because certain Roma living elsewhere escaped its stigmatising effects. Partial discrimination is discrimination all the same. On this analysis, the decision goes no further than *Coleman*.

That said, the observations of AG and court alike on associative indirect claims cannot be ignored despite the failure of both to explicitly address the contrary noises from *Coleman*. *CHEZ* suggests that the focus of associative claims is not so much nexus to a protected *person* but to the less favourable treatment or particular disadvantage in issue. While analogous PCPs are few and far between, the judgment raises real questions for the Supreme Court on *Hainsworth*. After all, an indirect discrimination claim has no knowledge requirement at all: a claimant in a reasonable adjustments claim must by contrast establish actual or constructive knowledge both of disability and disadvantage. If *CHEZ* is writ large, s.19 EqA 2010, which requires the claimant to possess the characteristic in issue, looks vulnerable. Time will tell whether *CHEZ* represents a case on its facts or a sea change.

KEY:

Essop	*Home Office (UKBA) v Essop* [2015] IRLR 724
CHEZ	*CHEZ Razpredelenie Bulgaria AD v Komisa ZA Zashtita ot Diskriminatsia* [2015] IRLR 746
Coleman	*Coleman v Attridge Law & anor* [2008] ICR 1128
EBR Attridge	*EBR Attridge LLP & anor v Coleman* [2010] ICR 242
JFS	*R (E) v Governing Body of JFS* [2010] 2 AC 728
Kulikaoskas	*Kulikaoskas v Macduff Shellfish* [2011] ICR 48
Meister	*Meister v Speech Design Carrier Systems GmbH* [2012] 2 CMLR 1119
Belov	*Belov v CHEZ Elecktro Balgaria AD* [2013] 2 CMLR 29
Hainsworth	*Hainsworth v Ministry of Defence* [2014] IRLR 728