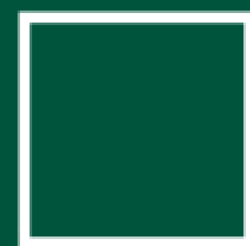
OLD SQUARE CHAMBERS



When objective justification is required

(*Gibson v Sheffield CC*)

Ben Cooper

Where we are and where we may be going

Three main issues to consider:

- The distinction between direct and indirect discrimination
- The burden of proving indirect discrimination
- Can an employer escape objective justification even where statistics show disparate impact?

Distinction between direct and indirect discrimination

- Surprising confusion appears to have arisen in *Gibson*

- See Smith LJ's description of a scenario which she appears to regard as an example of *indirect discrimination*

> 'Where the evidence reveals that the work done by the disadvantaged group has historically been done by women and the work done by the advantaged group has historically been done by men, there may well be a basis for inferring that the employer has (in the past) had a subconscious attitude that women do not need to earn as much as men and that the present pay arrangements are a legacy of that attitude.' (Para 68)

- In an ‘ordinary’ sex discrimination claim, a difference in treatment based on stereotypical assumptions about men and women would undoubtedly be regarded as *direct* discrimination

- That is classic subconscious direct discrimination

- Why should it be any different in an equal pay case?

- Does it make a difference that the stereotypical assumptions that gave rise to the difference are historic, not current?
- It should not: if the cause of the difference is direct discrimination, that should make it unlawful
- See in support: *Snoxell & Davies v Vauxhall Motors Ltd* [1977] ICR 700, EAT

- The importance of the distinction: direct discrimination *cannot* be justified

- Therefore, it is to be hoped the Supreme Court will reaffirm these fundamental principles of discrimination law

- And in any case where there is good evidence to suggest that the ongoing difference in pay has its origin in historic stereotypical assumptions, run direct as well as indirect

The burden of proving indirect discrimination

- The issue does not strictly or necessarily arise in *Gibson*
- But it is possible that the Supreme Court may nevertheless address it as part of its consideration of the overall law

- The issue:
  - Under EqPA, s1(3), burden on employer to show difference in treatment not due to "the difference in sex"
  - Not drafted with indirect discrimination in mind but "the difference in sex" construed to encompass both direct and indirect discrimination
  - Construed in that way in order to ensure consistency with SDA – a single, harmonious code
  - So, *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA, holds that burden of proving indirect discrimination is on claimant, as under SDA
  - But doubted subsequently on basis that language of EqPA, s1(3) places burden on employer (see *Bailey v Home Office* [2005] ICR 1057, CA)

- So issue potentially remains to be resolved under old EqPA, s1(3)
- But for all future cases, has been resolved by Parliament under Equality Act 2010, s69 – burden firmly on employee
- ? Makes it unlikely that Supreme Court will re-visit or interfere
- At least provides clarity and consistency – and in most cases incidence of burden of proof not actually important (see *Redcar & Cleveland BC v Bainbridge & ors* [2008] ICR 238, CA)

Can employers nevertheless escape objective justification?

- *Armstrong & others v Newcastle Upon Tyne NHS Hospital Trust* [2006] IRLR 124, CA, held employers can: by showing that despite disparate impact there is no sex taint
- That appears inconsistent with EU law
- See *Enderby v Frenchay HA* [1994] ICR 112, ECJ – disparate impact itself triggers need to objectively justify

- *Gibson* – ET and EAT held employers had succeeded in showing no sex discrimination notwithstanding clear disparate impact

- CA held the "*Armstrong* defence" not made out on facts of *Gibson*

- But recognised that *Armstrong* is binding, and probably correct

- Overall impact of treatment of *Armstrong* by CA in *Gibson* is similar to its treatment in other subsequent cases – to limit its scope very significantly
- See also:
  - *Redcar & Cleveland BC v Bainbridge & ors* [2008] ICR 238, CA
  - *Cumbria County Council v Dow (No 1)* [2008] IRLR 91, EAT
  - *Coventry City Council v Nicholls* [2009] IRLR 345, EAT
  - *Middlesbrough BC v Surtees* [2007] ICR 1644, EAT

- Suggest effect of subsequent treatment of *Armstrong* and approach which is consistent with EU authority is to treat the opportunity for the employer to disprove discrimination in spite of disparate impact as **part of the assessment of whether the statistics are valid and meaningful**

Hence:

- The examples that have been discussed in the cases of instances where the "*Armstrong* defence" might be made out are examples where the statistics are fortuitous or not meaningful because another cause is shown:
  - Gender composition changes
  - Benefit offered to both groups and turned down by one
- But in any case where statistics are convincing and meaningful, it will be impossible for employer to escape objective justification

- Note: ongoing significance of the issue in light of Smith LJ's view that the old SDA also allowed for the "*Armstrong* defence" (see *Gibson*, para 63)

- New Equality Act, s69, essentially mirrors old SDA provisions, so the issue still a live one

- But provided approached as above, it is unobjectionable and so it is to be hoped Supreme Court will approach in that way

Contact

London
10 - 11 Bedford Row
London WC1R 4BU
DX 1046 London / Chancery Lane

T +44 (0) 20 7269 0300
F +44 (0) 20 7405 1387

Bristol
3 Orchard Court, St Augustines Yard
Bristol BS1 5DP
DX 78229 Bristol 1

T +44 (0) 117 930 5100
F +44 (0) 117 927 3478

E clerks@oldsquare.co.uk
W www.oldsquare.co.uk