

Standing, discrimination, bias and the PSED in judicial review of a public appointment

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Public Law analysis: Two campaigning organisations (the Good Law Project (GLP) and Runnymede Trust (RT)) bought judicial review proceedings against the policies and processes behind three public appointments. The appointments were not subject to open competition and were awarded to individuals known to the decision-maker. The claimants argued this was indirectly discriminatory, because the decision-makers were less likely to know non-white and/or disabled candidates, placing them at a disadvantage. They also alleged breaches of the Public Sector Equality Duty (PSED), and in one instance, apparent bias. The court found neither claimant had standing to bring the indirect discrimination or apparent bias claims. They did not have a particular interest in the decisions nor were representative of an identifiable group in society affected by the decisions. In any event, each appointment process was shaped by its individual circumstances and the urgent need in the context of the pandemic. There were as a matter of fact no potentially discriminatory policies. RT had standing to bring the PSED challenge, and two of the appointment processes breached the PSED (the challenge to the third being time-barred). Written by Jack Castle, barrister at Henderson Chambers.

R (on the application of Good Law Project Ltd and another) v Prime Minister and another [2022] EWHC 298 (Admin)

What are the practical implications of this case?

The court's approach to standing may limit the ability of certain campaigning organisations to bring claims for judicial review. It indicated that an organisation wishing to sue as a representative claimant will likely need to act either for its members, or a section of the public who are directly affected. Organisations like GLP, whose aims are broadly drawn to be concerned with good administration generally, may be denied standing if there is an individual or organisation with a more direct link to the issue even if they have no intention of suing.

For claimants, this will mean greater focus on who should sue—whether a representative individual can be found, or whether another, single-issue, organisation would be better placed (as RT was on the PSED challenge). The more general the mission, the less likely the organisation is to be representative of those directly affected, the less likely that standing will be accorded.

For defendants, a new line of argument has been opened that a claimant cannot confer on themselves standing by merely claiming an interest, no matter how sincere (paras [57]–[58]). The reasoning that an indirect discrimination challenge should be bought by a victim of it (or their representative) (para [32]) may also prove useful.

The court also gave a reminder about the evidence required to prove 'particular disadvantage' in an indirect discrimination case. It was dismissive of the probative value of general statements, guidance and surveys, saying that the disadvantage 'must be measured in specifics' (para [102]).

What was the background?

In May 2020, Baroness Harding (BH) was appointed head of NHS Test and Trace (NHST&T) through a closed, unadvertised recruitment process. BH had been longlisted by recruitment consultants. This list was reviewed by civil servants, the Cabinet Secretary and Secretary of State for Health and Social Care, and BH was appointed by the Prime Minister on 6 May 2020. BH decided not to take a salary.

In August 2020, BH was appointed Interim Chair of the National Institute for Health Protection (NIHP), again by a closed, unadvertised process. The defendants described this as an extension of her previous role at NHST&T.

In September 2020 Mike Coupe (MC) was appointed director of testing at NHST&T. MC was not included in an initial longlist, and was suggested as a candidate by BH, with whom MC had worked in the private sector. BH also conducted final round interviews. MC was appointed by BH, Chief People

Officer at NHST&T, and the Second Permanent Secretary for the Department for Health and Social Care. MC did not ask for payment for the role.

The claimants argued the defendants operated policies that there would be no open competition for the roles, that only candidates with some relevant personal or political connection to the decision maker were appointed, and the positions must be unpaid. This amounted to indirect discrimination on grounds of race and/or disability, because people with those characteristics are less likely to be known to the decision-makers. They also claimed breach of the PSED, and apparent bias in MC's appointment.

What did the court decide?

Neither claimant had standing on the indirect discrimination or apparent bias claims. The court noted that NGOs found to have standing in the case law 'have a particular interest and in a sense was representative of an identifiable group in society which was affected by the decision or policy in question' (para [21]). These claimants sought to represent the general public interest, but not all members of the public were equally affected by the impugned appointment processes. There were individuals more directly affected than the general public—the other or potential candidates for the roles. They would be able to bring discrimination challenges, and would be the obvious challengers (paras [31]–[32]). Neither claimant represented them in particular. In any event, the Employment Tribunal is a more appropriate forum of challenge than the Admin Court (para [34]).

The appointment decisions were not amenable to judicial review for the same reasons (paras [43]–[47]), though an underlying policy would be (para [52]). There was an alternative remedy by way of the Employment Tribunal for individuals overlooked.

The discrimination challenge would anyway have failed on its facts. The claimants failed to prove the policies it alleged existed, as opposed to being discrete, situation-dependent decisions (paras [91]–[95]), and failed to establish they caused particular disadvantage even if they did exist (paras [97]–[103]).

RT had standing to bring the PSED challenges, but GLP did not. Although GLP's Articles of Association drew its interests broadly, the court was unwilling to allow that this meant it could confer standing on itself by an expansive mission (paras [54]–[58]). However, defendants were unable to provide evidence of compliance with the PSED relating to the particular appointment decisions. The process leading up to DH's appointment to NIHP and MC's appointment did not comply with the PSED, though the court did not order that the appointments themselves were unlawful (para [137]). The claim about BH's appointment to NHSTT was out of time.

The apparent bias claim failed on its facts. Also, the court considered that the principles of apparent bias have no application to employment decisions (para [123]). They are not adjudicative decisions, and decision-making in that area is already heavily overlaid by statute (para [125]).

Case details:

- Court: Divisional Court, Queen's Bench Division, High Court of Justice
- Judge: Lord Justice Singh and Mr Justice Swift
- Date of judgment: 15 February 2022

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