

# Outer Temple

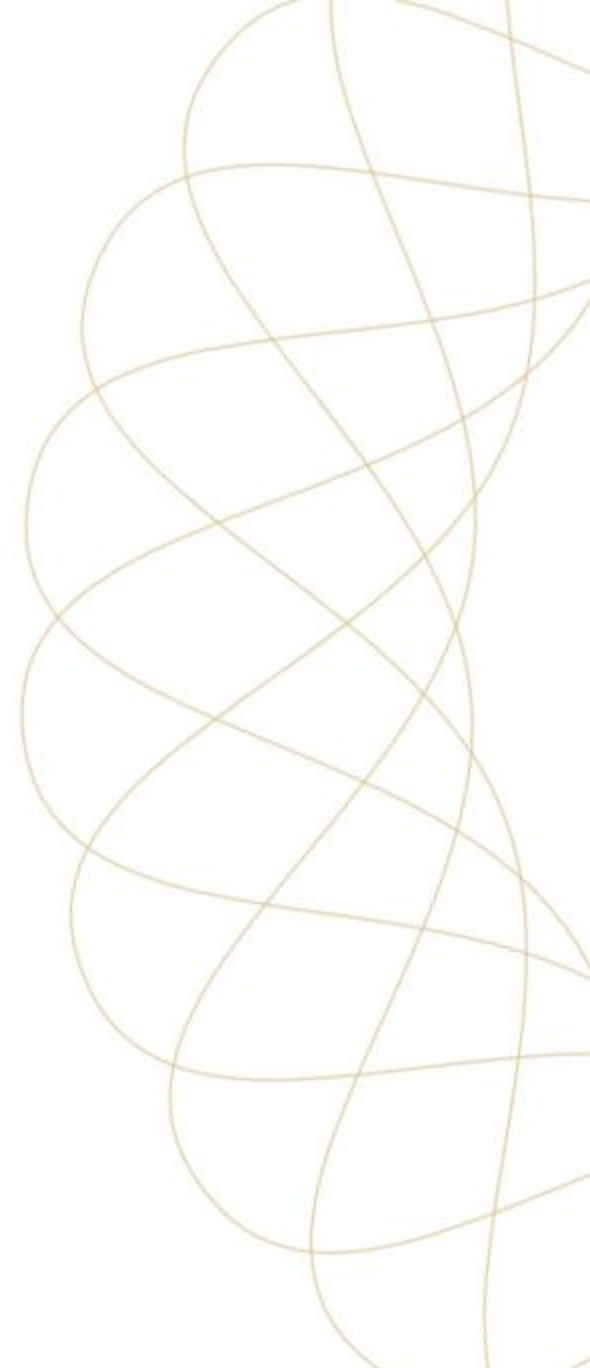
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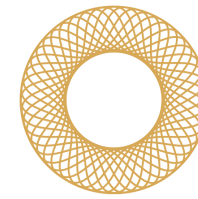
## A New Class of Claimant British Airways Plc v Rollett and the new s19A Equality Act



**Jessica Franklin**

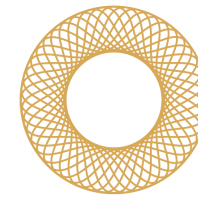
Jessica.Franklin@outertemple.com





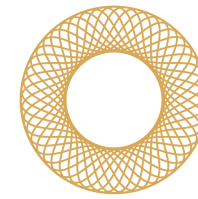
## **British Airways Plc v B Rollett & Others [2024] EAT 131, [2024] IRLR 891**

- Around 50 claimants
- Claims arising out of Covid-19 pandemic and changes to BA's shift patterns
- Some claimants bring claims for 'associative' indirect discrimination under s19 EqA



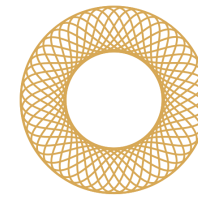
## What is an 'associative' s19 claim?

- A PCP puts a group with a protected characteristic at a particular disadvantage
- The Claimant does not have the protected characteristic but is put at the same disadvantage as the group



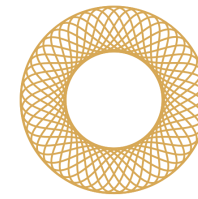
## What is an 'associative' s19 claim?

- PCP = scheduling changes
- PCP put (predominantly non-British nationals) living abroad at a particular disadvantage (normal s19 EqA claim)
- PCP also put a British national living abroad at a particular disadvantage (associative s19 EqA claim)



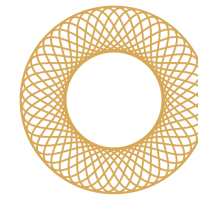
## **S19 Equality Act**

- S19 EqA, on its face, requires the Claimant to have the relevant protected characteristic himself



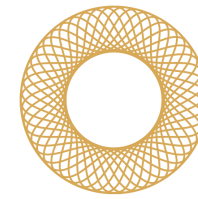
## **CHEZ v Komisia za zashtita ot diskriminatsia [2015] IRLR 746**

- CHEZ installed electricity meters in Bulgaria
- Normally at 2m above ground
- In Roma districts, they were installed 6-7m above ground
- Claimant was not Roma, but was put at the same disadvantage



## CHEZ v Komisia za zashtita ot diskriminatsia [2015] IRLR 746

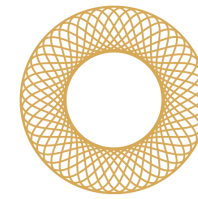
- “56. [...the principle of equal treatment in the Equal Treatment Directive] is intended to benefit also persons who, **although not themselves a member of the race or ethnic group concerned,** nevertheless suffer less favourable treatment **or a particular disadvantage** on one of those grounds...”



## **BA's position**

- Not possible to read s19 Equality Act in line with CHEZ
- The Employment Tribunal has no jurisdiction to hear the claims



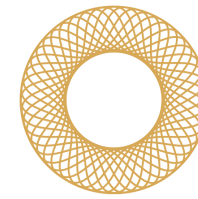


## Is it possible to interpret s.19 in accordance with CHEZ?

Yes, according to the ET:

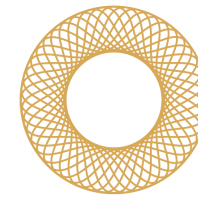
“23... I must read s19 of the Equality Act without the requirement for the claimant to share the protected characteristic of the disadvantaged group. CHEZ-type associative discrimination is unlawful...”

*First instance PH, Rollett & others v British Airways Plc (Case No.3315412/2020)*



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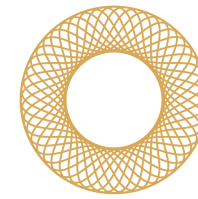
## **Appeal to the EAT**



## Appeal to the EAT

“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”...”

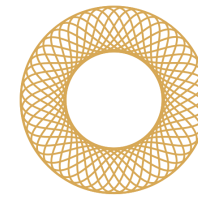
*British Airways Plc v B Rollett & Others [2024] EAT 131*



## Appeal to the EAT

Interpretation must “go with the grain of the legislation” or be compatible with the “underlying thrust” of the legislation.

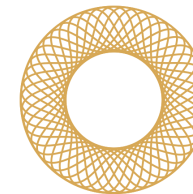
(See *Vodafone 2 v Revenue and Customs* [2009] EWCA Civ 446 and *Ghaidan v Godin-Mendoza* [2004] UKHL 30)



## Appeal to the EAT

“61. ...I am unable to see that the extension to [the] 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...”

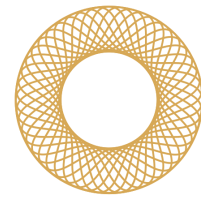
*British Airways Plc v B Rollett & Others [2024] EAT 131*



## Appeal to the EAT

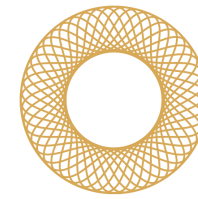
“64. For all these reasons, I am satisfied that the ET made no error of law, but correctly reached the conclusion that it had jurisdiction to consider indirect discrimination claims under section 19 EqA, **where there is a PCP applied by an employer that puts people with a particular protected characteristic 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.**”

*British Airways Plc v B Rollett & Others [2024] EAT 131*



## What does this mean?

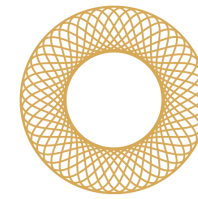
- Claimants without protected characteristics can bring indirect discrimination claims where they are put at the same disadvantage as the group with a protected characteristic



## What does this mean?

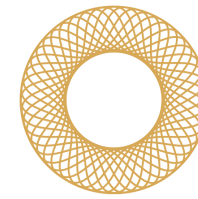
- No requirement for an *actual* person or group with a protected characteristic for the claimant to 'piggy back' on. Can be a hypothetical group disadvantage.





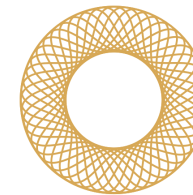
## What does this mean?

- For causes of action before 1 January 2024, Claimants must rely on *British Airways Plc v Rollett* as authority
- After 1 January 2024, Claimants must rely on **s19A EqA**



## **Equality Act 2010 (Amendment) Regulations 2023**

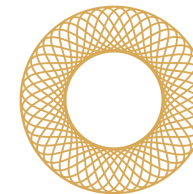
- From 1 January 2024, supremacy of EU law no longer exists (by virtue of the Retained EU Law (Revocation and Reform) Act 2023)
- The Equality Act 2010 Amendment Regulations 2023 reproduce and preserve specific EU laws



## **Equality Act 2010 (Amendment) Regulations 2023**

**“Regulation 3 adds section 19A to the Equality Act 2010 to reproduce the principle established in “CHEZ Razpredelenie Bulgaria” AD v Komisia za zashtita ot diskriminatsia (Case C-83/14) that a person without a relevant protected characteristic is indirectly discriminated against where they suffer alongside persons with a relevant protected characteristic from a particular disadvantage arising from a discriminatory provision, criterion or practice.”**

***Explanatory Note***



## s19A EqA

### 19A Indirect discrimination: same disadvantage

(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,

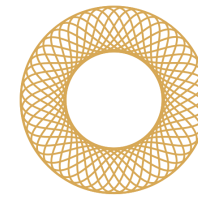
(c) B does not share that relevant protected characteristic,

(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

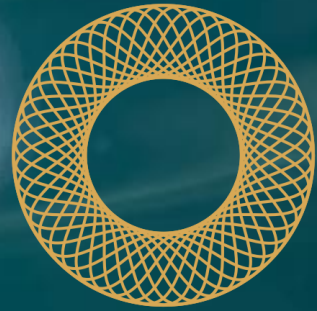
(f) A cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

*[See subsection (2) for the protected characteristics for this section]*



## **Substantively the same disadvantage...?**

- Sabbath and secular Friday night commitment? (associative religion claim)
- Disabled wheelchair user and wheelchair user because of temporary injury? (associative disability claim)
- Commuting from France and commuting from Cumbria? (associative race claim)
- Unprotected gender critical belief and protected gender critical belief?



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