



Indirect Discrimination



Indirect discrimination

Imposing uniform conditions with discriminatory consequences

Unlike with direct discrimination, indirect discrimination does not involve treating workers differently. Rather, it is a type of discrimination that arises when, although the employer treats all workers the same, some aspect of that uniform treatment affects one group of workers adversely compared to another. In the context of sex discrimination, examples might include:

- o an employer specifying that all workers must be over two metres tall, which would disqualify more women than men and therefore be potentially indirectly discriminatory
- o an employer requiring workers to work long and/or uncertain hours, which women might find particularly difficult to comply with because a far greater percentage of them than men are primary child carers

References: London Underground v Edwards [1998] IRLR 364

A person indirectly discriminates against another (the complainant) if the complainant possesses any one of the protected characteristics other than 'pregnancy and maternity' (see below) and:

- o he applies a provision, criterion or practice (PCP) to the complainant, and
- o he applies, or would apply the same PCP to persons who do not possess the same protected characteristic as the complainant, and
- o that PCP puts or would put persons who possess the complainant's protected characteristic at a particular disadvantage when compared with persons who do not possess it, and
- o that PCP puts, or would put, this individual complainant at that disadvantage, and
- o the person cannot show that the PCP is 'a proportionate means of achieving a legitimate aim'

PCPs include not only criteria that an employer imposes openly but also practices that are in fact applied without being written down or otherwise made official.

It must be the PCP which puts the complainant at a disadvantage, not some other factor which is self-inflicted. For instance, in *MacMillan*, a woman's employment moved to a new location. She decided not to move house, and instead commuted every day, a round trip of some 120 miles, taking 70 minutes each way. She was offered accommodation at the new location for her whole family by the employer, but chose not to accept it. Instead, after moving to the new location, she made a request to work part-time, in order to accommodate her childcare responsibilities. The employer had a policy that all persons in the category of employees into which the claimant fell must, for operational reasons, work full time, and turned down her request. The EAT held that the problems the claimant had

with childcare were self-inflicted by her decision to commute rather than move house, and hence not a detriment caused by the PCP requiring full time work.

Persons who comply with a PCP may still be placed at a disadvantage

The test for indirect discrimination does not require an *inability* on the part of the complainant to comply with a particular condition or requirement. Rather, it requires that the complainant is put, or would be put, at a 'particular disadvantage' by the application of the PCP.

It follows that, under the current test, it is possible for:

- o a person to be found to have been put at a particular disadvantage by the PCP, even though
- o that person was in fact able (perhaps reluctantly) to comply with it

References: Eweida v British Airways [2010] IRLR 322, CA

For example, a woman might wish, for childcare reasons, to work part time. Her employer declares it to be a job requirement that all workers work full time (ie he will not consider the possibility of part-time work). She reluctantly agrees to work full time. On these facts:

- o the PCP is that all workers must work full time
- o the woman is *able* to comply with that PCP, but
- o she is nonetheless particularly disadvantaged by the application of that PCP, so
- o there is a potential case of indirect sex discrimination, even though she actually chose to comply with the PCP by working full time

'Particular' disadvantage

It must be the case that the PCP puts, or would put, persons in the same 'group' as the complainant at a particular disadvantage compared to persons not in that group. The word 'particular' is probably intended to signify that the disadvantage must be substantial, and not merely trivial or theoretical.

Historically, earlier discrimination legislation which preceded the Equality Act 2010 required a claimant to show that the proportion of one group who could comply with the PCP was 'considerably' smaller than the proportion of those not in that group who could comply with it. Tribunals were inconsistent about how big a difference had to be before it was 'considerably' smaller.

When that earlier test was in force, the Court of Appeal ruled in one indirect sex discrimination case that the proportion of women who could comply was considerably smaller when:

- o there were 2,023 men in the pool, all of whom could comply with the PCP
- o only one of the 21 women in the pool (the complainant) could not comply with the PCP

- o therefore 95.2% of women could comply with the PCP as compared to 100% of the men

It seems likely that the same latitude will be shown in respect of the current requirement that the disadvantage be a 'particular' disadvantage.

How many persons must be disadvantaged?

As noted above, part of the test for indirect discrimination requires a claimant to show that the PCP puts or would put 'persons' sharing the same protected characteristic as the complainant at a particular disadvantage.

The legislative provision does not specify a specific number of persons who must suffer the disadvantage in order to satisfy the test.

However the Employment Appeal Tribunal has given the following analysis, since confirmed by the Court of Appeal:

Eweida v British Airways [2010] IRLR 322, CA

- o it is not enough for a claimant to:
 - o identify a disadvantage which he personally suffers, which disadvantage is not generally suffered by others who are not of the same sex or race or sexual orientation etc as him, and then
 - o show that there is in existence, somewhere, one other person, who:
 - is of the same sex or race or sexual orientation etc as the claimant, and
 - would be similarly disadvantaged if employed in similar circumstances by the same employer
- o in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about an identifiable group, even a small one, sharing the same relevant characteristic as the claimant, such that an employer ought reasonably to be able to appreciate that any particular PCP may have a disparate adverse impact on that group. The onus is on the claimant to prove group disadvantage

Choosing the correct pool

The test requires a comparison of particular groups of people with characteristics that are not materially different, rather than comparing, for instance, all women with all men. Those in the comparison group may be different from the claimant's group, provided the difference is not 'material'.

When deciding on the correct pool of individuals for comparison, guidance given in caselaw which relates to the (subtly different) wording used in earlier discrimination legislation remains relevant. There is also some caselaw on this issue in which the wording under consideration corresponds with that in the Equality Act 2010.

Where an individual is relying on statistics to prove a claim:

- o the tribunal will first have to establish the correct pool of persons to be involved in the comparison. This is often the logical corollary of the PCP that is being challenged

References: *Allonby v Accrington* [2001] IRLR 364

- o people who have no interest in the advantage or disadvantage created by the provision, criterion or practice in question should not be included in the pool, and the pool must be one which suitably tests, and is potentially capable of illustrating, the particular discrimination complained of

References: *Rutherford v SoS for Trade and Industry (No.2)* [2006] IRLR 551

Chaudhary v British Medical Association [2007] IRLR 800

Grundy v British Airways [2008] IRLR 74

Somerset CC v Pike [2009] IRLR 870

- o one example of how to analyse a pool, in an indirect sex discrimination case where the dispute concerned an age requirement in a job advert, is to:

References: *Jones v University of Manchester* [1993] IRLR 218

- o identify the disputed PCP (the age requirement in the advert)
- o identify the pool of people who would meet all the other requirements for the job if the disputed PCP did not exist
- o divide them into two groups:
 - those who satisfy the PCP in question, or rather, following *Eweida* (in the EAT), satisfy the PCP *willingly* ('first group') and
References: *Eweida v British Airways* [2009] IRLR 78, EAT
 - those who either do not satisfy the PCP, or, following *Eweida*, would find it difficult (or would be reluctant) to satisfy the PCP ('second group')
- o ascertain:
 - how many men and how many women there are in the first group, and
 - how many men and how many women are in the second group
- o the PCP is discriminatory if the percentage of the first group that is female is significantly lower than the percentage of the second group that is female

- o it is essential that the initial pool contains those who either cannot satisfy the PCP, or, following *Eweida* (in the EAT), would find it difficult (or would be reluctant) to satisfy the PCP and those who are able and willing to satisfy it

Eweida v British Airways [2009] IRLR 78, EAT

In many instances, there will be a number of different possible pools. For example, a woman who is employed as a salesperson in a company with many departments wants to return to work part time. The PCP is that workers must work full time. The pool could be:

- o (1) all male and female salespersons in her department, or
- o (2) all male and female salespersons in the whole company, or
- o (3) all men and women in the whole company, or
- o (4) all those of working age in the UK

The choice will depend on the facts of the case. Groups (1) or (2) may well be right, since in each case there are no 'material differences' between the people in them. However, group (3) or (4) might be preferable if:

References: EqA 2010, s 23(1)

- o groups (1) or (2) are too small to produce statistically significant results, and/or
- o groups (1) or (2) do not contain any women

It may be appropriate to compile figures for groups (1), (2), (3) and (4) and compare them. If the figures for within the company show very different proportions to the national figures, this could be explained by discriminatory practices operating within the company.

Whichever group is picked, the next stage would be to compare:

- o the percentage of women working part-time out of all the females in that group
- o the percentage of men working part-time out of all the men in that group

Claimant must show he suffered or would suffer the disadvantage

A particular complainant cannot bring a claim just because he can show that a PCP puts the group into which he falls (eg Muslim men) at a particular disadvantage when compared with those not in that group.

For example, a woman who is over 2 metres tall may not claim indirect discrimination because of a PCP that all workers must be over 2 metres tall, even though it does disadvantage women in general compared with men.

Rather, he must also show that he himself:

- o is personally disadvantaged by the PCP, or
- o *would be* personally disadvantaged by the PCP

The position of a claimant who has already suffered personal disadvantage on account of the PCP is straightforward.

However the Act also allows persons who *would be*, but are not yet, personally disadvantaged by the PCP to claim as well. Hence where there is a job advertised which stipulates certain requirements for applicants, and those requirements amount to an indirectly discriminatory PCP, a would-be applicant for the job (who, but for the imposition of the PCP, would be likely to get it) can complain of indirect discrimination even though he has not yet actually applied for the job and been rejected because of the PCP, because it is clear that if he did apply, he would be put at that particular disadvantage by that PCP.

This would not, however cover individuals who either (i) do not want or (ii) would not (even without the PCP) be likely to get the job, because such persons cannot show the PCP would put them at any disadvantage at all, since they would not have got the job in any event.

Likewise, a claimant who applies for a job in which he has no genuine interest, in the sense that he would not accept it were it offered to him, cannot succeed in a claim for discrimination where his application was rejected on discriminatory grounds, because he will have suffered no detriment (ie not have been put at a 'disadvantage') on account of the rejection.

Justification - a proportionate means of achieving a legitimate aim

Unlike direct discrimination, a potential 'defence' to indirect discrimination is justification: where the person accused of the indirect discrimination can show that the PCP was 'a proportionate means of achieving a legitimate aim'.

Indirect sex discrimination: PCPs which are contractual terms

Note that as regards indirect workplace sex discrimination, the indirect discrimination provision of the Equality Act 2010 (section 19) only covers PCPs that are *not* contractual terms. Any PCP which is a contractual term is dealt with instead under the 'equality of terms' provisions

Where a sex equality clause or rule (under the 'equality of terms' provisions at ss 64-80) applies to a term in an employee complainant's contract (or would apply were it not the case that a relevant equality of terms defence is made out):

- o references to 'sex discrimination' in the Act mean only direct or indirect sex discrimination
References: EqA 2010, ss 25(8), 13, 19
- o where one of the employee complainant's terms is less favourable to her than a corresponding term of her comparator's is to him, this is deemed **not** to be 'sex discrimination', ie not to amount to direct or indirect discrimination where the relevant protected characteristic is sex
References: EqA 2010, ss 70(2)(a), 66(2)(a), 70(3), 39(2)(a)
- o likewise, where the employee complainant does not have a term which corresponds to a term of her comparator's that benefits him, the failure to include that term in the complainant's terms is deemed not to be 'sex

discrimination', ie not to amount to direct or indirect discrimination where the relevant protected characteristic is sex

References: EqA 2010, ss 70(2)(b), 66(2)(b), 70(3), 39(2)(a)

Where an employee complainant's contract has a term in it that relates to pay, but a sex equality clause or rule would have no effect on it, then, for the same reasons as set out immediately above, this is deemed **not** to amount to indirect discrimination where the relevant protected characteristic is sex. Note, however, that in this latter case a claim of direct sex discrimination may still be brought.

The combined effect of all this is that indirect sex discrimination in respect of contractual pay can be challenged only by means of an equality clause under the equality of terms provisions (ss 64-80), and not under the indirect discrimination provision itself.

This 'division of business' between the indirect discrimination provision and the equality of terms provisions is further illustrated in the Equality Act Explanatory Notes.

No indirect pregnancy and maternity discrimination

The protected characteristics in respect of which there is indirect discrimination protection are:

- o age
- o disability
- o gender reassignment
- o marriage and civil partnership
- o race
- o religion or belief
- o sex, and
- o sexual orientation

It will be noted that the protected characteristic 'pregnancy and maternity' is not in this list.

It follows that claims may not be framed as indirect pregnancy and maternity discrimination.

However, in practice this does not prevent any claims from being brought, as:

- o any situation in which there is indirect discrimination against those who are pregnant or exercising their maternity rights will also amount to indirect discrimination against women, and hence
- o such claims may be pleaded instead as indirect sex discrimination