

What is indirect discrimination and how to identify the right comparator?

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Occasionally, as barristers, we set ourselves near impossible tasks.

My task over the next 15 minutes is to try to explain what is meant by “indirect discrimination”. In one sense this is straightforward but, the moment one scratches the surface of the concept, it becomes enormously complex - and hence nearly impossible to explore in any detail within 15 minutes.

But let’s start at the beginning - and see how far we get.

Legal prohibitions on discrimination based upon certain characteristics have been part of UK domestic law for decades. The Foreword to the seminal book “Monaghan on Equality Law” started as follows:

“Equality, wrote Rabinder Singh QC (as he then was) some time ago, is the “neglected virtue”. But it is not neglected now. At long last, we have the Equality Act 2010, which brings together the many separate laws against discrimination and tries to make them into a coherent whole. That is easier said than done. If equality is indeed a virtue, then it is a very complicated one”

Those words were written by Baroness Brenda Hale, later President of the Supreme Court and the reference to “Rabinder Singh” is a reference to the notable human rights lawyer, now styled Lord Justice Singh who sits on the Court of Appeal. In 2017 Lady Hale explained the purpose of indirect discrimination as follows¹:

“It is meant to avoid rules and practices which are not directed at or against people with a particular protected characteristic but have the effect of putting them at a disadvantage

¹ See *Essop v the Home Office* [2017] 1 WLR 1343 at §1.

The Equality Act 2010 sets out a closed list of “protected characteristics”. There are 9 in number and (in alphabetical order) are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The public policy justification for equality laws is that it is “wrong” - that is it is conduct which society deems to be unacceptable - for both private individuals and public bodies to treat somebody less favourably than they would treat others because of a protected characteristic. Hence, for example, someone should not be refused a job, refused to be served in a pub or subject to any other less favourable treatment because of the colour of their skin or because of their racial origin. Just as we cannot drive a motor car precisely as we would like because we have to bear in mind the rights of other people who are impacted by our driving, so discrimination laws curtail people’s freedom to act in the way they would choose by preventing them treating other people unfavourably in any way if the unfavourable treatment is based on a protected characteristic.

However, effective discrimination laws focus on discriminatory effects, not on the intention of the person whose conduct is being criticised. It is about consequences, not intentions.

That is why indirect discrimination is both so important and also so complex.

Indirect discrimination is concerned with rules, practices, policies and other provisions which, on their face, apply to everybody equally but which in practice have a differential impact on different groups of people. It is part of both domestic and EU law. The first legislative definition of indirect discrimination was contained in [Council Directive 97/80/EC of 15 December 1997](#) on the burden of proof in cases of discrimination based on sex (OJ 1998 L14 , p 6), [article 2\(2\)](#) of which provided that, for the purposes of the principle of equal treatment:

“indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.”

This introduced the term “an apparently neutral provision, criterion or practice” (or PCP as it is generally known) and the concept of disproportionate group disadvantage.

Looking how this works in practice is shown by case involving a rule which required all Greek police officers to be a minimum of 1.7 m tall - that is 5’ 7” in old money - on its face applied equally to all applicants. However the Greek police force were sued by Ms Kalliri who applied to join the Greek police but was rejected due to her falling just 2 centimetres short of its minimum height criteria. She brought a claim for indirect sex discrimination on the basis that women are in general shorter than

men and so this universal height requirement indirectly disadvantages women. This was - as is often the case indirect discrimination cases - a victory for the little person against the system - in this case literally.

For the purposes of UK law, the primary definition of indirect discrimination is in section 19 of the Equality Act 2010 which provides that there are 8 protected characteristics which are relevant to indirect discrimination. Discrimination on the grounds of “pregnancy and maternity” is excluded from indirect discrimination but is separately provided for in sections 17 and 18 of the Act.

An act of indirect discrimination occurs where there is a “provision, criterion or practice” engaged which is claimed to be discriminatory. This is a “PCP” in the jargon.

A “provision” generally means a rule, which can be part of a statutory scheme can be in a different set of rules. A criterion is similar in that it is a set standard and a practice is something that is formally or informally in place as a way of doing things in a particular environment. These provision should be widely interpreted

In *Ishola v Transport for London* [2020] EWCA Civ 112 Court of Appeal was concerned with whether a one off response by an employer constituted a “practice”. The Court said that it did not. Simler LJ explained:

“ ... all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises.

Once the relevant PCP has been identified, the next question under section 19(2)(a) namely:

“A [*the alleged discriminator*] applies, or would apply, it to persons with whom B [*the alleged victim*] does not share the characteristic”

This part of the test is concerned with establishing that the PCP - the provision, criterion or practice - is applied to others and not just to B. The test is whether the alleged discriminator applies or would apply the PCP to persons with whom the claimed of discrimination does not share the protected

characteristic. If the alleged discriminator only applies the PCP to persons with the protected characteristic, then this is direct discrimination because the way in which the discriminator acts is different depending on a protected characteristic.

Hence, to take an example, if a barman refused to serve someone who was more than 6' tall because he claimed that he was worried that such person would cause trouble, but only applied that rule to black customers, this is direct discrimination against black customers. However, if he applied that rule to all customers, the test in section 19(2)(a) would be satisfied.

The wording is of importance. It is not necessary to show that A has in fact applied the PCP to anyone else. It is only necessary to show that, if the same facts arose in respect of somebody who did not share the relevant protected characteristic, A would apply the same PCP. The more clearly establish the PCP is, the easier it is to show that it would be applied to others.

The next element of the test is in section 19(2)(b) namely that:

“it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it”

The “it” here is the PCP. Hence the question is whether the application of the same rule or practice to everybody puts “persons” who share a relevant protected characteristic at a “particular disadvantage”. The relevant group here are persons who share the relevant protected characteristic. Section 23(1) EA provides that that comparison has to focus on individuals for whom there is no other material difference between their circumstances.

It is important though note, as the Supreme Court did in *Essop v The Home Office* in 2017 that in none of the various definitions of indirect discrimination in both EU and domestic UK law, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. In order to establish the case of indirect discrimination, it is enough to show that the PCP puts one group sharing a particular characteristic at a particular disadvantage when compared to others. The question as to why it does so maybe relevant justification but is not relevant to establishing the indirect discrimination in the first place.

Further, the definitions of indirect discrimination does not require the applicant to prove a causal link between the less favourable treatment and the protected characteristic. Instead, it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. It is thus not necessary to show that the PCP unfairly impacts on those with the protected characteristic because of their protected characteristic, but only that this is, in practice, the effect.

Indirect discrimination is about dealing with hidden barriers which may well not be easy to anticipate or even spot.

A third factor is that there may be a huge variety of what are called “context factors” which mean that the application of the PCP, in the real world context in which people live their lives, can disadvantage those with a protected characteristic even if this was not intended or foreseen. Hence, for example, it is still the case that the majority of caring responsibilities fall on women in our society and thus a refusal to allow a worker to adjust the shifts to meet these caring responsibilities will impact more on women than on men. That does not mean all women have caring responsibilities or no men have caring responsibilities, but this is an area of law where statistical evidence is admissible to show how a PCP will impact on the way that people live their lives.

That leads to the next feature of indirect discrimination, namely that it is not necessary to show every member of the group shown particular characteristic are at the same disadvantage. If proportionately more women are carers, a PCP that disadvantages carers will amount to indirect discrimination against women even though many women may not be carers. The group can be at a disadvantage if the proportion of members of that group who can satisfy the PCP is lower than the proportion of non-members of the group who can satisfy the PCP. Again, this is an area which can be proved by statistical evidence.

The next part of the test is in section 19(2)(c) namely that:

“it puts, or would put, B at that disadvantage”

Here the analysis moves from group to the individual. Hence, if rules on sitting shift patterns - a PCP - puts carers at a disadvantage and that amounts to indirect discrimination because more women are carers, a woman can only bring a claim of indirect discrimination if she is a carer. The fact that other women who are carers are put at the disadvantage does not mean that an individual who is subject to the same rules but is not a carer suffers indirect discrimination.

If a person succeeds in satisfying the tests under section 19(1)(a) to (c), then the application of the PCP will be unlawful discrimination unless A - the person responsible for the PCP - can discharge the duty of showing that it is a proportionate means of achieving a legitimate aim.

In order to illustrate how these principles work out in practice, I am going to work through 2 cases as examples. The first concerns pension rights. In 2015 the government implemented large-scale changes to public sector pension schemes. In summary, new schemes were introduced which provided less generous by, for example, moving from a pension based on a final salary pension

scheme to a pension based on a career average salary, and providing that pensions started to be paid when the pensioner was older. Accumulated pension rights under existing pension schemes were broadly preserved but, for most workers, the schemes were closed and workers were only able to accumulate new pension rights under the 2015 schemes.

If the government had applied the same rules to everybody, it is probable that there would have been no discrimination. However, the government decided to allow those who were approaching retirement to be able to stay in their existing pension schemes and to continue to accrue new pension rights in those schemes. That meant a different set of rules depending on how close to retirement an individual was. In effect, it disproportionately favoured older workers and thus, because this benefit was not available to younger workers, meant they were treated less favourably.

Fiona Scolding QC is going to talk about justification in a moment - but the justification defence failed, and the cost of putting it right is estimated at £17 billion.

The second example comes from a case I was involved in last year, leading my colleague Leon Glenister. There is a particularly generous award under the police pension system for officers who get totally and permanently as a result of their police service - to such an extent that the officer will never work in any form of employment for the rest of their working life. These are known as "Regulation 12" awards and can be a single, tax-free payment of 5 years average salary.

But the rules provided that the total and permanent disablement must arise within 12 months of the date when the injury is received. That rule prejudices police officers who develop mental health problems as a result of their police service, such as post-traumatic stress disorder, because there can often be a significant delay between the triggering event and the onset of symptoms. Further, once the symptoms have been triggered, they can be just as disabling as a physical condition.

Disability is defined in the Equality Act as being the "particular disability" from which the individual suffers. Hence it can be unlawful to treat one group with a disability more favourably than another group with a different disability if the effects of the disability are not material - back to the question of the materiality of the comparator.

A police officer who suffered delayed onset PTSD challenged the Regulations as constituting unlawful disability discrimination. Permission was given by the Court of Appeal and, in effect, the Secretary of State threw in the towel. The officer got his regulation 12 award and the Secretary of State is reviewing the regulations with a view to removing the discrimination. Once again, an indirect discrimination claim can have widespread effects, which in effect require the government body to "level up" benefits if they are to be maintained for any group.

