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Recent Changes in the Evidential Requirements in Indirect Sex and Race Discrimination Cases

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In this article the evidential issues and requirements relating to indirect sex and race discrimination cases will be discussed with particular reference to important and/or recent changes in the law.

The complexity of this area of law, particularly evidential requirements, has frustrated the efforts of employees or workers attempting to achieve equality in the workplace and statutory changes over the last ten years have tried to address this problem

*Given the similarities between the legal rules applying across the different areas of UK equality law (sexual orientation, age and religion or belief) most of the issues identified here in relation to sex and race discrimination will have general application.*¹

Introduction

The following quote is helpful in explaining the nature of indirect discrimination claims: “Here the challenge is made to a rule or practice that on its face respects the principle of equal treatment, but the effect of which is disproportionately to exclude a protected group... The law of indirect discrimination examines how equal treatment

¹ There are no provisions for indirect discrimination in the Disability Discrimination Act but the requirement for reasonable adjustments under section 6 of the Act extends to a provision criteria or practice which is the terminology used in the definition of indirect discrimination

may have the effect, whether or not intended or foreseen, of continuing patterns of exclusion”²

The essential quality of indirect discrimination dictates that there are various evidential requirements which applicants must meet to succeed in a case of indirect discrimination which are not required in cases of direct discrimination.

The Changing Definition of Indirect Discrimination

Although the changes to the definition of indirect discrimination brought in under the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations SI 2001/2660 and Employment Equality (Sex Discrimination) Regulations 2005 (considered below) cannot be claimed to be recent their importance in these cases means they must be given due consideration here.

Under the 2001 Regulations the terms “requirement or condition” in the definition of indirect discrimination under section 1 of the SDA³ were replaced with the much broader terms of “provision, criterion or practice” for certain important sections of the Act 1 (1) (2) (b) including employment matters. This resulted in an easier evidential requirement for the applicant in indirect discrimination cases to establish since these terms are capable of being interpreted broadly. The new definition avoids the need to comply with the “*absolute bar*” requirement previously advocated by the Court of Appeal as the threshold requirement in indirect discrimination cases (See for example the case of *Perera v Civil Service Commission* [1983] IRLR 166, CA).

² Collins, H *Employment Law* (2003) Oxford University Press p 59

³ Terms which still apply to non-employment matters under section 1(1)(b) of the SDA and equivalent section of the Race Relations Act 1976

Since the 2001 Regulations came into force the terms “provision, criteria or practice” have been widely defined by Employment Tribunals. It is for the applicant to show (PCP) that the treatment complained of amounts to a PCP. It may be a written or oral instruction or it could be part of a policy, procedure or collective agreement or be contained in a contract, letter or written particulars etc. It might refer to specific practices or be one of several criteria used. It could apply to just one employee or to a group of employees. It may even be sufficient to amount to a provision if the conduct complained of has happened on only one occasion.⁴ Common examples of PCP’s include age limits, dress codes, refusal to allow part time working and imposition of mobility clauses.

Similar alterations to the definition of indirect race discrimination apply the new definition to discrimination in the employment are on grounds of race, ethnic or national origins.⁵

The Relevance of a Particular Pool for Comparison

Once a PCP has been established, the next evidential hurdle the applicant has to overcome is to prove that this PCP puts him/her at a “particular disadvantage”. Since the Employment Equality (Sex Discrimination) Regulations 2005 removed the words “to the detriment of a considerably proportion of member of one sex” from section 1(2) (b) (1) of the statute it might be the case that statistical evidence of indirect discrimination is not always required by the employment tribunal. There may be less reliance on workplace or occupational statistics as tribunals are more willing to rely

⁴ British Airways Plc v Starmar [2005] IRLR 863

⁵ The “old definition” continues to apply to discrimination on grounds of colour, race nationality or ethnic or national origins.

on national statistics and the *common knowledge* that women have primary responsibility for childcare.⁶ On the other hand, individuals bringing indirect discrimination claims can only prove they are a victim of discrimination through comparison with a group or class of workers rather than an individual. So a female applicant for a job faced with a height requirement might choose to compare the relative position of women and men in terms of height in a certain geographical area (e.g. Scotland, The United Kingdom). The use of statistics therefore remains one important way of proving “particular disadvantage”, used in conjunction with other evidence

When statistical evidence is used in this way it is important in deciding on the relevant pool for comparison for the purposes of an indirect discrimination claim that the applicant tries to second-guess the pool that the Employment Tribunal will choose as appropriate. In *Jones v University of Manchester* [1993] IRLR 193 the applicant was excluded from employment as a careers adviser as the University (wanting someone close to the age of the students) had restricted eligibility for this post to graduates aged 27-35. She was forty six years of age and the basis of her claim was that the requirement was indirectly discriminatory as female mature students tended to be older than male mature students and by definition fewer women could comply with the age requirement than men.

The Court of Appeal rejected this argument claiming that the appropriate comparators were all persons meeting the relevant criteria. “It is, in effect, the total number of all those persons, men and women, who answer the description contained in the

⁶ *London Underground v Edwards* [1997] IRLR 364 CA

advertisement, apart from the age requirement. Here, that means all graduates with the relevant experience.”⁷

In the event that an applicant chooses a pool for comparison which is incorrect he or she may lose their case.⁸

“Choosing the pool for comparison carefully is therefore decisive for success of an indirect discrimination claim where a strictly statistically established disparate impact is required.”⁹ The relevant pool is a matter of fact for the Employment Tribunal to determine¹⁰ but, as illustrated in the *Jones* case, they do often prefer to choose a broad pool (e.g. all women in UK eligible to apply for a job). They will expect statistical evidence to be produced and led to support assertions of indirect discrimination.

In an equal pay claim Lord Justice Sedley in the Court of Appeal provided a rather cynical but accurate overview of this requirement.¹¹ “The correct principle, in my judgement, is that the pool must be one which suitably tests the particular discrimination complained of: but this is not the same thing as the proposition that there is a single suitable pool for every case. In fact one of the striking things about both the race and sex discrimination legislation is that, contrary to early expectations, three decades of litigation have failed to produce any universal formula for locating the correct pool, driving courts and tribunals alike to the conclusion that there is none.”¹²

⁷ Evans LJ pp 228-291

⁸ Pearce v City of Bradford Metropolitan Council [1988] IRLR 378 EAT

⁹ Schiek, D Waddington, L Bell, M Non-Discrimination Law (2007) Hart p 401

¹⁰ Kidd v DRG (UK) Ltd [1985] IRLR 190, EAT

¹¹ Paragraph 27

¹² Mrs V Grundy v British Airways plc 2007 EWCA Civ 1020

The Women and Equality Unit's guide *Changes to Sex Discrimination Legislation in Great Britain: Explaining the Employment Equality (Sex Discrimination) Regulations 2005* highlights the usefulness of statistics in establishing particular disadvantage: "This may be apparent from a comparison of the statistics of male or female workers or applicants who are at a disadvantage, i.e. that a larger proportion of one sex experiences a detriment. Statistics can be helpful in ascertaining relative disadvantage, however they are not essential."

In indirect race discrimination choice of the comparator is arguably even more difficult because the application of section 3(4) of the Race Relations Act 1976 requires that the circumstances of the comparator must be the same or not materially different from the applicant. Therefore the pool will be more restricted. In *Hanly v Norinchukin International* it was held that when selected only British employees for redundancy the Japanese employees on secondment from Japan were not the correct group for comparison because they were not at risk of dismissal. Their circumstances were materially different from the British workers.

The impact of the correct selection of the comparison group in race discrimination case is also illustrated in the case of *BMA v Chaudhury*.¹³ Mr Chaudhury claimed that in failing to support his claim of racial discrimination against the BMA was indirectly discriminating against him. His pool for comparison was all members of the BMA and he won his case before the tribunal and EAT. On appeal the Court of Appeal held that the "the appropriate pool comprised all BMA members who want the advice and support of the BMA for race discrimination claims against the specific regulatory medical bodies. No member of that pool could comply with the condition or requirement imposed by the BMA. It follows that there was no

¹³ 2007] EWCA Civ 788

comparative disadvantage or advantage for any racial group and no indirect race discrimination against members of the racial group to which Mr Chaudhary belonged.”¹⁴ The BMA’s appeal was successful.

Detriment

The applicant must go on to show that their inability to meet or comply with the provision, criterion or practice caused them to suffer a detriment. The degree of detriment needed to substantiate a discrimination claim for the purposes of this Act and other equality legislation was until recently unsettled.¹⁵ In *Ministry of Defence v Jeremiah* [1979] IRLR 436, CA it was defined as merely ‘putting under a disadvantage’. In other cases however something more has been looked for. In *Schmidt v Austicks Bookshops Ltd* [1977] IRLR 360, EAT it was not sufficient detriment for a woman to be required to wear a dress under the company rules.¹⁶

To establish a detriment it is not necessary to establish a breach of contract but it is necessary to show that the applicant had been disadvantaged in the circumstances in which he/she had to work.¹⁷ In *Ealing LBC v Garry* [2001] IRLR 681 the applicant was able to establish a detriment on the basis of race when an investigation into her behaviour took much longer to investigate than other cases even though she did not know it had continued after the normal length of time for an investigation.

In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 the issue of whether someone had to suffer economic or physical consequences of the

¹⁴ Mummery LJ at para 202

¹⁵ *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 House of Lords

¹⁶ In *De Souza v Automobile Association* [1986] IRLR 103, CA a racial insult made in a conversation overhead by a typist about her was an insufficient detriment

discriminatory behaviour before a detriment could be established was considered by the House of Lords and they decided that it wasn't necessary. The detriment claimed in this case was the loss of the right to carry out appraisal interviews with police officers. They went on to find: "however, an "unjustified sense of grievance" cannot amount to a detriment¹⁸ and their Lordships held that in the absence of economic or physical consequences the "reasonable worker" test formulated by Brightman LJ in the Ministry of Defence v Jeremiah [1980] QB 87 had to be satisfied in order to show a detriment. "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment."¹⁹

As Mummery LJ explained in R exp Elias v S of s for Defence²⁰ "the focus is not on the difference in treatment on racial grounds, express or implied, it is on the evaluation of the disparate and adverse racial impact of the application of an apparently neutral and general provision, criterion or practice."

In cases where the applicant has been forced to resign because of difficulty in complying with a PCP then this would be evidence of detriment but it will be necessary for the applicant to establish the causal link between the PCP and the detriment suffered. In the MacMillan case the applicant failed to establish this link.

Justification

In most indirect discrimination cases the defence of justification is available if the employer can show that the types of discriminatory activity were 'justifiable' by an employer on a ground other than race or sex (or under other equality statutes).

¹⁷ Sexual harassment will represent a suitable detriment in most cases

¹⁸ Barclays Bank plc v Kapur and others (No 2) [1995] IRLR 87

¹⁹ p 104

²⁰ 2006 EWCA Civ 1293 at 3237

There are differences in the rules for justification for age discrimination brought in under the Employment Equality (Age) Regulations SI 2006/1031. Under Regulation 3 of the Regulations there is provision for a general objective justification defence for both direct and indirect age discrimination.²¹

In *Ojutiku v MSC* [1982] IRLR 418 CA the Court of Appeal said that the standard for proving a justifiable reason other than sex should be “what was acceptable to right thinking people as sound and tolerable reasons for adopting the practice in question.”

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This was not a very helpful definition for Employment Tribunals and the European Court of Justice in *Bilka-Kaufhaus GmbH V Weber Von Hartz* [1986] ECR 1607

provided clarification of the standard of proof required. as “the objective of the employer's measure must correspond to a real need of the enterprise and the means used must be appropriate with a view to achieving that objective and be necessary to that end”.

The approach adopted by the ECJ in *Bilka - Kaufhaus* has now been enshrined in statute and since 2005²³ it has been a statutorily recognised defence to show that the action complained of was proportionate means of achieving a legitimate aim.

The employer must demonstrate objectively justified factors which are unrelated to discrimination based on sex. The employer must show that there is real business need

²¹ The Regulations make provision specific exceptions from the scope of the prohibitions on age discrimination: the use of certain age-based or age-linked criteria (in particular in imposing mandatory retirement ages) fixing age limits in minimum wage and New Deal programmes, using seniority-based benefit schemes and fixing access requirements for occupational benefits. These are exempted from any requirement to show that they are objectively justified.

²² In *Rainey v Greater Glasgow Health Board* [1987] IRLR 26, HL the House of Lords held that the concepts of justification in indirect discrimination and equal pay cases should be interpreted in the same way

²³ Regulation 3 Employment Equality (Sex Discrimination) Regulations S.I. 2005/2467

for the discriminatory outcome and the means chosen to achieve the outcome are suitable and necessary.²⁴

Useful guidance on the issue of justification under the previous definition was given in *Hampson v Department of Education & Science* [1989] IRLR 69 that was: (a) the test for justification was objective (b) the standard was the reasonable need of the undertaking (c) that reasonable need might be, but is not confined to, economic or administrative efficiency (d) the Employment Tribunal in considering the matter must strike an objective balance between the discriminatory effect of the practice complained of and the reasonable need of the undertaking.

More recently, the Court of Appeal has said, in deciding whether the application of a discriminatory provision, criterion or practice is proportionate to the means to be achieved, there is a three stage test set out in *R (on the application of Elias) v Secretary of State for Defence* [2006] IRLR 934, CA):

1. Is the objective sufficiently important to justify limiting a fundamental right?
2. Is the measure rationally connected to the objective?
3. Are the means chosen no more than is necessary to accomplish the objective?

One reason often put forward by employers as justification is Health and Safety. Whilst this will often be successful²⁵ there must be some real evidence to back the claim up. In the *British Airways* case (*supra*) the argument failed.

²⁴ Anderman S Chapter 8 pp 103-109 Dine, J Watt, B Discrimination Law Concepts, Limitations and Justifications (1996) Longman

²⁵ *Singh v British Rail Engineering* 1986 ICR 22

Similarly cost implications are often cited as justification for a PCP. The impact on the employer will be considered in the light of its size and resource and balanced with the adverse impact on the affected employee(s). The ECJ has held for example, that indirect discrimination cannot be justified by the aim of restricting public expenditure.²⁶ However where the employer is a private organisation financial impact is a relevant factor to be taken into consideration.²⁷ Employers seeking to use this as a defence will be expected to provide a thorough and analytical analysis of the economics of the business and its working practices²⁸

Recently the EAT has gone so far as to hold that unlawful and dishonest actions can amount to “a proportionate means of establishing a legitimate aim” although this case is subject to appeal.²⁹

Conclusion

Lord Justice Mummery in the Court of Appeal in the case of Secretary of State for Trade and Industry v Rutherford (No.2) [2005] ICR 119 described the legal rules dealing with indirect discrimination as a ‘lamentable state of complexity and obfuscation.’³⁰

This overview of the issues cannot do justice to the complex evidential requirements arising in indirect discrimination cases.³¹ This article has attempted to provide a concise and simplified version of the legal rules applying in indirect sex and race

²⁶ *Schonheit v Stadt Frankfurt am Main* 2003 ECJ 1-12572 and *Steinicke v Bundesanstalt für Arbeit* [2003] Case C-77/02

²⁷ *Cross & Ors v British Airways plc* [2005] IRLR 423

²⁸ See comments of LJ Thomas in *Hardy & Hansons v Lax* 2005

²⁹ *GMB v Allen and Ors*

³⁰ The House of Lords decision can be found at *Rutherford (No.2) v Secretary of State for Trade and Industry* [2006] IRLR 551, HL

³¹ For detailed analysis see Connolly, M Townshend-Smith on Discrimination Law, Text Cases and Materials 2nd ed. (2004) Cavendish Publishing, Chapter 10

discrimination cases particularly identifying evidential obstacles that apply in these cases and recent changes in the law which have modified or removed these obstacles.

Despite these developments, which are to be welcomed, the evidential burden on an applicant bringing a claim for indirect discrimination is still considerable.

The chances of the legal enforcement against this form of discrimination achieving the ambitious objectives highlighted for it in the following quote are definitely improved.

“Indirect discrimination law does have the potential to recognise the ethical demand that society should make some attempt to secure some degree of redistribution of wealth and opportunities from privileged groups to those who have been historically less privileged. “³²

³² Ibid p 238