



University of Strathclyde
LAW CLINIC

9B Types of Claim: (2) Indirect discrimination

A guide for the general public

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Introduction

When completing your ET1, you will be asked to identify which claims you are making. This is at Section 8.1 of the ET1.

You will be ticking the box that says discrimination and then the box below that identifies 'disability'. **This may be alongside other complaints.**

However it will also be necessary to be able to identify which type of disability discrimination you are claiming. The earlier you can do this the better so that you can be sure that the type of discrimination you are complaining of is included within the time limit.

You can do this at Section 8.2 of the ET1 where you are asked to set out the background and details of your claim. For more information about completing the claim form see slideshows 3A and 10D.

Types of disability discrimination

There are six possible claims for disability discrimination. These are:

- ▶ Direct Discrimination
- ▶ Indirect Discrimination
- ▶ Discrimination arising from disability
- ▶ Harassment
- ▶ Victimisation
- ▶ Failure to make reasonable adjustments

You can claim for any combination of these six claims. This series of slideshows aims to explain what these six possible claims are so that you can work out which ones might apply in your case.

What is indirect discrimination?

Under Section 19 of the Equality Act, indirect discrimination occurs when an employer applies an apparently neutral provision, criterion or practice which puts workers sharing a protected characteristic at a particular disadvantage.

The relevant legislation reads as follows:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) 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,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

There are four elements to indirect discrimination:

- 1 The employer applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group including a particular worker;
- 2 the provision, criterion or practice puts, or would put, people who share the worker's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic;
- 3 the provision, criterion or practice puts, or would put, that particular worker at that disadvantage; and
- 4 the employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

(1) What constitutes a provision, criterion or practice? (PCP)

The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Equality Act.

It can be interpreted widely so as to include, for example: any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions operating in the workplace.

A provision, criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a 'one-off' or discretionary decision.

Is the PCP neutral? What does this mean?

The provision, criterion or practice **must be applied to everyone in the relevant group, whether or not they have the protected characteristic in question.**

It will be necessary to identify who is in the relevant group, for example the whole workforce, people carrying out a particular job, or people based in a particular office. You should give careful consideration to identifying the right group.

On the face of it, the provision, criterion or practice must be **neutral.**

If it is not neutral in this way, but expressly applies to people with a specific protected characteristic, it is likely to amount to direct discrimination.

Example of a neutral PCP

A bus company adopts a policy that all female drivers must re-sit their theory and practical tests every five years to retain their category D licence. Such a policy would amount to direct discrimination because of sex. In contrast, another bus company adopts a policy that drivers on two particular routes must re-sit the theory test. Although this provision is apparently neutral, it turns out that the drivers on these two routes are nearly all women. This could amount to indirect sex discrimination unless the policy can be objectively justified.

(2) the PCP puts, or would put, people who share the worker's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic;

Inclusion of the words 'or would put' means that indirect discrimination can occur before the particular PCP has been implemented.

The word 'disadvantage' is not defined by the Equality Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion.

It is important to be clear which protected characteristic is relevant.

In disability claims, it is **the particular disability** that you have which will be relevant, not disabilities in general. A comparison must be made between the impact of the PCP on the people without your particular disability, and its impact on people with the same disability as you.

(3) the provision, criterion or practice puts, or would put, the worker at that disadvantage

You must demonstrate that the PCP actually had, or will have, an impact on you specifically and your claim cannot be purely hypothetical.

It is **not enough** that the PCP puts (or would put) a group of people who share your disability at a particular disadvantage.

It **must also have that effect** (or be capable of having it) **on you** as an individual.

This means it is not enough for you to establish that you are a member of the relevant group, you must also show that you have personally suffered (or could suffer) the particular disadvantage as an individual.

(4) the employer cannot show that the PCP is a proportionate means of achieving a legitimate aim.

This means that there can be a defence to a complaint of indirect discrimination.

If the person applying a provision, criterion or practice can show that it is ‘a **proportionate means of achieving a legitimate aim**’, then it will not amount to indirect discrimination. This is known as the ‘**objective justification**’ test.

The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages:

- ▶ Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?
- ▶ If the aim is legitimate, is the means of achieving it proportionate - that is, appropriate and necessary in all the circumstances? i.e. does the legitimate aim outweigh any actual or potential discriminatory impact?

What is a legitimate aim?

The health, welfare and safety of individuals may qualify as legitimate aims provided that the risks are clearly specified and supported by evidence. One legitimate aim commonly used by Respondents in disability discrimination claims relating to capability and absence management is the efficient and effective management of the workforce.

Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test.

For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination.

What is proportionate?

Even if the aim is a legitimate one, the means of achieving it must be proportionate.

Deciding whether the means used to achieve the legitimate aim is proportionate involves a balancing exercise.

An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the PCP as against the employer's reasons for applying it, taking into account all the relevant facts.

Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the Court of Justice of the European Union (formerly the ECJ). EU law views treatment as proportionate if it is an '**appropriate and necessary**' means of achieving a legitimate aim. But 'necessary' does not mean that the PCP is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

Example of indirect discrimination

The employer applies an absence management policy that disciplines employees who take more days off than is allowed by the policy. An employee with MS may need to take more days off as a direct result of their condition. The policy applies equally to all employees, but it puts the employee with MS at a particular disadvantage as she cannot avoid taking days off due to her condition. If the employer cannot show that the policy is objectively justified, the employee could succeed in a claim for indirect discrimination.

Proving an indirect discrimination claim

