

UNINTENTIONAL INDIRECT DISCRIMINATION

Helena Ifeka & Declan O'Dempsey

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UNINTENTIONAL INDIRECT DISCRIMINATION

Agenda

- 1) Legal framework and key cases
- 2) Concepts – intention and burden of proof
- 3) Issues with the provision
- 4) Using this in practice – two perspectives

UNINTENTIONAL INDIRECT DISCRIMINATION: LEGAL FRAMEWORK

Indirect discrimination

- ❑ Section 19 EA - where employer applies a PCP to C and other employees/workers, which puts C and others with the same protected characteristic, at a particular disadvantage compared to others who did not share the protected characteristic, and the PCP cannot be objectively justified
- ❑ Section 19A EA - where employer applies a PCP to C and other employees/workers, and although C does not share the same protected characteristic as the group, suffers same disadvantage
 - ❑ Recent s19A case - R. (on the application of LL) v Trafford MBC [2025] EWHC 2380

UNINTENTIONAL INDIRECT DISCRIMINATION: LEGAL FRAMEWORK – STATUTORY BACKGROUND

Race Relations Act 1976

- ❑ Section 57(3) read with s.1(1)(b) of the RRA 1976
- ❑ As respects an unlawful act of indirect race discrimination, **no award of damages shall be made** if the respondent **proves** that the requirement or condition in question was not applied with the **intention** of treating the claimant unfavourably on racial grounds

Sex Discrimination Act 1975

- ❑ Section 1(B) read with 65(1) SDA 1975 (as later amended)
- ❑ As respects an unlawful act of indirect sex discrimination, if the respondent **proves** that the requirement or condition in question was **not** applied with the **intention** of treating the claimant unfavourably on the ground of his [sic!] sex or marital status, an order for compensation may be made **only if** the tribunal makes a declaration and/or recommendation as if it had no power to make an order for compensation **and...** considers it would also be **just and equitable** to order compensation.

UNINTENTIONAL INDIRECT DISCRIMINATION: LEGAL FRAMEWORK – S.124(4)-(5) EQUALITY ACT 2010

124 Remedies: general

- (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
- (2) The tribunal may—*
 - (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
 - (b) order the respondent to pay compensation to the complainant;*
 - (c) make an appropriate recommendation.*
- (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate*
- (4) Subsection (5) applies if the tribunal—*
 - (a) finds that a contravention is established by virtue of section 19 or 19A, but*
 - (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.*
- (5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).*

UNINTENTIONAL INDIRECT DISCRIMINATION: KEY CASES

Cases under predecessor statutes

- ❑ Orphanos v Queen Mary College [1985] A.C. 761 at 775C-F; J. H. Walker v Hussain [1995] 11 WLUK 5 at 298G-299G; and British Medical Association v Chaudhary [2007] C.L.Y. 139 (*obiter*) at [224] – on RRA 1976
- ❑ Whitbread Walker Ltd v Jones EAT/1084/99 at [10-11] – on SDA 1975

Cases under Equality Act 2010

- ❑ Bessong v Pennine Care NHS Foundation Trust [2020] ICR 849 (not directly on topic)
- ❑ Wisbey v Commissioner of the City of London Police [2021] ICR 1465

UNINTENTIONAL INDIRECT DISCRIMINATION: CONCEPTS EXPLAINED – ‘INTENTION’



- ❑ State of mind ('a question of law')
- ❑ Two-stage test to determine discriminator's subjective intention ('a matter of fact')
- ❑ To be decided on the balance of probabilities, by direct evidence or by inference from all the circumstances
- ❑ Discriminator must:
 1. Positively want the PCP to have the prohibited result (*"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"*), and
 2. Actually know / consciously realise that the prohibited result will follow (*"it puts, or would put, B at that disadvantage"*).
- ❑ With respect to second limb, constructive knowledge unlikely to be sufficient (Chaudhary)

UNINTENTIONAL INDIRECT DISCRIMINATION: CONCEPTS EXPLAINED – INTENTION



- ❑ In practice this means that to be **satisfied** that a PCP was **not** applied with the intention of discriminating, the tribunal needs to find that the discriminator:
 1. knew or realised that the PCP would have a disparate impact on the complainant, but
 2. did not **positively** want to bring about that disparate outcome.
- ❑ Wisbey on ‘intention’ - *obiter*? Debate to be had.

UNINTENTIONAL INDIRECT DISCRIMINATION: CONCEPTS EXPLAINED – BURDEN OF PROOF

- ❑ In earlier statutes, burden on employer to ‘prove’
- ❑ EA
 - ❑ Neutral burden of proof
 - ❑ Tribunal must be ‘satisfied’ -> evidential burden on both sides
- ❑ Oral evidence critical



UNINTENTIONAL INDIRECT DISCRIMINATION: ISSUES WITH THE PROVISION



Wisbey v Commissioner of the City of London Police [2021] EWCA Civ 650

- ❑ R had policy of satisfying colour vision tests for firearms & advancing driving duties
- ❑ C was firearms officer with defective colour vision – s.19 claim
- ❑ ET held no ID in respect of firearms, but ID in respect of driving – but UID, no ItF
- ❑ EAT refused appeal.
- ❑ CA dismissed appeal on incompatibility with EU law
 - ❑ s124 sets out procedure. Does not ‘dissuade’ or ‘steer tribunals away from’ ordering compensation.
 - ❑ Open to ET to decline to order compensation

UNINTENTIONAL INDIRECT DISCRIMINATION: A RESPONDENT PERSPECTIVE

- ❑ Remedy hearings are an exercise in damage limitation & **reputation management**
- ❑ Finding of UID alters procedure *not* principles of compensation
- ❑ ... But tribunal can only move straight to compensation if there **was** intention to discriminate
- ❑ Greater focus on declaration and recommendations... and on Int & Inj to F
- ❑ Inj to F - Bessong: accepted subs that “the more serious nature of the claim of harassment” could give rise to greater losses than a s.19 claim and distinguished between “material differences in approach” to remedy for s.19 and s26
- ❑ Interest - in disc claims discretionary



UNINTENTIONAL INDIRECT DISCRIMINATION: A CLAIMANT PERSPECTIVE

So what? Here's what!

- s19A cases where the ET may have little sympathy
- Causation of loss is the key
- How did the application of the particular PCP cause loss?
- Don't be generic in the witness statement
- Focus on impact not intention (because the question is not how bad the R is but how hurt the C is).

UNINTENTIONAL INDIRECT DISCRIMINATION: IN PRACTICE – CLAIMANT

Claimants – Thought Experiments

- ❑ **Thought 1 — Identify the PCP** carefully as the application of this is what causes the loss.
- ❑ **Thought 2 — Apply “*Wisbey*” causation (it is in fact ordinary causation!)**
 - ❑ Analyse whether loss arises from the discriminatory PCP or from other employment actions. Apply §§43–44 Wisbey.
- ❑ **Thought 3 — Intention vs motive**
- ❑ Using the definition at §35 Wisbey, classify your scenario and explain to yourself whether you have constructive knowledge or actual knowledge in the case. The former does not mean that the indirect discrimination was intended. If there is evidence that the disadvantage was intended major on that.

UNINTENTIONAL INDIRECT DISCRIMINATION: IN PRACTICE

Claimants - Drafting a witness statement where lack of intention has been raised

Describe

1. how the PCP applied and its effects in detail
2. the Claimant's personal disadvantage (and that of the group);
3. the emotional or financial impact attributable only to the PCP or on a balance of probabilities chiefly to the application of the PCP.

Consider

- How foreseeable was it – a matter of common sense that it would affect the disadvantaged group and the individual?
- Deal with the evidential burden that C is asserting a positive (it was intentional) and R is asserting a negative
- C only needs to show that loss flowed from the imposition of the PCP (whether or not it was unintentional).
 - The only reason Wisbey did not get anything is because no evidence was led on injury to feelings (or presumably other loss).

UNINTENTIONAL INDIRECT DISCRIMINATION: QUESTIONS

Questions?

THANK YOU



Website:
www.cloisters.com



Contact Number:
020 7827 4000



Email Addresses:
clerks@cloisters.com
hi@cloisters.com
dod@cloisters.com