

Justifying discrimination

Introduction

Several different forms of discrimination are outlawed under the Equality Act 2010 (EqA). Some of these, including direct discrimination and harassment, cannot be justified. However, some of them, namely indirect discrimination and discrimination arising from disability (S.15 discrimination), as well as direct age discrimination, can be justified in certain circumstances.

This note sets out a brief summary of indirect and S.15 discrimination, along with details of the justification defence.

This is a complicated and constantly evolving area of employment law, so please speak to one of our Employment Advisers for further assistance before taking any action.

Indirect Discrimination

Section 19 of the EqA states that indirect discrimination is where:

- A applies to B a provision, criterion or practice (PCP);
- B has a protected characteristic;
- A also applies (or would apply) that PCP to people who do not share B's protected characteristic;
- the PCP puts or would put those with whom B shares the characteristic at a particular disadvantage compared to others;
- the PCP puts or would put B to that disadvantage; and
- A cannot show the PCP to be a proportionate means of achieving a legitimate aim.

In essence, indirect discrimination is about applying policies or doing things in a way that is not intended to disadvantage particular groups but in practice has that effect.

If, for example, an employer insists that a female worker works full-time, that can be indirectly discriminatory. That insistence would tend to disadvantage more women than men, as women still have the lion's share of domestic caring responsibilities. If the particular woman was also disadvantaged in this way and brought a claim for indirect sex discrimination, it would be for the employer to explain the reason for requiring that the job be done full-time and persuading the tribunal that the policy or practice in question was in pursuance of a legitimate aim and that, when balanced against the discriminatory effect, it was a proportionate means of meeting that aim. This can also apply to other rules, such as dress codes and when workers are required to work.

Discrimination arising from disability (S.15 Discrimination)

This is where A treats B unfavourably because of something arising in consequence of B's disability. No comparison with the treatment of others is required. As with direct disability discrimination, the employer will only be liable for this if it knows or ought to have known of the worker's disability.

A common example is where an employer dismisses an employee not because they are disabled but because of the long-term absence they have had as a result of the disability.

As with indirect discrimination, it is possible to argue that the treatment was justified by showing that it was a proportionate means of achieving a legitimate aim.

Direct Age Discrimination

This occurs when A treats B less favourably because of age than A treats or would treat others.

Unlike other types of direct discrimination, it is possible to justify this type of discrimination. Again, to rely on this it is necessary to show that the treatment was a proportionate means of achieving a legitimate aim.

Justification

Indirect, S.15 and direct age discrimination have the same definition of when such discrimination can be justified. Namely:

- That the PCP or treatment was in pursuance of a legitimate aim, and that the PCP or treatment is capable of meeting that aim, and
- That, when balanced against the discriminatory effect, the PCP or treatment was a proportionate means of meeting that aim.

Legitimate Aim

The first step in establishing a justification defence is to show that there was a legitimate aim. There is no definition of what this means, and it will be for a Tribunal to decide if the stated aim of the employer is indeed legitimate.

The [Equality and Human Rights Commission's \(EHRC\) Employment Code](#) states:

"The concept of 'legitimate aim' is taken from European Union (EU) law and relevant decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence."

The Court of Appeal in *R (Elias) v Secretary of State for Defence (2006)* said:

"... the objective of the measure in question must correspond with a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end."

An aim which itself is discriminatory will never be able to be relied upon in any justification defence.

To complicate matters further, saving cost on its own will not be a legitimate aim in these circumstances. However, costs alongside another aim could be legitimate. This has been called the “costs plus” approach.

With regards to direct age discrimination, an aim will only be legitimate if it relates to “employment policy, the labour market or vocational training” and not “purely individual reasons particular to the employer’s situation, such as cost reduction or improving competitiveness.” (Art 6(1) Equal Treatment Directive 2000).

Examples

As mentioned above, it is for the Tribunal to decide whether an employer’s aim is legitimate, and each case will turn on its own facts – what is legitimate for one employer may not be legitimate for another. However, it can be useful to look at some examples:

HM Land Registry v Benson (2012) – a “cheapness criterion” in a redundancy selection exercise to fairly distribute limited financial resources was found to be a legitimate or reasonable aim in defence of an age discrimination claim.

Azmi v Kirklees MBC (2007) – in an indirect religious belief discrimination claim, ensuring that a teacher can communicate effectively with her pupils was found to be a legitimate aim in the context of a requirement not to wear a veil while teaching.

Cherfi v G4S Security Services (2011) – in another indirect religious belief discrimination claim, when requiring a security guard to work on a Friday and not attend Muslim prayers, it was found that the aim of ensuring that the employer could fulfil its contractual requirements to a third party was legitimate.

There are also cases that show that securing efficiencies and other desirable management aims, such as achieving a coherent pay structure, avoiding job losses and cuts in hours, etc, may be legitimate.

The supplement to the EHRC’s Employment Code also has some examples in respect of age discrimination, including promoting access to employment for younger people, rewarding experience, and facilitating the participation of older workers in the workforce.

Disability related sickness absence

Issuing warnings and dismissing a worker for disability related absences could amount to S.15 discrimination. It may, therefore, be necessary to consider whether such treatment can be justified. In terms of what could be the legitimate aim:

DL Insurance Services Ltd v O’Connor (2017) – the EAT in this case found that ensuring adequate attendance levels and seeking to improve Mrs O’Connor’s attendance were legitimate aims. However, issuing a warning after 60 days of sickness absence was found not to be a proportionate means of meeting it. See below. Note that the EAT appeared to imply that “to deter absences by making it financially disadvantageous to an employee to be absent even when genuinely ill, or to enable the Respondent to take the case to the disciplinary procedure, so as eventually if attendance did not improve to be able to dismiss an employee who had a poor record of absences” could be legitimate aims when considering absence management procedures.

General Dynamics Information Technology Ltd v Carranza (2014) – Here, the EAT said that “it was legitimate for an employer to aim for consistent attendance at work” when issuing a warning for sickness absence related to a disability.

The key point here is to think about the reason why you have a particular policy or process in place, or the reason why you are taking a particular course of action.

Proportionality

Showing that the employer has a legitimate aim is only half the battle. They must also show that the PCP or the treatment, when balanced against the discriminatory impact, was a proportionate means of meeting that aim.

This part of the justification defence can be very difficult to predict, particularly when dealing with disability related sickness absence – the question here is often where can an employer draw the line and issue a warning in respect of disability related absences?

When considering proportionality, a Tribunal will look at how many people in a protected group are adversely affected by the PCP or treatment (when looking at indirect and direct age discrimination) and how severe that is (also in respect of S.15 discrimination). Where the discriminatory effect is particularly severe, the PCP or treatment is less likely to be proportionate.

It is also necessary to consider whether there are less discriminatory ways of achieving the legitimate aim. If there are, it will be difficult for the employer to argue that the steps taken were proportionate.

Another factor to consider when dealing with S.15 claims is whether any reasonable adjustments could have been implemented before taking any action that could be discriminatory. If there are, then the treatment will not be proportionate.

Examples

Here are some examples on the question of proportionality:

Grosset v City of York Council (2018) – A teacher, G, with cystic fibrosis showed the 18-certificate movie “Halloween” to a group of vulnerable 15 and 16 year olds in school. The School dismissed G. G successfully argued that the reason why he showed the film was connected to his disability, satisfying the requirements of S.15. While the School were able to show that they had legitimate aims in dismissing him, namely the protection of children and ensuring that disciplinary standards were maintained, the Court of Appeal decided that this was not proportionate. Given his long service and clean record, a final written warning would have also met their stated aim. In addition, there were several reasonable adjustments the School should have put in place which may have prevented this occurring at all.

DL Insurance Services Ltd v O’Connor (2017) – see above in respect of the employer’s legitimate aim when dealing with disability related absences. The Employment Appeal Tribunal found that issuing a warning was not proportionate means of achieving their stated aim because there was no evidence to show that this would improve her attendance. In addition, the employer had not obtained an occupational health report which may have suggested some reasonable adjustments that could have been implemented.

Azmi v Kirklees MBC (2007) – see above in respect of the employer’s legitimate aim. Before the School required A not to wear a veil while teaching, it was relevant that they observed her teaching both with and without a veil and taken the view that she was much more effective without the veil. Also, they allowed A to wear the veil at any other time when she was not teaching. The Tribunal found, therefore, that the School’s actions were proportionate.

Conclusion

Being able to justify some forms of discrimination provides a valuable defence to these claims. However, this can be tricky to establish.

Here are some tips that may help:

- Before implementing any measure, process or procedure, consider why it is needed. What aim are you trying to achieve? Does what you are proposing help in achieving that aim?
- Carry out a risk assessment to establish if a protected group may be adversely affected by it.
- If a protected group is adversely affected, consider whether there are less discriminatory ways of achieving your aim, or whether there are ways of limiting the detrimental impact.
- When dealing with workers with a disability, before taking any action in respect of misconduct or absence management consider whether S.15 applies.
- If it does apply, think about what you are trying to achieve – what is your aim and is it legitimate?
- Consider whether there are any reasonable adjustments that should be put in place before taking any action.
- If reasonable adjustments have been put in place, or there are none, and things have not improved, consider whether there are less discriminatory ways of achieving your stated aim. This may include downgrading a disciplinary sanction to take the disability into account or disregarding some or all disability related absences.

As mentioned, this is a complicated and constantly evolving area. Seek advice from your Employment Adviser before taking any action to discuss your options.