

Indirect Discrimination: A Guide For Employers



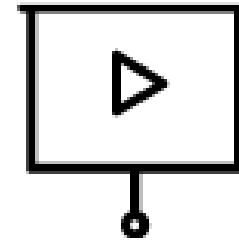
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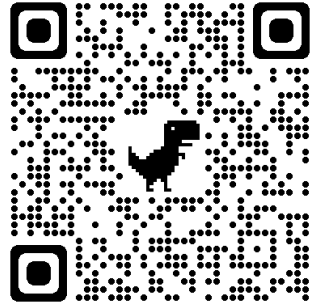


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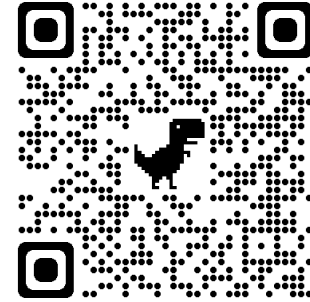


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Introduction & Connect with Us



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Agenda

1. Defining Indirect discrimination
2. Case studies:
 - a) Employee appearance
 - b) Contractual sick pay
 - c) Flexible working
3. Objective justification
4. Practical steps
5. Building a more inclusive workforce
6. Questions

Indirect vs Direct Discrimination

- Indirect discrimination is when an apparently neutral provision puts people sharing a protected characteristic at a particular disadvantage.
- Direct discrimination is less favourable treatment because of a protected characteristic.

Section 19 The Equality Act 2010

Indirect Discrimination occurs when:

- An employer applies a **provision, criterion or practice** (PCP) equally to a group of employees.
- An employee within that group has a **protected characteristic**.
- The PCP puts or would put persons with whom the employee shares the protected characteristic at a **particular disadvantage** compared to others.
- The PCP puts or would put the employee to **that disadvantage**.
- An employer cannot show the PCP to be a **proportionate means of achieving a legitimate aim**.

Protected Characteristics

- Age (including specific and range)
- Disability (section 6 EqA definition)
- Gender Reassignment (does not require a medical process)
- Marriage and Civil Partnership (not including absence of)
- Pregnancy and maternity (not covered under s.19 but could be s.18 EqA)
- Race (including colour, nationality and ethnic or national origins)
- Religion or belief (including absence of religion)
- Sex (means male or female)
- Sexual orientation (towards same, opposite or either sex)

Particular Disadvantage

- Something that a reasonable person would complain about.
- Examples include denial of an opportunity or choice, deterrence, rejection or exclusion.
- Must be linked to the protected characteristic (*likely not obvious*)
- Statistics can be important
- Expert evidence may be necessary
- Comparison exercise
 - *Include everyone affected by the PCP*
 - *Those who share the protected characteristic vs those who don't*

Case Study 1

A factory owner announces that from next month staff cannot wear their hair in dreadlocks, even if the locks are tied back.

- This is an example of a policy that has not yet been implemented but which still amounts to a PCP.
- The decision to introduce the policy could be indirectly discriminatory because of religion or belief (Rastafarian workers).
- The employer must show that the PCP can be objectively justified.
 - Why has it been introduced?
 - Document the reason in the written policy

Case Study 2

An employer decides to cut contractual sick pay for unvaccinated employees who are required to self-isolate due to COVID-19.

- It will certainly be a PCP and reduced sick pay will certainly be a disadvantage.
- Would the disadvantage be linked to a protected characteristic?
 - Disability – those who cannot take the vaccine on medical grounds
 - Religion – some religions do not allow medical interventions
 - Belief – Fear of having the vaccine is unlikely to succeed
 - Pregnancy – Not indirect discrimination but could be s 18 EqA.

Case Study 3

A decision to refuse an employee's request for flexible working, which would have enabled them to collect their child from nursery.

- PCP generally requires a degree of repetition but can be a first decision.
- Judicial presumption that women bear more responsibility for childcare
- Disadvantage as employee will likely be put to additional cost
- Justification?
- Employer's obligation to consider flexible working request reasonably overlaps with the prohibition on discrimination.

Objective Justification

The **provision, criterion or practice (PCP)** will not be indirectly discriminatory if the employer can show that it is “**objectively justified**”.

The employer must show that its actions were a **proportionate means** of achieving a **legitimate aim**:

- Is the aim of the PCP legal and non-discriminatory, and one that represents a real, objective consideration?
- If the aim is legitimate, is the means of achieving that aim appropriate and necessary in all the circumstances?

An intention not to discriminate is irrelevant

Practical steps to avoid indirect discrimination

- Start with your legitimate aim!
- What is necessary to achieve that aim?
- Build a policy on those foundations
- Avoid unnecessary policies
- Don't draft policies too wide
- No hidden agendas
- Take time to draft policies and engage key stake holders
- Review policies regularly to ensure that are up to date
- Don't be afraid to amend policies
- Give yourself the discretion to deviate from a policy

Building a more inclusive workforce

- Have an up-to-date equality policy
- Elect an Equality and Diversity Champion
- Provide regular anti-discrimination training to educate staff
- Promote understanding on all protected characteristics
- Make it clear how staff can complain if discrimination is perceived
- Regular one-to-one catch-ups to help build positive working relationships
- Actively tackle prejudice and discrimination when it occurs
- Operate appropriate investigatory procedures in order to effectively resolve complaints of discrimination and harassment when they are reported
- Avoid victim blaming
- Clear messaging from the top down

Any Questions?



Upcoming Webinars

Redundancy Masterclass

25 May 2022 at 9:30

<https://www.machins.co.uk/events/redundancy-masterclass/>

Disability in the Workplace

20 July 2022 at 9.30

<https://www.machins.co.uk/events/disability-in-the-workplace/>

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