



JUSTIFIED? - THE BREADTH AND LIMITATIONS OF THE EQUALITY ACT JUSTIFICATION DEFENCE AND HOW TO WIN THE ARGUMENT

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Introduction

1. This presentation considers the justification defence to claims for unlawful discrimination under the Equality Act 2010 ("EqA").
2. It sets out below the legislative framework for the defence and considers the key case-law and guiding principles emerging therefrom. It also focuses on a number of current areas of difficulty and uncertainty, as well as providing the writer's view as to the type and extent of the evidence necessary to maintain or defeat such an argument. There is also a specific consideration of disability discrimination and the interplay between claims for indirect discrimination, disability-related discrimination and failures to make reasonable adjustments, in this context.

When does the Justification Defence potentially apply?

3. The defence of justification is potentially open to Respondents facing claims of:
 - a) Indirect Discrimination based on any of the eight protected characteristics (s.19(2)(d) EqA).
 - b) Direct Discrimination based on the protected characteristic of age only (s.13(2) EqA).
 - c) Disability-related discrimination (s.15 EqA).
4. Unlike the position under the Disability Discrimination Act 1995 ("DDA") as originally drafted, there can be justification for a failure to make reasonable adjustments in disability cases.
5. The defence does not apply to other forms of prohibited conduct, such as harassment or victimisation.

The EU Justification Framework

6. The **Equal Treatment Framework Directive (Council Directive 2000/78/EC)** has different wording for the justification tests for indirect and direct discrimination.



7. In relation to indirect discrimination, the question is whether the PCP is '*objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*' (Art 2(2)).
8. In relation to direct discrimination, treatment will not be discriminatory if it is 'objectively and reasonably justified by a legitimate aim' (Art 6(1)).

The Equality Act Framework

9. For both indirect and direct discrimination, the EqA uses the same terminology, namely whether the measure in question '*is a proportionate means of achieving a legitimate aim*'.
10. There is very settled case law confirming that both limbs of the test must be considered separately and must not be conflated (**MacCulloch v ICI plc [2008] IRLR 846, [2008] ICR 1334**). Further, it is only possible to consider the proportionality once the legitimate aims have been properly and clearly identified, as it is against the specific aim that the proportionality issue falls to be considered.

Are the tests the same for indirect and direct discrimination?

11. The starting point is the judgment of the ECJ in the Heyday challenge (**R (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business Enterprise and Regulatory Reform [2009] IRLR 373, [2009] ICR 1080, [2009] All ER (EC) 619**). One of the key issues was whether the tests for indirect and direct discrimination should be the same.
12. It should be noted that before this judgment was handed down the EAT in **MacCulloch v ICI plc [2008] IRLR 846, [2008] ICR 1334**, had accepted that as a general principle, direct discrimination may be harder to justify than indirect discrimination.
13. The ECJ`s judgment (paras 53-67) noted that the wording of the two Articles differed, with Art 6(1) (direct age discrimination) specifically including the concept of reasonableness.
14. However, the ECJ accepted that it was '*inconceivable that a difference in treatment could be justified by a legitimate aim, achieved by appropriate and necessary means, but that the justification would not be reasonable*', In other words, reasonableness is inherent if there is a justification of indirect discrimination. This suggested that the same standard of justification applied regardless of the type of discrimination, albeit that an employer is likely to require more cogent evidence to support the legitimate aim claimed where the discrimination is direct. However, unhelpfully, the judgment is not always clear as it also states (paras 46-49) that the potential for



justifying direct age discrimination under Art 6 only exists if they are covered by a social policy objective such as those related to employment policy or the labour market.

15. On remission from the ECJ, Blake J. giving the judgment of the High Court in **R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills [2009] EWHC 2336 (Admin), [2009] IRLR 1017, [2010] ICR 260**, commented (at para 37) that the government's aim in promoting the Regulations prohibiting age discrimination was to '*preserve the confidence and integrity of the labour market*', and that this was a legitimate aim. Blake J held that '*there is no reason to believe that in the special context of age discrimination, the kind of business practice reasons that can justify indirect discrimination are fundamentally different from those that can justify direct discrimination.*'
16. However, in **Kücükdeveci v Swedex Gmnh & Co C-555/07, [2010] IRLR 346**, the principle was drawn from the ECJ in Heyday that the potential for justifying direct age discrimination under Art 6 *only* exists in relation to public interest aims, distinguishable from purely individual reasons particular to an employer's situation. The judgment of the ECJ then found that the objectives which had been identified by the national court in that case '*clearly belong to employment and labour market policy within the meaning of art 6(1).*'
17. The point was considered in **Seldon v Clarkson Wright and Jakes (and Secretary of State for Business Innovation and Skills, and Age UK - Intervenors) [2012] UKSC 16, [2012] IRLR 590, SC; [2010] EWCA Civ 899, [2010] IRLR 865, CA**. This concerned a claim by a partner in a firm of solicitors that his compulsory retirement at the age of 65 in accordance with the terms of the partnership deed was unlawful direct age discrimination. The ET found that there were legitimate aims, of (i) ensuring associates were given an opportunity of partnership after a reasonable period, (ii) facilitating the planning of the partnership and workforce, and (iii) promoting collegiality by limiting the need to expel partners by performance management. The ET was satisfied that the means of compulsory retirement at the age of 65 was a proportionate way of achieving those aims.
18. On appeal to the EAT, Elias P (in a judgment handed down before the Heyday decisions of the ECJ or High Court) **[2009] IRLR 267, [2009] 3 All ER 435, EAT** held that '*the overall discriminatory effect of a measure will necessarily be greater when there is direct as opposed to indirect discrimination*', such that while it will not be necessary to apply different concepts of justification, it ought to be recognised that '*the application of the concept may vary with the form which the discrimination takes*'. The EAT upheld the judgment of the ET in relation to the first and second legitimate aims, but not that of collegiality.
19. The express reasoning of the EAT in *Seldon* suggested therefore that at the first stage of what can constitute a 'legitimate aim', the question is the same whether the form of discrimination is direct



or indirect, and the difference in measuring the discriminatory effect will come in at the proportionality stage.

20. The reasoning of the Court of Appeal indicated that when considering justification for direct age discrimination, there is a distinction between justification of national legislation that either renders lawful or unlawful the actions of an employer and those actions themselves as contemplated by the legislation. National legislation must be justified by reference primarily to social and employment policy choices, and in so doing, there is a margin of appreciation. That is not the same as saying that a particular employer must only have a social or employment policy aim. An employer may have slightly mixed motives.
21. The position after the CA judgment therefore seemed to be that to justify direct discrimination there may be required, at least in part, a social policy aim (which a private employer can rely on as acting in pursuance of), whereas in justifying indirect discrimination purely individual reasons particular to an employer's situation can be relied upon.
22. The Supreme Court then considered the issue. Lady Hale, giving the leading judgment, held that the approach to justification of direct age discrimination is '*significantly different*' to justification of indirect discrimination. Direct discrimination, such as the mandatory retirement in issue in that case, may only be justified if the relevant treatment or provision seeks to achieve a legitimate aim of a public interest nature related to employment policy, the labour market and vocational training, the legitimacy of which member states must establish rather than individual employers.
23. Thus, in direct age discrimination cases, a distinction must be drawn between these types of social policy objectives, and purely individual reasons that are specific to the situation of a particular employer such as pure cost reduction or improving competitiveness, which could not of themselves justify direct discrimination.
24. Respondents wishing to rely on a justification defence in such a case must therefore ensure that they align their pleaded legitimate aims with such objectives. In addition, bearing in mind the authorities which confirm that it is generally more difficult to show proportionality in cases of direct discrimination, they must also ensure they fully address this issue. Both limbs of the test will require careful consideration and the production of sufficient evidence to discharge the burden of proof, which lies firmly on the Respondent.



Key Principles emerging from the case law

General

25. The leading case is a decision of the ECJ in **Bilka-Kaufhaus GmbH v Weber von Hartz 170/84, [1986] IRLR 317, [1987] ICR 110, ECJ.**

26. This concerned Germany's exclusion of part-time workers from a particular occupational pension scheme, which was alleged to be indirect discrimination against women. It was held that *'it is not sufficient to show that in adopting a pay practice which in fact discriminates against women workers, the employers sought to achieve objectives other than discrimination against women..... in order to justify such a pay practice from the point of view of Art 119, the employer must..... put forward objective economic grounds relating to the management of the undertaking. It is also necessary to ascertain whether the pay practice in question is necessary and in proportion to the objectives pursued by the employer'*.

27. This was approved by the Supreme Court in **Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority [2012] UKSC 15, [2012] IRLR 601** in which Lady Hale stated (para 19):

'The approach to justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination ... [and] can encompass a real need on the part of the employer's business.'

28. The test to be applied is an objective, not a subjective one. In **Hampson v Department of Education and Science [1989] IRLR 69, [1990] ICR 511**, the CA emphasised that for a requirement or condition (now a PCP) to be justified, it is necessary for the Respondent to do more than show that he himself considered his reasons adequate. The test requires an objective balance to be struck between the discriminatory effect of the requirement or condition and the reasonable needs of the person who applies it.

29. In **Allonby v Accrington and Rossendale College [2001] IRLR 364, [2001] ICR 1189**, Sedley LJ outlined what is required to find justification under the traditional formulation of indirect discrimination:

'Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons [for



imposing a condition] demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.'

30. The case law is quite clear. The test to be applied is always an objective one, and not, as in unfair dismissals, a band of reasonable responses approach. This was made clear by the Court of appeal in **Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR 1565, CA:**

'The principle of proportionality requires the tribunal to take account of the reasonable needs of the business, but at the end of the day it was for the tribunal to make its own judgment as to whether the rule imposed was 'reasonably necessary'. It is not enough that the view is one which a reasonable employer could take.'

31. The Hardy decision was applied in **British Airways plc v Starmar [2005] IRLR 862, EAT,** where an employment tribunal's decision that justification had not been made out was upheld on appeal.

Legitimate Aim

32. There is no definition of this term in either the European or the national legislation. Rather it is a matter of fact for the tribunal. According to Mummery LJ **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, 1 WLR 3213:**

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

33. The Equal Treatment Framework Directive (Council Directive 2000/78 EC) in Art 6, (dealing with circumstances in which direct age discrimination may be justified), states that legitimate aims may include 'legitimate employment policy, labour market and vocational training objectives'. Clearly, what can amount to a legitimate aim when seeking to justify indirect discrimination is, however, far wider than the considerations listed there. The Supreme Court in ***Homer*** made it clear that the legitimate aims relied upon to seek to justify indirect discrimination may be much wider than the social policy aims needed to seek to justify direct age discrimination. There are numerous examples of these in the case law.

34. Whether an aim is 'legitimate' is a question of fact for the tribunal (**Ladele v London Borough of Islington [2009] EWCA Civ 1357, [2010] IRLR 211, [2010] ICR 532,** (para 45)). Further, an aim will not be legitimate if it is in itself discriminatory.



35. It must be remembered that the legitimate aim being relied upon must in fact be pursued by the measure in question. However, it is not necessary that the aim was either articulated or even realised at the time; ex post facto rationalisation is perfectly permissible (**Seldon v Clarkson Wright and Jakes [2012] UKSC 16, [2012] IRLR 590**).

Cost as a legitimate aim

36. A controversial question is the extent to which a need to reduce or minimise cost can be relied upon as a 'legitimate aim'. In **Cross v British Airways plc [2005] IRLR 423**, the EAT interpreted European case law as meaning that an employer seeking to justify a discriminatory PCP under the Sex Discrimination Act 1975 cannot rely solely on considerations of cost but may be permitted to put cost into the balance together with other justifications, if there are any. The latter scenario has become known as the 'costs plus' approach, which was accepted by Elias P in **Redcar and Cleveland Borough Council v Bainbridge [2007] IRLR 91, [2008] ICR 249**.
37. In **Woodcock v Cumbria Primary Care Trust [2012] EWCA Civ 330, [2012] IRLR 491** (EAT decision at [2011] IRLR 119, [2011] ICR 143) the Court of Appeal upheld the decision of the EAT that the employer had been justified in timing its redundancy notice to the claimant so as to avoid the very substantial cost it would otherwise have incurred in funding his early retirement. The EAT, while agreeing with the starting point in *Cross*, that 'considerations of cost must be admissible in considering whether a provision, criteria or practice which has a discriminatory impact may nevertheless be justified' went on to state '*we find it hard to see the principled basis for a rule that such considerations can never by themselves constitute sufficient justification, or why they need the admixture of some other element in order to be legitimised*' (para 32).
38. While the EAT stopped short of saying that cost alone could be sufficient to justify discrimination, in the light of two existing EAT decisions to contrary, the question remained as to whether the higher courts could take the view that cost alone could be a legitimate aim. In *Woodcock*, the CA answered this question in the negative, Rimer LJ holding that '*the guidance of the Court of Justice is that an employer cannot justify discriminatory treatment "solely" because the elimination of such treatment would involve increased costs. This means that no more than that the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim*'.
39. More recently, the CJEU in **O'Brien v Ministry of Justice C-393/10, [2012] IRLR 421** has stated that '*budgetary considerations cannot justify discrimination*'; This was applied in the Supreme Court; **Ministry of Justice v O'Brien [2013] UKSC 6, [2013] 1 WLR 522**.



40. It remains to be seen as to whether some future challenge to this position may be launched. Underhill LJ in **R (On the Application of Unison) v Lord Chancellor [2015] EWCA Civ 915, [2016] ICR 1** referred back to his judgment in the EAT in *Woodcock*, and said:

‘there is in discrimination litigation a good deal of bandying about of the language of "cost", which is said never to be an admissible justification, and "cost plus", in which the presence of some other factor appears magically to legitimate partial reliance on cost considerations. I have expressed elsewhere [ie in Woodcock in the EAT] my concerns about this crude dichotomy; and I respectfully agree with the Supreme Court in O'Brien that the issue is one of some subtlety.’

41. The courts have devised ways to avoid this dichotomy, which many find difficult to reconcile. For example, in the earlier case of **HM Land Registry v Benson [2012] IRLR 373**, the EAT (again, Underhill P) held that the application of a 'cheapness criterion', whereby those whose redundancy would cost less were selected, resulting in an adverse impact on employees in the 50-54 year old age group, was justified. The ET had found that the respondent could have released all those who applied for voluntary redundancy, albeit not within budget. The EAT, overturning their decision, stated that an employer's decision as to how it allocates its financial resources should be considered to be a 'legitimate' or 'reasonable' need.

42. While then it is clear that cost considerations alone cannot serve as a legitimate aim, this seems to draw a distinction between 'cost' and 'fair distribution of limited resources'. This same distinction seems to have been present in **Odar v Baxter Deutschland GmbH [2013] EqLR 167, [2012] All ER (D) 155 (Dec)**.

43. Another example is **Braithwaite v HCL Insurance BPO [2015] ICR 713**, EAT. The ET had found that the employer, in increasing working hours / reducing holidays and removing benefits from employees, to the particular disadvantage of older employees, was acting in pursuance of a legitimate aim, namely reducing staff costs *to ensure the future viability of the business*. The finding that the employers had acted proportionately in pursuance of this aim was also upheld by the EAT.

Proportionate Means

44. While the EqA uses the term 'proportionate' rather than the phrase 'appropriate and necessary' which appears in the Equal Treatment Framework Directive (2000/78/EC; Arts 2.2(b) and 6.1), the ECJ has used the two terms interchangeably and there appears to be no difference in their interpretation.

45. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The more serious the disparate



adverse impact on a protected group, the more cogent must be the justification for it (**Hardys & Hansons plc v Lax [2005] IRLR 726, [2005] ICR 1565**). Further, it is for the employment tribunal to perform this balancing exercise and to make its own, objective assessment of where the balance lies.

46. There is nothing to prevent an employer relying on 'after the event' justifications which were not actually considered at the time. In **Cadman v Health and Safety Executive [2004] IRLR 971, [2005] ICR 1546** the CA held that there is no rule of law that the justification must have consciously and contemporaneously featured in the decision-making processes of the employer. However, it may be more difficult for an employer to discharge the burden of establishing justification where there is no evidence to show that it ever applied its mind to the question of whether there was another way of achieving the legitimate aim that would avoid or diminish the disparate adverse impact on the protected group (**Hockenjos v Secretary of State for Social Security [2005] IRLR 471, CA**).
47. More recently, the EAT in **Chief Constable of West Midlands Police v Harrod [2015] IRLR 790** highlighted that consideration of objective justification requires an analysis not of the decision-making process, but of the outcome of the measure adopted (para 41). The ET had found that the failure to consider alternatives was such that the means adopted to achieve the aims were not proportionate. This judgment was overturned by Langstaff P, who criticised the ET for applying too high a standard of scrutiny, and for suggesting alternative means of achieving the legitimate aim which would have lacked the required certainty of making financial savings and increasing efficiency. The task of the ET is to enquire whether the means adopted to pursue the legitimate aim were '*reasonably necessary*', and it is not for an ET to '*manufacture a different scheme*' nor to '*focus on process*' (Note: this case is now the subject of an appeal to the CA. The CA is due to hear the substantive appeal on 31 January and 1 February 2017).

Evidence in Justification Cases

48. There can be a tendency for justification to be pleaded as an afterthought and to be inadequately thought out. There are many cases where the respondent's witness statements fail to deal with the issue adequately, if at all, and where the documentary evidence to support the defence is woefully lacking. Similarly, there are cases where the respondent has set out its stall properly but the claimant has failed to respond to the issue at all, for example, by way of seeking further and better particulars or providing evidence in rebuttal.
49. Justification is often the last stage in the tribunal's consideration. Sometimes, where conduct is accepted as being prima facie discriminatory, it is the only stage. It can be a huge mistake for parties to fail to get to grips with the issue and to ensure appropriate evidence is submitted. Many



a justification defence has failed, for example, simply because the respondent has failed to produce evidence it could have produced if sufficient attention had been given to the matter.

50. The general approach of the courts is that convincing factual evidence is required to support a justification argument. It is against this that the tribunal has to perform its own objective, critical evaluation. For example, in **R v Secretary of State for Employment, ex p Equal Opportunities Commission [1994] IRLR 176, [1994] ICR 317, HL**, it was held that there was indirect sex discrimination under where part-timers had to work for five years before gaining protection against unfair dismissal and redundancy dismissal, while full-time workers needed to work for only two years, in circumstances where the vast majority of part-time workers were female. As for justification, the UK government's argument was that the imposition of additional requirements for part-timers was justified because otherwise employers would be disinclined to take them on. However, this was rejected by their Lordships on the simple basis that there was a lack of convincing factual evidence to support that argument.

51. That does not necessarily mean that the tribunal cannot exercise its own judgment and common sense in an appropriate case. In considering what evidence is required to establish justification, the EAT in **Chief Constable of West Yorkshire Police and West Yorkshire Police Authority v Homer [2009] IRLR 262, [2009] ICR 223** (considered on other grounds by the Supreme Court [2012] UKSC 15, [2012] IRLR 601) stated (at para 48):

‘.. it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions.’

52. Similarly at EAT level in **Seldon v Clarkson Wright and Jakes [2009] IRLR 267, [2009] 3 All ER 435, EAT**, Elias P stated (at para 73):

"We do not accept the submissions ... that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature... Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment."

53. However, it would be a brave, and arguably foolish Respondent which chose not to explore what if any evidence might be obtained to support a justification argument and to ensure that the tribunal



is presented with the most cogent evidence possible on the issue. A more recent CJEU authority reiterates the importance of doing exactly that. In the context of a claim of race discrimination the CJEU in **CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia [2015] IRLR 746** stated that the '*concept of objective justification must be interpreted strictly*', going on to emphasise the need for appropriate evidence to be presented to support the argument.

54. In considering the evidence necessary to support their position on justification, a party must always remember to start with the legitimate aims. Only once they are identified is it possible to even begin addressing the issue of proportionality. The evidence must then address both issues. For the respondent, it must address what the aim is, why it exists and why it is a legitimate one to hold in the circumstances. Conversely, a claimant who does not accept this must ensure these points are properly challenged.
55. Assuming the legitimate aims have been identified, proper attention must then be given to proportionality. There is a wide range of evidence that might be produced, ranging from the oral evidence of decision-makers and policy-setters, statistical evidence from within and outside the employer's business, to financial histories and forecasts and reports as to the impact on the business of removing the discriminatory provision, and so on. Where non-discriminatory or less-discriminatory alternatives have been considered, this should be covered carefully in the evidence.
56. For claimants, it must not be forgotten that is perfectly open to them to consider obtaining and presenting evidence to rebut the justification arguments. This is often a neglected area of preparation. The starting point should always be to ensure that the justification position taken by the respondent is properly and fully particularised, the aim being to close down the wider arguments respondents often raise for the first time at the hearing itself. Once the extent of the justification defence is known, a claimant can take an informed decision about whether and to what extent it is necessary to produce evidence on the point and if so, what such evidence may be and how it may be obtained and presented to the tribunal. There will be some cases where, in the absence of any real evidence from the respondent, a claimant will be advised to sit tight and do nothing, at least for the time being. It will always be a matter for judgment on the individual facts.
57. A recent example of a case failing solely because the Respondent failed to provide sufficient evidence to support the admitted legitimate aims will be discussed as part of the presentation. This was a judgment of EJ. Christensen in the Bristol Employment Tribunal in *Mc Dowell v BAE* (1401127/2015), in respect of which the Respondent is currently seeking to appeal to the EAT. A r.3(10) hearing is due to take place on 10 November 2016.



8. Justification in the context of Disability

58. The principles set out above, insofar as they relate to indirect discrimination, apply equally to disability cases as they do to cases involving other protected characteristics. However, disability cases are unique, in that they also have to be seen in the context of potential claims for disability-related discrimination and/or failures to make reasonable adjustments.

S.15 Claims

59. The justification defence under s.15 EqA (disability-related discrimination) uses exactly the same *'proportionate means of achieving a legitimate aim'* formulation. Justification had previously been defined (DDA 1995 s 3A(3), formerly s 5(3)) as arising *'if, but only if, the reason for it [the treatment] is both material to the circumstances of the particular case and substantial'*. Due to the change in the formulation under the EqA, there is now no room for the interpretation applicable to the former test, as set out in **Jones v Post Office, [2001] EWCA Civ 558, [2001] IRLR 384, [2001] ICR 805,** whereby the justification test was considered to be akin to the range of reasonable responses test in unfair dismissal claims. The test is now much stricter than this.

60. In **Hensman v Ministry of Defence UKEAT/0067/14/DM, [2014] EqLR 670,** the EAT applied the justification test as described in *Hardy* to a claim of discrimination under s.15 EqA. Singh J. held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. This was subsequently applied in **Monmouthshire County Council v Harris UKEAT/0010/15 (23 October 2015, unreported).**

S.20 Claims

61. The overlap between claims for indirect discrimination and failures to make reasonable adjustments in disability cases could not be more obvious. There has been a tendency for claimants to focus primarily on reasonable adjustments claims, which is not surprising in circumstances where this duty can give rise to a requirement to positively discriminate in favour of a disabled employee and not simply to level the playing field. However, there will be some cases where an indirect discrimination claim will be appropriate, often as an alternative to a reasonable adjustments claim.

62. It must be remembered that when considering an adjustments claim, the tribunal will be concerned solely with the concept of reasonableness. There are a very wide range of factors which can come into play in addressing this issue. For example, cost alone can mean that it is not reasonable to make an adjustment a claimant is contending for. By way of illustration, in **Cordell v Foreign and**



Commonwealth Office UKEAT/0016/11 the cost of providing the support a disabled employee would need to perform a new role (some £250,000 per annum, more than 5 times her salary and almost half of the FCO's disability budget) in itself meant that it was not reasonable to make the proposed adjustments.

63. Cost alone was the determining factor, with the EAT recognising that cost is a central consideration in deciding whether an adjustment is reasonable. Indeed, in this case, it was the only consideration:

`a decision about.....how much it is reasonable.... for an employer to be expected to spend - cannot be a product of nice analysis. There is no objective measure that can be used to balance what are in truth two completely different kinds of consideration - on the one hand, the disadvantage to the employee if the adjustments are not made, and on the other, the cost of making them`.

The Act `requires tribunals to make a judgment, ultimately on the basis of what they consider right and just in their capacity as.... industrial jury. Their judgment of what level of cost it is reasonable to expect an employer to incur can be informed by a variety of considerations that may help them to see the required expenditure in context and in proportion...`



64. While there is still some doubt about the costs / costs plus approach in the context of indirect discrimination, with the weight of authority currently supporting the costs plus approach, it is easy to see how outcomes of cases such as these could be very different if the cause of action was for indirect discrimination. In the event claims are pursued as causes of action for indirect discrimination, alongside or instead of claims for failures to make reasonable adjustments, respondents must ensure they draft their legitimately aims and proportionality arguments appropriately and with the current limitations firmly in mind, and then ensure there is sufficient evidence to support the pleaded case.

