# High on PCPs: *What are they and how to use them?*

***Allan Roberts, Guildhall Chambers***

## Introduction

1. An essential ingredient for all claims of indirect discrimination (s.19 EqA) and many claims of failure to make reasonable adjustments, (s.20 EqA) is the application of a provision, criterion or practice (more conveniently referred to as a "*PCP*"). Despite the pivotal role they play, PCPs have nonetheless proved to be a vexing issue. What, exactly, are they; how can they be formulated and how can they be used? These are all problematic issues, not aided by the absence of any statutory definition.

2. This talks aims to demystify PCPs - particularly in the context of disability discrimination - and to make it easier to use them for maximum effect. We will also consider whether in light of the recent decision in ***Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216 (CA)*** and ***Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported)*** the height of PCPs has now been reached.

## Definition

3. The Equality Act does not seek to identify or define the meaning of a PCP, either in the context of indirect discrimination or a first requirement case of failure to make reasonable adjustments. In many senses, this is deeply frustrating. It leaves an essential component of the Act to be determined by the courts and tribunals.

4. One might therefore think that turning to the Statutory Code of Practice on the Equality Act 2010, would be illuminating. After all, the code is published by the Equality and Human Rights Commission and is intended to assist in the interpretation and understanding of the Equality Act. In relation to indirect discrimination, the Code contains the following analysis[1], with a similar passage in relation to failure to make reasonable adjustments[2]:

[1] Paragraph 4.5
[2] Paragraph 6.10

> *"The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. 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.*"

5. As can be seen this provides little by way of additional signposting of what is within and without the definition of a PCP. One could be forgiven for thinking a conscious effort has been made to conceal the definition like some hidden treasure.

6. Statutory authorities have arguably provided little further assistance. In ***Lamb v The Business Academy Bexley***[3] the EAT observed that:

> *"The phrase "PCP" is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions.*"

7. All of this ambiguity is however, a product of two features:

   a) What amounts to a PCP is principally a question of fact for the tribunal to determine based upon the circumstances of the individual case. This was made clear in ***Jones v University of Manchester [1993] IRLR 218***; and

   b) The legislation is intended to be broad in order to encapsulate the vast array of employment circumstances to which the EqA applies.

8. Accordingly, it is suggested that time is more usefully spent considering the *scope* of PCPs. Practitioners will therefore gain greater assistance from an understanding of the relevant boundaries of what can and cannot amount to a PCP rather than seeking to pin-point a universal definition.

9. Practitioners and litigants still nonetheless require something with which they can work, unless they are left to scrabble around in search of something within this broad scope.

[3] (2016) UKEAT/0226/15, [2016] All ER (D) 228 (Mar) at paragraph 26

In the absence of any clear authority on the point, one can do a lot worse than considering the ordinary meaning of each of the three nouns comprising the PCP requirement. The following definitions are given by the Oxford Advanced Learner's Dictionary:

a) Provision: "*the act of supplying somebody with something that they need or want; something that is supplied*";

b) Criterion: "*a standard or principle by which something is judged, or with the help of which a decision is made*"

c) Practice: "*a way of doing something that is the usual or expected way in a particular organisation or situation*".

## Scope

10. As noted above, the parameters of the PCP element are deliberately broad. This has been confirmed by a number of authorities, most recently in ***Carrera***. This case concerned an employee who had become disabled following a cycling accident. The claimant alleged that he had been "*required*" to work late. The employer however, defended the case on the basis the claimant had been "*expected*" to work late but had not been "*forced*" or "*coerced*". The tribunal accepted the employer's evidence. The EAT however, held that tribunals should adopt a "*real world*" approach to such cases. In doing so, the EAT concluded that the expectation, whilst not a "*requirement*", could amount to a "*practice*" and accordingly came within the PCP definition. In reaching this decision HHJ Eady QC stated:

> *"…the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted."*

11. It is therefore useful to look at the limits of the PCP element. Perhaps the most important boundary to the scope of PCPs is the difference it has when compared with the key elements of other types of discrimination. It is worth stressing this distinction, since it is one with a tendency to lead parties astray (as a number of authorities have demonstrated). In many other forms of discrimination, the court or tribunal is concerned with what may be broadly termed the conduct of the employer. This is in the context of considering the treatment of employees and the employer's motive for that treatment. A fact finding enquiry will therefore focus on the treatment to which the employee has been

subjected and "*the reason why*" such treatment occurred, (***Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] UKHL 11, [2003] IRLR 285, [2003] ICR 337***). This analysis however, is irrelevant to the PCP element (albeit potentially relevant to any defence an employer may wish to run). The significance is that the tribunal must focus on the PCP (often a neutral element) and its *effect* and not look generally at how the employer has treated the employee (no matter how unreasonable). This often arises in the context of an allegation by an employee along the lines that their employer has acted unreasonably in its approach to the question of adjustments. This can take a number of forms, common examples of which might include:

a) The employer unreasonably failing to consult the employee; to meet the employee to discuss their requests or to obtain up-to-date medical advice; or

b) The employee is disabled and the employer unreasonably refusing the adjustments which have been requested.

12. Assuming such cases are without something more, they are bound to fail. This is notwithstanding any unreasonableness on the part of the employer. This was made clear by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***. In that case, the claimant suffered severe migraines, as a result of which she had several periods of absences. The employer had a policy which provided for certain trigger points which could lead to warnings and dismissal. The policy however, provided for those trigger points to be relaxed in certain situations (such as for chronic conditions). Although the employer had relaxed those trigger points for the claimant, it later issued her with a warning. The claimant alleged this and a subsequent reduction in sick pay amounted to a failure to make adjustments. The tribunal upheld the claim. In doing so the tribunal placed considerable emphasis on the employer's conduct and thought process. In one part of the judgment the tribunal stated: "*The focus of the tribunal's attention was on the decision made by Ms O'Donnell in May 2008 to invoke the disciplinary procedure and the reasons and manner in which she then did so*." The Employment Appeal Tribunal allowed an appeal against the decision noting this was the wrong approach. In particular, at the outset of the judgment, Langstaff J stated:

> *" What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that*

*employer has gone through... A focus on the words and requirements of the Disability Discrimination Act 1995 will show that the thought processes an employer has gone through are unlikely to be relevant in all but some unusual cases where what is in issue is the question of reasonable adjustment.*

13. It is worth pausing to note that whilst an employer who fails to consult or seek medical may struggle to demonstrate they lacked knowledge of a disability or its effects, this will not affect whether there has been a PCP and whether it placed the claimant at a substantial disadvantage. A PCP and the concomitant disadvantage will exist irrespective of the employer's knowledge of the claimant's disability or the effect of the PCP upon them. The employer's knowledge is relevant only to whether it was required to alleviate the disadvantage.

14. Finding the precise limits of the PCP element will depend upon each case. The following general cases are however, informative:

a) Whilst a PCP can include the application of a disciplinary procedure, this will normally need to be something more than a one-off application. This was the case in ***Nottingham City Transport Ltd v Harvey [2013] EqLR 4, [2013] All ER (D) 267 (Feb)***. In his judgment Langstaff J stated:[4]

> *""Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply."*

b) In ***Environment Agency v Donnelly [2014] EqLR 13*** the EAT concluded that a disabled claimant who had impaired mobility was subject to the PCP of "*having to walk a distance from her car to the office in the prevailing cold weather and possibly on uneven surfaces*." Notably the word "*having*" is potentially synonymous with a *requirement*, though not necessarily. However, in line with ***Carrera*** it would nonetheless amount to a *practice*.

[4] At paragraph 18

c) The claimant need not rely upon a single PCP but instead may rely upon the combined effect of multiple PCPs. This was the case *in* ***Ministry of Defence v DeBique [2010] IRLR 471***. In that case two PCPs applied to the claimant, namely a requirement to be available 24/7 and certain immigration rules, the effect of which was to preclude her half-sister coming to the UK (and thereby provide childcare assistance). It was the combined effect of these PCPs that placed the claimant at a disadvantage.

## Formulating

15. Despite the very broad scope given to the PCP element, its importance cannot be understated. Everything flows from this one ingredient. For example, in a claim under s.20 EqA the duty to make adjustments is only triggered if the employee is placed at a substantial disadvantage compared to non-disabled employees. Critical to this point however, is that it must be the PCP that "*puts*" the employee at that disadvantage. If it is anything else, the duty is not triggered and the claim cannot succeed. This is commonly overlooked, often in one of two ways:

a) By not pleading any PCP at all. Instead, the Claimant simply avers that because of their disability they are at *a* substantial disadvantage and that it was reasonable for the employer to make the adjustment requested. As made clear by ***Ashton*** (see paragraph 10 above) this is not the correct approach.

b) By pleading a PCP which does not in fact place the claimant at a substantial disadvantage. Here the claimant tends to focus upon a PCP with which they have difficulty complying. However, when analysed against a non-disabled employee it can be seen they too would similarly struggle. Since the difficulty is comparatively no different, the claim will be unsuccessful.

16. A failure to properly formulate the PCP is therefore of great significance as it is likely to inhibit any claim. Even if the tribunal accede to the proposition, a failure to identify and analyse the correct PCP will invalidate any finding of substantial disadvantage. This was the case in ***Smith v Churchills Stairlifts plc [2005] EWCA Civ 1220, [2006] IRLR 41, [2006] ICR 524*** albeit the tribunal's error had operated to the respondent's advantage. Mr Smith was a disabled employee applying for the role as a salesman. This role entailed demonstrating radiator cabinets to clients in their homes. The claimant was offered a place on a training course, successful completion of which would lead to

a permanent position. The company subsequently decided that salesmen were required to transport a full-sized cabinet with them as a sales aid. Knowing this was something the claimant could not do, the employer withdrew their offer. The tribunal concluded that the requirement to "*carry a full-sized radiator cabinet*" amounted to an *arrangement* (the predecessor test now replaced by PCPs). However, the tribunal went on to conclude the claimant was not placed at a substantial disadvantage since the comparator would equally "*…have difficulty carrying the cabinet any distance and lifting it into a car, at least without risk of personal injury*." This would fall into the second limb identified in paragraph 15. The claimant appealed unsuccessfully to the EAT. The Court of Appeal however, concluded the tribunal had erred in two respects. First in the comparator adopted (a separate point to this talk) and secondly in limiting its analysis to the one arrangement identified. On appeal the claimant argued the correct approach was to include an arrangement to the effect that the claimant was susceptible to his offer being withdrawn "*if he was, or was believed to be, unable to carry such a cabinet*." The Court of Appeal agreed and accordingly allowed the appeal. As a note of caution, one should not take from this that the tribunal are obliged to formulate PCPs on behalf of the parties. Rather it is for the claimant to plead the PCPs relied upon (see ***Project Management Institute v Latif [2007] IRLR 579***). This was made clear in ***Carrera***.[5] The outcome of this decision was in part effected by the House of Lords decision in ***Archibald v Fife Council [2004] UKHL 32, [2004] ICR 954*** (see paragraph 24 below) which was handed down shortly after the tribunal's judgement in ***Smith***.

17. Given the very broad scope of PCPs and the existence of very real pitfalls in not formulating them correctly, the burning question which must be answered is: *so, where does one start*? One possible method is to start at the end. The rationale of this approach is to identify where the claimant seeks to end up (the adjustment), what is causing the concern and distil down to its core the very thing which has brought this about.

18. Before considering, how this method might work it is crucial to identify a fundamental risk in this approach. In particular, this approach flows in the opposite direction to the approach a tribunal are required to take in analysing a claim under s.20 EqA. In ***Environment Agency v Rowan [2007] UKEAT 0060, [2008] IRLR 20, [2008] ICR 218*** the EAT held that in considering whether a duty to make adjustments had arisen, a tribunal should identify the following:

[5] Paragraph 26

a) the provision, criterion or practice applied by or on behalf of an employer; or

b) the physical feature of premises occupied by the employer; and

c) the identity of non-disabled comparators (where appropriate); and

d) the nature and extent of the substantial disadvantage suffered by the claimant.

19. Judge Serota QC went on to state:

> "*In our opinion an employment tribunal cannot properly make findings of a failure to make reasonable adjustments …without going through that process. Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.*

20. Whilst this is undoubtedly the correct approach to assessing a claim under s.20 EqA, it presents somewhat of a difficulty in formulating a PCP. The ***Rowan*** approach works if the PCP can be readily identified (which may of course be the case). It does not however, assist in formulating the PCP when one is not apparent. ***Rowan*** provides the criteria for examining if the claim has been correctly assembled. It does not however, provide the blueprint for how to create it in the first place. This requires a little bit of reverse engineering.

21. In many cases this is in fact what a claimant seeks to do. They come at the issue from the opposite direction by starting with the adjustment they are seeking. This however, should not be confused with reverse engineering the PCP in and of itself. There is a real risk in starting with the PCP that the claimant takes an erroneous detour in assessing the respondent's reasonableness. This is a fairly common detour and one which ***Ashton*** and other cases have confirmed is the wrong route.

22. Reverse engineering, if done correctly, can however, prove to be a useful means of formulating the PCP. To carry out this method, the claimant must:

a) Consciously and deliberately avoid the detour of *reasonableness* and consider only the elements in ***Rowan*** in ascertaining if the duty is triggered; and

b) Apply the ***Rowan*** test in the correct order once the PCP has been formulated. This is to ensure it is appropriate and meets the tribunal's test.

23. This reverse engineering method would work in this manner:

a) The claimant identifies the nature of the *concern* encountered by them as a disabled employee. This itself may be achieved by looking at the adjustment the claimant wishes implemented and considering why that is so.

b) Once this concern has been clearly established, one looks at what otherwise neutral circumstance is causing that concern to arise. In doing so, one must seek to establish the very essence of that circumstance.

c) Once this circumstance has been identified, the claimant must then consider what aspect of the claimant's employment creates this circumstance. This can then be distilled into the PCP.

24. This is best illustrated with a tailored (and perhaps familiar) example. Suppose Mr Pink is suffering from depression and has been absent long term. Mr Pink does not feel able to return to his substantive role and therefore seeks redeployment as a reasonable adjustment. Applying the above approach would yield the following results:

a) The claimant is seeking redeployment. This is because he has found that performing his existing role causes or exacerbates the symptoms of depression;

b) The neutral circumstance which creates this situation is the claimant having to return to his substantive post;

c) The aspect of the claimant's employment which creates this situation is his contract of employment, which requires him to be fit enough to perform his duties. The PCP is accordingly that requirement.

25. Having adopted this approach to isolate the PCP, the claimant must then apply the ***Rowan*** approach to see whether comparatively the PCP places him at a substantial disadvantage. Assuming it would do so, it is the correct formulation. If not, the claimant may rerun the process in the hope of finding an alternative PCP which will suffice. It is also worth the claimant considering whether the respondent could successfully defend such a claim (perhaps on the basis of the adjustment not being reasonable). This might alert the claimant to the fact another PCP will prove more beneficial.

26. It is worth noting that the PCP identified in the above example (the requirement to be fit and well enough to perform the relevant duties) is in many cases the most appropriate solution. It is therefore recommended that in most cases, this ought to be pleaded as at least one of the PCPs. This is because many problems, when distilled to their origins, will flow from this PCP (whether solely or collectively). This was the approach taken in ***Archibald*** where Lord Hope stated:

> "*It was an implied 'condition' or an 'arrangement' of her employment within the meaning of section 6(2)(b) that she should at all times be physically fit to do her job as a road sweeper … [After she became disabled she was] exposed … to another implied 'condition' or 'arrangement' of her employment, which was that if she was physically unable to do the job she was employed to do she was liable to be dismissed.*"[6]

27. This was similarly the case in ***Griffiths***. In that case the claimant suffered from post viral fatigue and fibromyalgia. This was another case which concerned the application of an attendance policy involving various trigger points. Like ***Ashton***, the policy had a provision making allowances for disability related absences. In its conclusion the Court of Appeal held that the EAT had been wrong to formulate the PCP as being the policy itself. In so concluding Elias LJ stated:

> *"But in my view formulating the PCP in that way fails to encapsulate why a sickness absence policy may in certain circumstances adversely affect disabled workers – or at least those whose disability leads to absences from work. Moreover, logically it means that there will be no discrimination even where an employer fails to modify the policy in any particular case. The mere existence of a discretion to modify the policy in the disabled worker's favour would prevent discrimination arising even though the discretion is not in fact exercised and the failure to exercise it has placed the disabled person at a substantial disadvantage.*"

28. He went on to state:

> "*In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the ET framed it in this case: the employee*

[6] Paragraph 11

*must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions.*"

29. In adopting this approach, Elias LJ was adopting something close to the reverse engineering method above. It is to take the difficulty, (the disability leading to increased risk of absences) and look back to the very thing that encapsulates that difficulty. Formulating the case in such a way therefore yielded a PCP which would place the claimant at a substantial disadvantage, as opposed to the policy relied upon, which did not. As noted above, it is likely that in many cases, it will often come down to this very requirement.

30. This process is equally apt in cases of indirect discrimination. Taking an example similar to the facts in ***DeBique*** (see paragraph 14 above) would look like this:

a) The claimant is a female solider, from a commonwealth country, who has childcare responsibilities. Whilst, the claimant has made childcare arrangements, the varying nature of her role makes this difficult to always accommodate.

b) This difficulty stems from the fact the claimant is required to be available 24/7. This would ordinarily be the PCP. The claimant however, appreciates the Ministry of Defence are likely to defend such a PCP on the basis it is a proportionate means of achieving a legitimate aim.

c) The claimant however, notes that her colleagues (who are UK nationals) overcome this difficulty by having an adult relative live with them. The claimant would wish to have her sister live with her, which would solve the problem. This however, is not possible because the claimant's sister is a foreign national.

d) UK immigration laws prevents such nationals from staying for more than six months. This would therefore constitute a PCP.

e) By combining the PCP's the claimant is able to show the required disadvantage and the UK government may have greater difficulty in advancing justification as a defence.

31. Whilst the reverse engineering method (starting with the issue and working back to find its cause) will not be applicable in all cases, it is suggested it will cover enough scenarios to prove a useful tool in the practitioner's toolbox.

## How to use PCPs

32. As demonstrated above, everything flows from the PCP and therefore so too does any tactical approach to claims under ss. 19 and 20. This is true for both claimant's and respondents. For claimants maximising prospects of success is achieved in the formulation of the PCP. For respondent's this will be achieved either by attacking that PCP or where appropriate advancing a PCP which is favourable to the respondent. This might be where no PCP has been formulated by the claimant or where the PCP advanced is inappropriate. Of course a respondent will need to consider whether to advance a PCP of their own or leave the point empty and the claim founder on the burden of proof.

33. In either case, the parties are advised to test any PCP against the following questions:

a) Does the PCP actually exist? Employees can sometimes wrongly believe a PCP has been applied (perhaps due to false rumours) when in fact no such PCP has been implemented. Equally, there may be a PCP in existence but the employee has not correctly understood what that is. They accordingly plead a PCP which, whilst similar, is not the PCP that was in fact applied.

b) Was the PCP applied by the employer? It may be the case that a PCP has been applied to the claimant but this was by someone for whom the employer is not liable. An example might be an independent social club or group set up for employees of the employer. If the employer is not responsible for that group they cannot be said to have applied the PCP.

c) Does the pleaded PCP in fact amount to a PCP in accordance with ss.19 and 20?

d) Who are the relevant comparators? This will likely depend on the precise PCP. Formulation (whether by the claimant or respondent) may greatly affect who comes within the relevant pool.

e) Is the claimant placed at the relevant disadvantage as required by ss.19 and 20?

f) Can the employer defend any such PCP? This will depend upon the claim. For s.19 claims this will be by objective justification. Under s.20 the employer may argue that no reasonable adjustments could have been made; the adjustment

sought by the employer was not reasonable or the employer has made some other adjustment which alleviated the disadvantage.

## Conclusion

34. PCPs are somewhat of a vexing issue but nonetheless an important matter to claims of indirect discrimination and failure to make reasonable adjustments. The following is a useful summary of how to approach PCPs:

a) There is no universal definition of what constitutes a PCP, whether in the EqA, the Code or in any legal authority;

b) The scope of PCPs is broad and tribunals should not take an overly technical approach but rather should adopt a "*real world*" approach, (see ***Carrera***);

c) Tribunal's should adopt the approach in ***Rowan*** in assessing claims under s.20 EqA, namely, identify the following:

- The PCP;
- The comparator relevant to the PCP; and
- Any comparative substantial disadvantage caused by the PCP.

d) In certain cases it will be useful to adopt reverse engineering in formulating the PCP. This starts with the issue which is causing concern and seeks to distil this to the core aspect of employment which is causing that concern;

e) Parties should test any formulated PCP against the ***Rowan*** test to ensure it is adequate;

f) In claims under s.19 and s.20 everything flows from the PCP. Both claimants and respondents alike will therefore benefit from assessing any PCP against each constituent part of the cause of action and where necessary, formulate alternative PCPs that better suit the respective case.

g) In many cases, the relevant PCP will be the requirement to be fit and able to perform the employee's substantive duties (see ***Archibald*** and ***Griffiths***).