

RECENT CASES

NOTE

DISCRIMINATION LAW: REQUIREMENTS AND PREFERENCES

Falkirk Council and others v Whyte and others
[1997] IRLR 560 (EAT)

1. INTRODUCTION

In *Perera v Civil Service Commission (No 2)* ([1983] ICR 428, followed in *Meer v London Borough of Tower Hamlets* [1988] IRLR 399) the Court of Appeal created an anomaly in British discrimination law has been allowed to grow and become established. The facts were that Mr Perera applied for a post as a legal assistant. The selection criteria stated *inter alia* that 'candidates with a good command of the English language, experience in the UK and with British nationality would be at an advantage'. Mr Perera argued that those criteria had an adverse impact on persons of his (Sri Lankan) racial group. The Court of Appeal did not get as far as that argument, holding that the selection criteria, expressed as 'mere preferences' did not amount to 'absolute bars' to the job and thus fell outside of the definition of discrimination provided by s 1(1), Race Relations Act, which demands that the employer applies a 'requirement or condition'. Stephenson, LJ reasoned (at 437):

'...a brilliant man whose personal qualities made him suitable as a legal assistant might well have been sent forward... in spite of being, perhaps, below standard on his knowledge of English...'

That comment reveals the problem. If a candidate has to be 'brilliant' in order to compensate for a racially based 'weakness' then he is at a disadvantage because of his race. A 'brilliant' black person will obtain a post otherwise suitable for an 'average' white person.

It was the use of the word *advantage* in the criteria which ensured that the advertisement did not infringe the Act. Only if the advertisement were modified to read 'Candidates *must* have an excellent command of English...' would it have infringed the legislation, so the Court stated. This is because in that modified example each criterion is promoted from a 'mere preference' to a 'requirement or condition'.

Clearly the aim of Britain's discrimination legislation is to prevent racial groups and women being put at a disadvantage. Yet *Perera* stands in the way of fulfilment of that aim.

Since *Perera* was decided in 1983 it has been followed many times - until now. In *Falkirk Council v Whyte* a Scottish Employment Appeal Tribunal may have made history by being the first tribunal or court in Britain expressly to turn its back on *Perera* and open the door to an overdue change to the law.

The anomaly created by *Perera* stems from the British definition of *indirect* discrimination, which is based upon the landmark decision of the US Supreme Court in *Griggs v Duke Power Co* 401 US 424 (1971). In this case Duke Power required either a high school diploma or the passing of intelligence tests as conditions of employment, transfer or promotion. Consequently a disproportionate number of blacks were rendered ineligible for employment, transfer or promotion, as the case may have been. These requirements could not be shown to be related to job performance. Section 703(a) of Title VII, Civil Rights Act 1964 provided that it was unlawful employment practice for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely to affect their status because of race, colour, religion, sex, or national origin. However no definition of discrimination was provided by the legislation. Further, s. 703(h) authorised the use of any professionally developed ability test, provided that it was not 'designed, intended, or used to discriminate because of race....' In their defence Duke Power showed that they had not intended that the tests should have a disparate impact on blacks. However the Supreme court held that s. 703 only allowed ability tests so far as they could be shown to be related to job performance. As the employer could not show that, they were unlawful. This was so even though the employer did not intend to discriminate. In delivering the judgment of the court Burger, CJ gave a classic account of the reasoning of indirect discrimination (at 429):

'Congress has now provided that tests or criteria for employment or promotion may not

provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has - to resort again to the fable - provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.'

This has become known as *disparate impact* theory. The British definition of indirect discrimination is based upon this theory. It can be seen that the theory rests upon two broad limbs. First, the claimant must show that a practice has led to an adverse impact on a protected group. For example where a high school diploma is a condition of employment and a higher proportion of whites than blacks complete high school. Second, the burden shifts to the defendant to prove that the practice was *necessary* to achieve the aim. For instance, was a high school diploma necessary to perform the job? Note where the burden lies for each element.

The inclusion of provisions for indirect discrimination in Britain's legislation is a direct result of the then (Labour) Home Secretary's (Roy Jenkins, now Lord Jenkins of Hillhead) discovery of *Griggs* whilst on a trip to the United States. Mr Jenkins, upon his return, introduced section 1(1)(b) (*indirect* discrimination) in a late amendment to the 1975 Sex Discrimination Bill. A definition of indirect discrimination was included in the Bill and became law. That last minute inclusion explains why the White Paper (*Equality for Women* Cmnd 5724) which preceded the Bill contained no indication of the Government's understanding of, and policy towards, indirect discrimination.

A year later the same definition was included in the Race Relations Act 1976. This time the respective White Paper, *Race Relations* (Cmnd. 6234), included *some* indication of the Government's aims in introducing indirect discrimination laws. However, the imprecise use of language in that document made matters no clearer. This perhaps reflected the Government's failure to foresee the general lack of enthusiasm that the judiciary would have for implementing indirect discrimination law.

The White Paper on Race Relations stated that *direct* discrimination laws alone could not address the 'practices and procedures which have a discriminatory effect' and 'practices which are fair in a formal sense but discriminatory in their operation and effect' (at para 35). Clearly the sentiment here can be traced to *Griggs*. Further on the Government outlined the intended legislation. In place of the words 'practice and procedure', one finds 'requirement and condition' (at para 55). It is this phrase which is at the root of the anomaly, and has been used by the Court of Appeal to narrow considerably the scope of the Act.

When the American two-limbed theory (see *Griggs*, above) of indirect discrimination was translated into British legislation, (*ie* Sex Discrimination Act 1975 and Race Relations Act 1976, and by a 1989 amendment, s. 16, Fair Employment (Northern Ireland) Act 1976) more detail was added. The same formula, with necessary adjustments, was used in s. 1(1)(b), Race Relations Act and s. 16 Fair Employment (NI) Act.

Section 1(1)(b), SDA defines *indirect* discrimination thus:

'1(1) A person discriminates against a woman in any circumstances relevant for the purposes of this Act if -

(a)...

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but,

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.'

In broad terms that means that to make out a case the complainant would have to show that the employer applied an apparently neutral requirement which had a disparate impact on women (including the complainant) and was not justified.

2. *WHYTE* AT FIRST INSTANCE

In *Whyte* the appellant employer advertised a post of first-level line manager. One of the selection criteria stated that 'management training and supervisory experience' was 'desirable'. The three respondent complainants each made unsuccessful applications for the post. They alleged that the criterion above amounted to unlawful sex discrimination because a considerably lesser proportion of women than men had such experience. (The applicants themselves had no such experience.) The industrial tribunal upheld their claim and the employer appealed to the Employment Appeal Tribunal ('EAT').

3. *WHYTE* ON APPEAL

The EAT dismissed the employer's appeal. They noted that the preponderance of women in basic grade social work posts in contrast to promoted posts was 'so overwhelming' that it was 'inevitable' that any requirement for prior management experience would disadvantage women. Further, they upheld the industrial tribunal's finding that the criterion and the weight placed upon it by the employer was not justified: this was only a first level managerial post and so it was wrong to attach such importance to previous experience in contrast to other qualities, including, aptitude.

However the main - and most interesting - issue concerned the statutory phrase 'requirement or condition'. As we have seen, since 1983 (*Perera*) the Court of Appeal has maintained that s. 1(1), SDA demands that the defendant employer must have applied a 'requirement or condition' in the sense of an 'absolute bar' to the job.

It will be recalled that in *Whyte* the employer stated that management training and supervisory experience was 'desirable', rather than say 'necessary' or 'essential'. Thus it may have been possible for an applicant without such experience to still get the job. In other words the criterion did not amount to an 'absolute bar' to the job and, according to *Perera*, fell outside the scope of the Act. The EAT held otherwise, for two reasons.

First, the industrial tribunal found that although the criterion was *expressed* as a 'mere preference' in practice it operated as an absolute bar. They noted that one of the complainants would have got the post but for her lack of supervisory experience. This distinction between form and substance was a finding of fact which the EAT - as an appellate tribunal - did not feel able to interfere with. Not only is this a refreshingly positive and realistic approach, it should be the correct one. The Act demands that a requirement is *applied*. It does not demand that one is merely *expressed*. Yet in most cases on this point courts have failed to look behind the form of a criterion, allowing employers to avoid the anti-discrimination legislation. One exception is *Jones v University of Manchester* ([1993] ICR 474) where the English Court of Appeal took a similar line to the EAT in *Whyte*: they refused to interfere with an industrial tribunals' finding that a criterion ('candidates aged between 27-35 years would be *preferred*') was in practice applied as an absolute bar. However that decision was confined to a finding of fact and in no way undermined the authority of *Perera*, which was applied.

On that ground alone the decision could rest. But the EAT went on to approve a line of reasoning taken by counsel for the complainants. Lord Johnston recalled:

'It was counsel's essential submission that one should not interpret the words "requirement or condition" on any narrow or restricted basis, having regard to the fact that the legislation was based upon European Directive No 207/76 [the Equal Treatment Directive] covering sex discrimination which therefore fell to be treated differently from discrimination on grounds of race. Since the employers here were part of the emanation of the State, this tribunal, and indeed the industrial tribunal, could apply the Directive without reference to the legislation; but, in any event, if the legislation required it to be interpreted on any particular basis it should be consistent with the purpose of the Directive - the so-called "purposive approach" which can be found supported by the House of Lords in *Litster v Forth Dry Dock Engineering Co Ltd* [1990] 1 AC 546. He submitted that *Perera* had been rightly criticised even in the context of race relations (*Meer v Tower Hamlets London Borough Council* [1988] IRLR 399, CA), which was all the

more reason for not applying it to the scope of sex discrimination. The proper approach should be whether or not the factor, to give it a neutral phrase, hindered women as opposed to men in the particular context, here the application for the post in question.'

Lord Johnston concluded:

'In many ways this was a classic situation of indirect sex discrimination, with mostly women in basic grade posts, and mostly men in promoted management posts - a vivid example of what the Act and its forerunners in the United States set out to eliminate, *ie* those practices which had a disproportionate impact on women and were not justifiable for other reasons...'

4. ANALYSIS

This judgment was unusual in that Lord Johnston adopted the words of counsel for the complainants as part of his reasoning. And the decision was made without any apparent reference to conflicting authority or the minor errors in counsel's submission.

(a) *The Errors in Whyte*

Of the minor failings the first was that the Sex Discrimination Act of 1975 was *not* based upon the Equal Treatment Directive. The Directive was not even adopted until 1976 (OJ L39/76) and came into force in 1978. Whereas the Directive is solely concerned with employment matters the SDA covers education and the supply of services, goods, facilities and premises as well as employment. See also *Duke v GEC Reliance* [1988] AC 618, HL. However, although the proposition (that the SDA was based on the Directive) is mistaken the conclusion deriving from it is not. According to the European Court of Justice ('ECJ') domestic courts should interpret domestic legislation as far as possible to accord with a Directive whether the domestic law in question was enacted *before or after* the Directive (*Marleasing SA v La Comercial Internacional de Alimentacion* Case C 106/89 [1990] 1 CMLR 305).

Second, *Litster* was cited as authority for the 'purposive' approach to interpretation of the domestic legislation. Whereas *Litster* is an adequate authority, there are more appropriate ones. In *Whyte* the Equal Treatment Directive was *directly* effective. This is because the employer was an 'emanation of the State' who was thus bound to implement the Directive. However in *Litster* the employer was a private party and so not obliged to implement the Directive. That was a case where the Directive was *indirectly* effective. More appropriate House of Lords authorities would have been *Garland v British Rail Engineering* [1983] 2 AC 751 and *Pickstone v Freeman* [1989] AC 66. The principle is the same though: so far as it is possible to do so domestic legislation should be interpreted to accord with the wording and purpose of the Directive. In cases of direct effect only, if the court cannot interpret the statute to accord with the Directive they may simply ignore the statute and apply the Directive itself - that is the principle of supremacy of EC law: *Factortame v Secretary of State for Transport* [1990] 2 AC 85, HL. In *Whyte* no authority was cited for that proposition.

(b) *Conflicting Authorities: Does Perera apply to the SDA?*

The second shortcoming concerns the absence of the conflicting authorities. One of those authorities was in fact *Meer* which was cited *in support* of the decision to disregard *Perera*. *Meer* was heard in 1988, some five years after the *Perera* decision. The facts were broadly similar to *Perera* and so the Court felt bound by precedent to follow *Perera*. However only *one* (of three) Court of Appeal judges expressed a doubt over the correctness of *Perera*; Balcombe, LJ said *obiter* that had he not been bound there were 'strong arguments' that *Perera* 'may not be consistent with the object of the Act' (at 403). On the other hand Dillon, LJ expressed no opinion on *Perera* whilst Staughton, LJ positively endorsed it stating that otherwise s. 1(1)(b) 'would have such an extraordinary wide and capricious effect' (at 403).

Put simply *Meer* is a conflicting case containing one *obiter dictum*, which may *weaken* its authority but which cannot destroy it. It cannot be said, as the EAT did, that the speeches *Meer*, taken as a whole, criticised *Perera*; on balance they supported it.

In *Whyte*, *Perera* was distinguished as being a case concerning the Race Relations Act and not the Sex Discrimination Act. Of course *Meer* could be distinguished that basis too. However the EAT did not consider a number of cases where the construction in *Perera* was applied to the Sex Discrimination Act. For instance: in the Court of Appeal, *Jones v University of Manchester* (see above) and in Employment Appeal Tribunals, *Meikle v Nottingham City Council* EAT/249/92, (Transcript) 14th April 1994, *London Borough of Greenwich v Robinson* EAT/745/94, (Transcript) 21st November 1995, *Mutemasango v Staffline Recruitment Ltd* EAT/517/95, (Transcript) 13th May 1996 and *Connelly v Strathclyde Regional Council* EAT/1039/94, (Transcript) 8th March

1995. This last case, where a Scottish EAT held (reluctantly) that they were bound by *Perera*, was in fact cited by the employer but not dealt with in Lord Johnston's speech.

(c) *Conflicting Authorities: The status of EC law*

There are several judicial statements asserting that section 1(1), of the Sex Discrimination Act is unaffected by EC law. These assertions are responses to *Enderby v Frenchay Health Authority* [1994] ICR 112. In this case a speech therapist made a claim of equal pay for work of equal value. She compared her pay with that of a pharmacist who, it was accepted did work of equal value. The vast majority of speech therapists were women and most of the pharmacists were men. The pay of both workers was set by collective bargaining: each group (that is speech therapists and pharmacists) having a separate agreement. Therefore this was a case of indirect discrimination.

Now the relevant domestic legislation in this case is the Equal Pay Act and the Sex Discrimination Act. The Equal Pay Act provides, *inter alia*, that there shall be equal pay for work of equal value. But only the Sex Discrimination Act provides a definition of indirect discrimination (s. 1(1)(b), above). Article 119 of the Treaty of Rome is directly effective here as well: See *Jenkins v Kingsgate* (Case 96/80) 1981 ECR 911.

The Health Authority argued, *inter alia*, that the Equal Pay Act was but a detailed exposition of the Sex Discrimination Act; an equal pay claim may be based upon direct or indirect discrimination. In either case a court should look to the Sex Discrimination Act for a definition of the type of discrimination in question. Therefore, the Health Authority argued, in an equal pay case based on indirect discrimination, the applicant must show that there was a *requirement or condition* (as stipulated by s. 1(1)(b), SDA) applied by them, which caused the variation in pay. No such requirement had been applied to any speech therapist. Doctor Enderby could train and qualify as a pharmacist and receive the preferable remuneration. There was no barrier in her way because she was a woman. The only cause of the lower pay was her decision to enter a less well paid profession.

The case went all the way to the ECJ where it was held that in equal pay claims under Article 119 it was not necessary to show that the employer had applied a 'requirement or condition'. Thus it was not possible to import into the British Equal Pay Act 1970 the definition of indirect discrimination from the Sex Discrimination Act, even though the two Acts form 'a single code' (*Shields v Coome Holdings* [1978] ICR 1159 CA and *Rainey v Greater Glasgow Health Board* [1987] AC 224, HL) and only the SDA provides a definition of indirect discrimination.

Clearly *Enderby* is authority for the proposition that the element 'applies a requirement or condition' does not apply to cases of equal pay - under Article 119 or the EPA. But does this principle of *Enderby* extend to cases brought under the Sex Discrimination Act and even the Race Relations Act? Judges in three English cases have commented on the effect of *Enderby*. They have all confined it to equal pay claims only.

In the first case, *British Coal v Smith* ([1994] ICR 810), Balcombe, LJ speaking for the Court of Appeal stated:

'In our judgement, the result of *Enderby* is that a clear distinction has to be made between the 'objective justification' required by Article 119 of the Treaty... and the separate question whether indirect discrimination as defined in the British statute, which requires the positive application of a requirement or condition, is shown to be "justifiable" pursuant to section (1)(b)(ii) of the [Sex Discrimination] Act of 1975.'

In *Ratcliffe v North Yorkshire County Council* ([1995] 3 All ER 597, HL), in a speech with which the other Law Lords agreed, Lord Slynn (without referring directly to *Enderby*) stated:

'In my opinion the 1970 [Equal Pay] Act must be interpreted in its amended form without bringing in the distinction between so-called "direct" and "indirect" discrimination.'

The third English case to comment on the effect of *Enderby* was *Bhudi v IMI Refiners* [1994] ICR 307, EAT. This was a claim under the Sex Discrimination Act where the Equal Treatment Directive had *indirect* effect only. In this case the respondents employed full-time (mainly men) and part-time (mainly women) cleaners. They made the part-time cleaners redundant because: (a) they were administered by a separate department; (b) they worked out-of-office hours, unlike the full-timers; and (c) it was (therefore) cheaper to contract out the part-time work. This adversely affected women. The employers argued that no 'requirement' had been applied for the purposes of section 1(1)(b) of the Sex Discrimination Act. Mrs Bhudi contended that the result of *Enderby* was that there was no longer a need to prove that there was a requirement in the sense of an

'absolute bar'.

Mummery, J rejected Mrs Bhudi's contentions on two grounds. First, he stated that *Enderby* was confined to cases on equal pay brought under Article 119. Second (at 315), the Tribunal was bound by House of Lords' authority that it was open to a domestic court to interpret a statute in accordance with a directive, as interpreted by the ECJ, 'only if it was possible to do so'. But as the phrase in section 1(1)(b) SDA was 'not open to divergent interpretations' this could not be done. (Mummery, J cited for support the House of Lords' decisions in *Duke v Reliance Systems* [1988] AC 618, *Finnegan v Clowney* [1990] 2 AC 407 and *Webb v Emo Air Cargo* [1988] 1 WLR 49. The judgement did however recognise (at 315) that at some time in the future a higher court ('probably the ECJ') may hold that the Equal Treatment Directive applies to all cases of sex discrimination and that the domestic legislation would have to be amended accordingly.) Thus it is clear that the English judges are stoutly defending any attacks on the *Perera* doctrine based on *Enderby*.

It would seem then that the state of the authorities before the tribunals in *Whyte* were this. The notion 'requirement or condition' does *not* apply in claims of equal pay where that claim is based upon indirect sex discrimination. In all other cases of indirect discrimination (*ie* under the SDA, RRA and presumably the Fair Employment (NI) Act) the complainant must show that there was a 'requirement or condition' in the form of an 'absolute bar': *Perera* is still good law although it is clear that this anomaly is under pressure from Europe.

(d) Arguments to Support *Whyte*

The EAT in *Whyte* failed to consider any of these conflicting authorities. If they were faced with them, could they have, with reasons, come to the same decision?

First it is clear that in case where the Directive has direct effect that Directive will prevail over conflicting domestic law. So the next stage is to inquire as to whether the Directive demands a 'requirement or condition' in the form of an 'absolute bar'. There are no ECJ cases on that point. However the Directive does not expressly demand a 'requirement'. Further, in related fields of discrimination law the ECJ has declined to make the distinction between a 'preference' and an 'absolute bar': *Enderby* (under A 119, equal pay) and *Ingetraut Scholz v Opera Universitaria di Cagliari* Case C-419/92 [1994] ECR I-507 (under A 48, which prohibits discrimination based on nationality between workers of Member States). Thus it seems highly unlikely that one could import such a notion into the Directive. Accordingly the EAT in *Whyte* were correct to assume that the Directive could offer a remedy if the domestic law could not.

The next point is the interpretive one. The EAT felt that it was possible to interpret the SDA in accordance with the Directive. This is, in many ways, a more important point. This is because in cases where the employer is *not* an emanation of the State, the Directive shall only have *indirect* effect. In other words a court could not apply the Directive. The only recourse to EC law is by interpreting section 1(1) in accordance with the Directive. In *Whyte* the EAT thought that that was possible. In *Bhudi* they thought that it was not. The better view was held in *Whyte*. Logically, a criterion expressed as a 'preference' is a requirement: it is an absolute bar to gaining an advantage in the job selection procedure. This interpretation in no way distorts the statutory words and accords with the purpose of the domestic statute and, more importantly, with the Directive.

There is support for this view in Australia, where there is similarly worded legislation. The Federal Court of Western Australia refused to follow *Perera* in *Secretary of Department of Foreign Affairs and Trade And: Styles* ((1989) 88 ALR 621, see also *Waters v Public Transport Corporation* (1991) 173 CLR 349, High Court of Australia).

5. CONCLUSION

The tribunals in *Whyte* are to be commended for being the first to confront the absurdity which is *Perera*. As we have seen the decision can be supported on three grounds. (1) The Equal Treatment Directive, which does not demand an 'absolute bar' was, in this case, directly effective. It was thus open to the tribunal to disregard conflicting UK law and simply apply the Directive. *Factortame* is authority for that. (2) In *substance* - if not in form - it was possible to conclude that an 'absolute bar' to selection had been applied. *Jones* is Court of Appeal authority for that. (3) It was possible to construe s. 1(1)(b), SDA in accordance with the Equal Treatment Directive without distorting the statutory words. The construction would be that s. 1(1)(b) includes a requirements needed to be put at an *advantage* in the selection process.

However, in the short term, the case will present problems. The absence of citation of conflicting cases and minor errors undermine its authority. In any future hearing on similar facts *Whyte* could be easily distinguished for those reasons. So, at present, the case may be of little help to claimants. But that does not mean to say that it favours employers - for the law is now uncertain. Clearly an appeal is needed to restore certainty and, one might hope, drive the absurdity of *Perera* out of British law for good. As *Perera* is a Court of Appeal decision, the only place for that is the House of Lords, or even the European Court of Justice.

Post Script.

Since *Whyte* the European Commission has published the *Burden of Proof* Directive (97/80/EC). Article 2 provides a definition of indirect discrimination, which 'shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex...'. Clearly *Whyte* accords with this definition and *Perera* does not. The British Government are obliged to implement the Directive by 1st January 2001 and in doing so they will abolish *Perera*.