

A. INTRODUCTION

What is the purpose of defining a PCP?

1. The purpose of defining a 'provision, criterion or practice' ("PCP") is to put the Employment Tribunal in a position to assess whether something an employer does to its employees gives rise to a difference in outcomes depending on the characteristics of its employees. I will call this 'adverse impact'.
2. The predecessor of the PCP was the 'requirement or condition' contained in the older ant-discrimination legislation. PCP is the European version of the concept. Both of these concepts were created for the purpose set out above. They existed initially in order to assess adverse impact in indirect discrimination claims.
3. The EU then introduced disability discrimination legislation. The use of the concept of the PCP was, upon the introduction of that legislation, extended into the duty to make reasonable accommodation for disabled persons.
4. In both situations, the PCP creates the framework in which adverse impact is assessed. Indirect discrimination and reasonable adjustments claims are similar but there are important differences between them.
5. In indirect discrimination claims, the cases often refer to 'adverse disparate impact' because the adverse impact must be shown to affect one group (to which the Claimant must belong) more than it does another group whereas in a reasonable adjustments claim, the Employment Tribunal does not need to consider whether adverse impact at a group level but simply at the level it affects the Claimant.
6. The phrase 'adverse disparate impact' is used in the case law in indirect discrimination and equal pay cases. Using the term 'Adverse impact' as a general term covering both 'adverse disparate impact' in indirect discrimination cases and the substantial disadvantage a disabled person suffers compared to non-disabled persons is my own usage.

When does a PCP need to be defined?

7. The proper definition of a PCP is the essential first step in two types of claim:
 - a. a claim of indirect discrimination brought under Section 19 of the Equality Act 2010;

- b. a claim for breach of the duty contained in Section 20(3) of the Equality Act 2010 to make reasonable adjustments in relation to a disabled person.
8. There is a third situation in which a PCP may need to be defined: in order to defeat an employer's material factor defence in a claim for equal pay. An employee may need to define a provision, criterion or practice in order to demonstrate that the material factor is of itself indirectly discriminatory and hence should fail (see Section 69(1) to (2) of the Equality Act 2010). However, in this situation (but only this situation), there exists an alternative form of indirect discrimination which does not require the definition of a PCP.
9. The European Court of Justice identified this concept of indirect discrimination in **Enderby v Frenchay Health Authority** [1994] ICR 112. The concept only applies to Section 69 of the Equality Act 2010 which creates the defence of material factor in claims arising out of the breach of the implied equality clause. An employer has a defence to an otherwise valid claim for equal pay if he can demonstrate that the difference in pay due to a material factor as defined by Section 69 of the Act.
10. In **Enderby**, the ECJ ruled that if the application of that material factor gave rise to adverse disparate impact, the employer could not rely upon it, even in circumstances where the adverse disparate impact did not arise as a result of measures taken by the employer. Under the **Enderby** test for indirect discrimination, the mere fact that the circumstances of the protected group are worse than those not belonging to the protected group is sufficient to establish indirect discrimination. So, for example, if an employer has a policy of paying pay at market rates and the market rate for a given profession which is traditionally female dominated is less than that her male comparators, **Enderby** type adverse disparate impact is made out even though the employer itself has no PCP which tends to favour women applicants to such roles. There is no requirement to show a causal link between what the alleged discriminator has done and the existence of the adverse disparate impact: Section 69(2) of the Equality Act 2010.
11. Such an approach is not applicable to Sections 19 or 20 of the Equality Act. However, **Enderby** type indirect discrimination highlights the purpose of defining the PCP. The purpose is to assess whether something an employer does to its employees gives rise to

a difference in outcomes depending on the characteristics of its employees. The employer must apply the PCP.

What are the consequences of defining the PCP wrongly?

12. The court or tribunal must carefully define the precise nature of the PCP that forms the substance of the complaint. A court or tribunal cannot go on properly to assess the impact of the PCP if it is not correctly defined. It will be unable to assess the true consequences of an ill-defined PCP. It will be unable to identify the precise identity of those to whom it was applied.
13. For those reasons, failure to define the PCP properly, using the wrong PCP or failing to define the PCP at all are errors of law¹. The leading decision of the EAT is **Environment Agency v Rowan** [2008] IRLR 20, EAT which was approved by the Court of Appeal in **Newham Sixth Form College v Sanders** [2014] EWCA Civ 734. For claims under Section 20 **Bethnal Green & Shoreditch Educational Trust v Dippenaar** UKEAT/0064/15 (21 October 2015, unreported) adopts the reasoning in that line of authorities.
14. However, failing to identify the PCP is a surprisingly common error, particularly in reasonable adjustment cases. A claim for failure to make reasonable adjustments should always be considered in two parts: firstly, does the duty to make reasonable adjustments arise at all (which involves defining the PCP and examining its disparate effect) and secondly, but only if the duty does arise in the first place, considering what adjustments should be made. It is surprising how often Employment Tribunals skip to the second stage without considering the first stage.

When does a PCP not need to be defined?

15. There are three types of claims for breach of the duty to make reasonable adjustments. Only one of them requires the definition of a PCP. Section 20 of the Equality Act 2010 provides that:

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant

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matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

16. There is no need to define a PCP in claim for breach of the duty contained in Section 20(4) and (5) of the Equality Act 2010 to make reasonable adjustments in relation to a disabled person.
17. Section 20(4) puts an employer under the duty of reasonable adjustments, where a *physical feature* puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Section 20(5) puts an employer under the duty to make reasonable adjustments where failure to provide a disabled person with an auxiliary aid puts a disabled person at a substantial disadvantage, to take such steps as it is reasonable to have to take to provide the aid.
18. Section 20(11) provides that “auxiliary aid” includes a reference to an “auxiliary service”. Section 22 of the Equality Act 2010 gives the Secretary of State the power to make regulations defining auxiliary aid if he wishes to do so. However, he has not exercised that power in relation to the employment provisions of the Equality Act 2010. There is therefore no further definition of ‘auxiliary aid’. There is therefore wide scope for arguing that an adjustment an employee wants is an auxiliary aid or auxiliary service. The advantage of pleading a claim under Section 20(4) is that it avoids the need to define a PCP. In my experience, Section 20(4) is an extremely underused provision in spite of its simplifying effect. It should always be considered as the primary cause of action, with a Section 20(3) claim pleaded in the alternative, if it is pleaded at all.
19. These causes of action are simpler than a PCP-based claim under Section 20(3) in spite of which they are so often forgotten.
20. There are other situations in which a PCP is unnecessary:
 - a. in **Enderby** type discrimination (see above);

- b. where the disparate impact of a PCP which is contractual gives rise to a difference in pay between men and women, in which case the claim is claim for equal pay (see below);
- c. where the PCP is so inextricably linked with a protected characteristic, in which case the claim is one of direct discrimination. The PCP in this case fails the requirement that it be neutral;
- d. where the allegation is that the PCP was in fact applied for the purpose of discriminating against the Claimant because of his protected characteristic. Again, the PCP in this case fails the requirement that it be neutral. Such allegations are allegations of direct discrimination.

SUMMARY

The purpose of the PCP is to enable the Tribunal to assess adverse impact

A PCP must be defined in a claim for indirect discrimination

PCPs must be defined in claims for breach of the duty to make reasonable adjustments brought under Section 20(3) of the Equality Act 2010 but not in claims for breach of the duty to make reasonable adjustments under Sections 20(4) (“physical feature”) and 20(5) (“auxiliary aid”) claims.

A PCP may need to be defined in an Equal Pay claim in order to prove that an employer’s material factor defence is tainted by discrimination and hence not a valid defence.

If a PCP is wrongly defined, there will be an error of law.

B. THE STATUTORY TESTS

21. PCPs cannot be considered in isolation without reference to the full legal test of which they form part. In particular, defining the PCP can only be done properly alongside defining the adverse impact to which it is said to give rise. The two are inextricably linked.

22. Claims under Section 20(3) are common; claims under Section 19 are by comparison rare. As long as the legal test is understood and properly applied, they are relatively straightforward. Claims under Section 19 are conceptually more difficult and even where the test is well understood, it can be difficult to apply in practice. The most difficult issue conceptually in claims under Section 19 is how adverse disparate impact is shown.

Section 19: Indirect Discrimination

23. An employer commits the tort of indirect discrimination where:

- a. the employer applies the PCP to the Claimant: section 19(1) of the Equality Act 2010; and
- b. the employer applies or would apply the PCP to those who do not share the Claimant's protected characteristic: section 19(2)(a) of the Equality Act 2010; and
- c. the PCP puts, or would put:
 - i. persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - ii. the Claimant at that disadvantage.

24. The Respondent has a defence if it can show that applying the PCP to the Claimant is a proportionate means of achieving a legitimate aim.

Section 20(3) of the Equality Act 2010: Reasonable Adjustments

25. An employer is under the duty in Section 20(3) where:

- a. the employer applies the PCP to the Claimant; and
- b. that PCP puts the Claimant at a substantial disadvantage in comparison with persons who are not disabled.

26. The duty consists of a duty to make take such steps as it is reasonable to have to take to avoid the disadvantage.

27. The Respondent has a defence if it can show:

- a. he does not know, and could not reasonably be expected to know that:
 - i. an employee has a disability; and
 - ii. is likely to be placed at the substantial disadvantage to which the PCP puts him.

C. PRACTICAL ISSUES AND THE CASE LAW RELATING TO DEFINING THE PCP

The Claimant must have the protected characteristic

28. The Claimant must prove first of all that he belongs to a particular protected group. Section 19(2)(c) requires the Claimant in a case brought under Section 19 to show that he is put to the disadvantage to which the protected group to which he belongs as a whole is put.
29. That may seem to be statement of the obvious. However, indirect discrimination differs from direct discrimination in this respect where there is no requirement for the Claimant to be a member of the protected group.
30. In direct discrimination claims, a Claimant who does not have a protected characteristic may bring a claim where he has shown solidarity with a member of a protected group: **Zarczynska v Levy** [1979] ICR 184, EAT; **Showboat Entertainment Centre Ltd v Owens** [1984] IRLR 7 EAT, because of his association with an actual member of a protected group (see **Coleman v Attridge Law and Steve Law**: [2008] ICR 1128, ECJ or even perceived membership of a protected group (see **English v Thomas Sanderson Blinds Ltd** [2009] IRLR 206, CA. In those circumstances, the Claimant need not be a member of a protected group in order to bring a direct discrimination claim.
31. However, it is an essential requirement of indirect discrimination on the plain wording of the statute that the Claimant be a member of a protected group, since liability rests, to a very significant degree, on showing adverse disparate impact between those who belong to that group and those who do not belong to that group.
32. The same goes for claims under Section 20. The EAT has expressly rejected the argument that an employer is under a duty to make reasonable adjustments to accommodate an employee associated with a disabled person (e.g. someone for whom the employee has care responsibilities): **Hainsworth v Ministry of Defence** [2014] IRLR 728, CA.

Application of the PCP

33. The only common element on plain wording of the statute is that the employer **applies the PCP to the Claimant**.

Must the PCP be applied to the Claimant himself?

34. However, even this simple aspect of the test, there is one difference. Under a claim under Section 19, the PCP can be something which is potentially applied, but not applied in practice. The purpose of defining the PCP is to be in a position to assess the adverse impact on the person with the protected characteristic.
35. Under Section 19, it is an express requirement that the PCP be applied either in practice (“*applies*”), or potentially (“*would apply*”), to those who do not share the Claimant’s characteristic.
36. There appears to be no express requirement under Section 20. It might be thought that by implication, a PCP under Section 20 must also be one which is applied to both disabled person and non-disabled person alike. However, the statute certainly leaves open the argument that in reasonable adjustment claims, the Claimant himself need be the only person to whom the PCP was applied. The EAT has held that such PCP applied to others which still places the Claimant at a substantial disadvantage can be actionable: **Roberts v North West Ambulance Service** UKEAT/0085/11, [2012] ICR D14.
37. The Court of Appeal suggested *obiter* in **Coker v the Lord Chancellor** [2002] ICR 321, [2002] IRLR 80CA at paras 21 to 24 that where an appointment is made without a selection procedure with the aim of appointing an already identified individual, no PCP is applied to those who are unaware of the procedure but would have applied, had they known about it.
38. However, it is submitted, this ignores the part of Section 19(2)(a) that makes clear that there are two circumstances where a PCP can be challenged: where the PCP was applied or where the alleged discriminator would apply it to the Claimant. If the Claimant had known about the application procedure, the requirement that he be known personally to the Lord Chancellor would have been applied to him. Such circumstances seem to comply with the requirements of the section.

Can a PCP be applied to just one person?

39. There is no need for universal or even wide application of the provision, criterion or practice; it is enough that it is applied to the Claimant: **British Airways v Sturmer** [2005] IRLR 863, para 17-18 per Burton P. The Claimant in that case was a female pilot who wished to reduce her hours to 50 per cent of full time hours. Her employer refused.

The employer argued that this was a one off decision by management and therefore did not amount to a PCP. The EAT rejected that argument. However, an assessment of how the PCP would have affected those to whom it might or could have been applied will be necessary. Consequentially, the argument in that case that a management discretion applied only to one individual was incapable of amounting to a PCP was rejected. It is sufficient if it is applied to the Claimant alone. In such circumstances, the court or tribunal has to draw up a hypothetical pool for comparison.

Statutory Definition

40. The Act does not define 'provision, criterion or practice' further. It has been left to tribunals and courts to determine what fits this description. The definition is undoubtedly intended to be very wide. An argument that the measures taken about which the Claimant complains does not amount to a PCP and hence falls outside of the Act is very unlikely to succeed. The first part of the test – which is common to both Section 19 and 20 claims – should be viewed as a very low hurdle.

Wide meaning

41. The words 'provision, criterion or practice' must not be given a narrow meaning. The words provision, criterion or practice are not cumulative and it is sufficient for a Claimant to prove it is one or the other: **British Airways v Sturmer** [2005] IRLR 863, para 17 per Burton P. It is enough if a PCP can be identified.

Neutrality of PCP

42. The PCP must be apparently neutral, for if it is premised on a rule that is of itself discriminatory, the claim is likely to be for direct discrimination, not indirect discrimination: **James v Eastleigh BC** [1990] ICR 554, HL.

43. Most of the European legislation relevant to the Equality Act 2010 is contained in European Directives². Articles 2 and 3(2) of the Treaty of Rome establish that equality

² A Directive is addressed to the Member States who are required to pass national legislation to put it into effect. A Directive will stipulate a date by which the Member State is required to comply with it. Each member state is required to amend existing legislation the extent that it does not give the protection required by the Directive by the date for implementation.

There are broadly speaking two ways in which the Directive is enforced. Firstly, by the doctrine of Direct Effect, which requires a national court to apply it even if it has not been transposed into national legislation. However, Direct Effect applies only against the Member State only and not between individual parties. Further, the provision of the directive on which an individual seeks to rely is clear, precise and

between men and women is one of the fundamental principles of EC law. Article 12 prohibits discrimination on the grounds of nationality. However, the wider protection afforded to persons belonging to many of the protected groups is to be found in Directives and generally, it is the European Directives which give rise to individual rights. Those Directives contain a definition of indirect discrimination which is relevant to the interpretation of Section 19. Article 2 of the Directive of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (2006/54/EC) (“the Recast Directive” came into effect from 15 August 2009 and replaced earlier directives dealing with sex discrimination and equal pay defines indirect discrimination as:

‘Where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared to persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’

44. The same definition as set out in Article 2 of the Recast Directive is used in the European Directives implementing equal treatment on the grounds of racial or ethnic origin³, the Directive which covers discrimination on the grounds of disability, age,

constitute a complete obligation: **Van Duyn v Home Office** [1974] ECR 1337, [1975] 1 CMLR 1. In other words, a Claimant may rely upon the Directive in an action against the State or a public body that emanates from the state. The Directive can only be pleaded by an individual against a state that has failed to implement it, and not against a non-state entity or individual: **Marshall v Southampton and South West Hampshire Area Health Authority** [1986] ECR 723, [1986] 1 CMLR 688.

The second means of enforcing it is the doctrine of Indirect Effect. That says that in applying national law and, in particular, a national law specifically introduced to implement a Community measure, national courts are required, so far as possible to interpret domestic law in the light of the wording of the Directive: **Von Colson v Land Nordrhein Westfalen** [1984] ECR 1891. The fact that the relevant piece of legislation predates the Directive does not matter: **Marleasing SA v La Comercial Internacional de Alimentación SA** [1990] ECR I-4135, [1992] 1 CMLR 305. However, it is left to the discretion of the national courts whether or not an interpretation in conformity with a Directive is possible. This interpretative duty effectively permits an individual to rely upon a Directive in an action against another individual where it is possible to interpret national legislation in accordance with European legislation.

³ Article 2 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

religion and belief and sexual orientation⁴ and the Directive prohibiting sex discrimination in the context of goods and services⁵

45. The differences between the European definition of indirect discrimination and the definition of Indirect Discrimination in the Equality Act 2010 are that the European definition speaks of an 'apparently neutral' PCP.
46. If the PCP is not neutral in its formation, it gives rise to the question of whether the claim is properly brought under Section 19 at all. It may well be a claim for direct discrimination. This is discussed in more detail below.

Circularity

47. The application of the PCP should not result in a circular argument and it should be sustainable in logic: **Bailey v Home Office** [2005] IRLR 369. This test case concerned equal pay claims on behalf of 2,000 administrative staff in the Prison Service, who compared their work to prison officers, or industrial or non-industrial support staff. The employment tribunal reasoned that there was a PCP to obtain the advantages enjoyed by the comparator group "that one has to be a member of that comparator group". The Employment Appeal Tribunal and Court of Appeal held that such an approach was unsustainable in law.

The PCP is an objective question of fact

48. The finding of a PCP is one of fact for the tribunal to make on the evidence before it: **Jones v University of Manchester** [1993] IRLR 218. In a claim under Section 20 of the Equality Act 2010, reasonableness of the employer's actions is not relevant to the question whether it has imposed a PCP, which is instead an objective question of fact (with reasonableness arising later in the process): **Wolfe v North Middlesex University Hospital NHS Trust** [2015] ICR 960, EAT.
49. It is for the Claimant to identify the provision, criterion or practice that he wishes to challenge: **Allonby v Accrington and Rossendale College** [2001] IRLR 364, CA, para 12 per Sedley LJ. It was said in that case that it is no defence for the alleged

⁴ Article 2(b) of the Framework Directive of 27 November 2000 (2000/78/EC) establishing a general framework for equal treatment in employment and occupation

⁵ Article 2 of Council Directive 2004/113/EC of 13 December 2004 supplementing the principle of equal treatment between men and women in the access to and supply of goods and services

discriminator to be able to define a different provision, criterion or practice from the same facts that could be non-discriminatory.

50. In some cases, PCP may be expressly defined by the employer. In other cases, the Employment Tribunal may need to formulate it by analysing the employer's practice or behaviour. There is no need for PCP to be explicitly stated. It need not be something formal in nature or expressed in writing: **Cast v Croydon College** [1998] ICR 500 CA, para 27. Evidentially, it will be easier for Claimant to prove the application to him of PCP, where it is a formal policy or procedure. So, for example, an employer who has no policy relating to working flexibly from which female employees who have childcare responsibilities might have sought to take advantage, nonetheless applies a PCP to those employees that can be challenged.
51. There may be a number of different formulations consistent with the underlying facts. If an employee can realistically identify a PCP capable of supporting their case... it is nothing to the point that [their] employer can with equal cogency derive from the facts a different and unobjectionable requirement or condition: **Allonby v Accrington and Rossendale College** [2001] IRLR 364, CA.
52. Nonetheless, a court or tribunal will have to determine as a first step whether the PCP actually existed and whether it was applied to the Claimant. The failure to identify the PCP, in accordance with the adduced facts could result in the failure of an otherwise strong claim: **Francis v British Airways Engineering Overhaul Ltd** [1982] IRLR 10, EAT.
53. Even where a PCP is identified that does accurately reflect the factual situation, there may be more than one way to describe that PCP. The way in which the PCP is formulated will affect who falls into the pool for comparison, which will in turn affect whether disparate impact is demonstrated or not. However, an appeal court will reformulate the PCP if the characterisation of it does not match the real substance of the complaint (see **Azmi v Kirklees Metropolitan Borough Council** [2007] ICR 1154 and **Ladele v London Borough of Islington** [2009] IRLR 154, EAT).
54. The Court of Appeal's decision in **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216 raises the central issue for disability discrimination law of whether absence management policies need to be modified to comply with the duty of reasonable adjustment and is a good example of an appeal court reformulating the PCP

so that it logically and accurately reflects the facts to enable the assessment of adverse impact to be properly carried out.

55. The claimant, who had been absent from work for disability-related reasons, was given a warning under the employer's attendance management procedure. She claimed that it would have been a reasonable adjustment for the trigger point to be delayed. The EAT accepted the employer's argument that since the same policy applied to everyone, the Claimant could not be said to have been placed at "a substantial disadvantage" when compared with a non-disabled person, as required to trigger the reasonable adjustment duty. The problem with the EAT's reasoning was that it treated different people the same, as much a potential error as treating the same people differently. The Court of Appeal ruled that the reasonable adjustment duty is engaged when an employer's absence management procedure adversely affects employees whose disability makes it more likely that they will be absent from work. Just because the policy applied equally to all employees did not mean that it did not disadvantage those who were disabled. In so finding, Lord Justice Elias holds that the relevant provision, criterion or practice was not the attendance policy as such. It was that the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions.

"Once the relevant PCP is formulated in that way ... it is clear that ... a disabled employee whose disability increases the likelihood of absence from work on ill health grounds, is disadvantaged in more than a minor or trivial way", since the risk of their being absent from work on ill health grounds is "obviously greater".

56. There was thus a duty to make reasonable adjustments, but the adjustment duty is limited to that which is "reasonable". In this case, it was open to the employment tribunal to conclude that it would not be reasonable to expect the employer to entirely ignore the claimant's disability-related absence and revoke the warning she was given. As Lord Justice Elias put it:

"an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision."

57. Therefore, what is reasonable and what is not will be a matter for the employment tribunal.

Covert PCPs?

58. Of course, a claimant may claim that PCP is covert. There is nothing in the legislation which prevents a case being brought on that premise although the legislation, with its anti-avoidance origins, was clearly drafted with express policies, criteria and practices and in mind. The PCP does not have to be something the employer consciously does or admits to doing. The employee may pray in aid of the burden of proof provisions in order to prove a covert PCP (see discussion in **Essop and others v Home Office (UK Border Agency)** [2015] ICR 1063 and **Bethnal Green & Shoreditch Educational Trust v Dippenaar** UKEAT/0064/15 (21 October 2015, unreported) (applying **Project Management Institute v Latif** [2007] IRLR 519, EAT at [45], per Elias P). However, the requirement that a PCP be neutral should be borne in mind. If applying a PCP is neutral, why do it in secret? If the intention of applying the PCP is to discriminate against a certain group, is the claim not really one of direct discrimination?

Can a one-off act be a PCP?

59. While some case law has suggested that these terms require an element of repetition (especially a 'practice') (see **Nottingham City Transport Ltd v Harvey** UKEAT/0032/12, [2013] EqLR 4 and **Carphone Warehouse v Martin** UKEAT/0371/12, [2013] EqLR 481) this was later doubted as a general principle (especially in the case of a 'provision' or 'criterion') in *obiter* remarks in **Gallop v Newport City Council** [2014] IRLR 211.

SUMMARY

In PCP based claims, the Claimant must have the protected characteristic being assessed for adverse impact

The employer must apply the PCP to the Claimant

In indirect discrimination, the application to the Claimant may be hypothetical as opposed to actual

The Claimant may be the only person to whom the PCP is applied in indirect discrimination

The definition of PCP is intended to be wide

PCP is a low hurdle

The PCP must be neutral

The PCP should not result in a circular argument

The PCP is an objective question of fact to the Tribunal to determine on the evidence it has before it

The PCP may be expressly stated or something more informal

The Claimant should however identify the PCP he wishes to challenge and the Tribunal should determine whether that PCP existed

The Tribunal can reformulate the PCP as long as it is derived from the facts alleged and proven in support of the PCP for which the Claimant contended

The PCP may be something covert (i.e. denied by the employer)

One-off act can be a PCP as long as it is not said to be a practice

D. PRACTICAL ISSUES AND THE CASE LAW RELATING TO DEFINING THE PCP

Adverse Impact

60. At the stage of assessing adverse impact, the tests start to diverge more.

61. The test for adverse impact on the employee is slightly different. To prove a claim under Section 20, the employee must show that he has been put at a 'substantial disadvantage'; to prove a claim under Section 19, he must show that he has been put at a 'particular disadvantage'.

62. In a claim under Section 19, this requires the Claimant to show (subject to any assistance he may derive from the reverse burden of proof) that the PCP puts ("actual disadvantage") or would put ("potential disadvantage") those of his protected characteristic at a particular disadvantage.

63. In a claim under Section 20, this requires the Claimant to show (subject to any assistance he may derive from the reverse burden of proof) that the PCP puts him at a substantial disadvantage in comparison with persons who are not disabled.

64. The difference between 'particular' and 'substantial' probably does not mean much in practice. Substantial potentially excludes very minor disadvantages. It has been said that the words 'particular disadvantage' were introduced in order to prevent the need for statistical comparison⁶.

⁶ In **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601, [2012] ICR 704, SC, Lady Hale pointed out that the current wording in para (b) ('particular disadvantage') was intended to change the law 'to do away with the need for statistical comparisons where no statistics might exist'. The old definition provided that unlawful indirect discrimination occurs where a person:

- applies to a person belonging to a protected group a requirement or condition which he applies or would apply equally to a person not belonging to that protected group; but
- which is such that the proportion of persons belonging to the protected group who can comply with it is considerably smaller than the proportion of persons not belonging to the protected group who can comply with it; and
- which is to the detriment of the person belonging to the protected group because he cannot comply with it.

65. The same difference as exists in relation to the application of the PCP exists in relation to the existence of the disadvantage caused by the PCP. Under a claim under Section 19, the disadvantage can be something which potentially arises. Under a claim under Section 19, it must be something which has arisen in practice. However, under Section 20, 'actual' disadvantage must be shown. There is no scope for 'potential disadvantage' which is permitted under Section 19.
66. In Section 20 claims there is a requirement for comparison albeit it takes a different approach to claims of indirect discrimination under Section 19. The statute provides that there must be 'substantial disadvantage' arising from the application of the PCP 'in comparison with persons who are not disabled'.
67. However, the disadvantage under Section 20 can be individual. Under Section 20, a claimant does not need to show that other disabled persons or persons with his disability are also disadvantaged. There is no need to show 'group disadvantage'. It is a requirement of a claim under Section 19 that actual or potential group disadvantage is shown in addition to individual disadvantage. The individual disadvantage must be the same disadvantage shared by the group. The fact that the factor in question affects disabled people generally may point to indirect discrimination, but it does not in itself give rise to this duty to make adjustments: **Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley** [2012] EqLR 634, EAT.
68. Recently it has been held that, even where the same policy (eg on sickness absence) is applied equally to disabled and non-disabled employees, this section can still apply if that apparent equality of treatment 'bites harder' on the disabled employee (eg if they are prone to a higher level of absence): **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216 (reaching the same result as in **Royal Bank of Scotland v Ashton** [2011] ICR 632, EAT below, ie no obligation to amend the sickness policy, but on the basis that it was not reasonable to do so, not because there was no viable comparison; quaere whether **Ashton** is now to be considered overruled on its reasoning).

The effect of this can be seen in **Games v University of Kent** [2015] IRLR 202, EAT where it was held that statistics now only work one way – if they exist they can be important, but lack of them is not fatal to a claim and a tribunal may have to consider other, wider evidence (here, the claimant's own experience in many years in the post).

The Nature of the Adverse Impact Shown May Cause a Different Cause of Action to Be in Play: Equal Pay or Direct Discrimination

69. There are some traps for the unwary even where the PCP has been carefully thought about and carefully defined.

Equal Pay

70. If the PCP demonstrates that there is adverse disparate impact between men and women as to their contractual terms of pay, the claim must be brought under the equal pay provisions of the Equality Act 2010.

Close Connection of PCP with Protected Characteristic and Direct Discrimination

71. The PCP must be apparently neutral, for if it is premised on a rule that is of itself discriminatory, the claim is likely to be for direct discrimination, not indirect discrimination: **James v Eastleigh BC** [1990] ICR 554, HL.

72. If the PCP alleged to have been applied is very closely linked with a protected characteristic, the complaint is probably one of direct discrimination and not indirect discrimination.

73. Direct and indirect discrimination are mutually exclusive in that a single act, if it constitutes discrimination at all, cannot be both: Direct and indirect discrimination are two different causes of action for race discrimination. They are two different statutory torts: **R (on the application of Elias) v Secretary of State for Defence** [2006] IRLR 934 CA, per Mummery LJ, paragraphs 117 to 123 and **National Statistics v Ali** [2005] ICR 201, CA. The conditions of liability, the available defences to liability and the available defences to remedies differ. Confusion sometimes arises as to whether a complaint is properly categorised as direct or indirect discrimination.

74. If the PCP alleged to have been applied is very closely linked with a protected characteristic, the complaint is probably one of direct discrimination and not indirect discrimination. To put it another way, if the proper characterisation of the PCP is a requirement that a person has or does not have a protected characteristic, the claim becomes one of direct discrimination. Obviously, applying a requirement that a candidate for a job be white is direct, is not indirect discrimination, as it is obvious that no black persons could ever fulfil the requirement and all whites can. To use the

terminology of the European definition of indirect discrimination, there is no 'apparently neutral' PCP being applied, as it is manifestly discriminatory.

75. The same principle applies in situations that are less obvious. In **James v Eastleigh BC** [1990] ICR 554, HL the Defendant local council had a practice of providing free access to a swimming pool to those of state pensionable age. At the time, state pensionable age was 60 in the case of women and 65 in the case of men. Mr James was 61 and was charged entry to the pool. The House of Lords found that the Council had treated him less favourably on the grounds of his sex. The simple question was if he had been a woman but had all his other characteristics – the material characteristic being 61 – would he have been treated differently. It was obvious that he would have been granted free admission.
76. The House of Lords went on to hold that he could not succeed in a claim for indirect discrimination. The PCP under challenge was that an entrant be of pensionable age in order to obtain free entry. However, the PCP must of itself be gender-neutral. The pensionable age was discriminatory. It was not apparently neutral so could not therefore constitute a PCP. Their Lordships found that the Court of Appeal had failed to apply the provision which is now contained in Section 23 of the Equality Act 2010 that there should be no material difference between the circumstances relating to the persons under comparison. Since pensionable age is itself discriminatory it cannot be treated as a relevant circumstance in making the comparison. The PCP that entrants to the swimming pool be of state pensionable age was therefore directly, not indirectly discriminatory against men.
77. This is a particular problem in age discrimination claims.
78. **Chief Constable of West Midlands Police v Harrod** [2015] IRLR 790 is the test case on claims of indirect age discrimination brought by police officers forced to retire by the application of reg. A19 of the Police Pensions Regulations 1987. This allows retirement "in the general interests of efficiency", but provides that only those with an entitlement to a pension of 2/3rds of average pensionable pay (which could be received after 30 years' service) can be retired. Forced to make staffing savings, various police forces applied A19 to nearly all officers who could be required to retire. An employment tribunal held that this was not proportionate because there were a number of alternatives available. Mr Justice Langstaff has now reversed this finding, in part because none of the

alternatives suggested by the tribunal, such as seeking voluntary retirement, part-time working or career breaks, “could deliver the certainty” of cost savings “which was a necessary part of the Forces' approach....” He says that the tribunal erred by failing to inquire “whether the adoption of A19 was a reasonably necessary means of achieving the aim of the Forces' scheme: it was not for it to manufacture a different scheme.” Moreover, the tribunal “focused impermissibly on the decision-making process which the Forces adopted in deciding to utilise A19.” Leave to appeal to the Court of Appeal is being sought.

79. Perhaps the most interesting dimension of the decision, however, is a coda by the EAT President, in which he attempts to delineate the distinction between direct and indirect discrimination in an age context:

“Where a criterion inevitably distinguishes between individuals on the basis of age ... to apply it is to discriminate directly; it is where a criterion disproportionately, though not inevitably, applies to people of a particular age group that the discrimination is indirect.”

80. Thus, in this case:

“though it may be said that those over 48 are not all, nor inevitably, included in the group of those subject to A19, since not all may have served for long enough, it is entirely permissible to see the group constituted by those over the age of 48 as being at risk of inclusion, whereas those under 48 could not be. This is a difference entirely and directly defined by age. It leads me to think that the discrimination here would properly have been identified as direct.”

81. However, in **Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH** [2012] IRLR 781, the ECJ held that a requirement that employees have three years' service prior to receiving certain benefits was not sufficiently linked to age for it to be directly discriminatory.

Manifestation of Belief Claims

82. However, just because the PCP of which a Claimant complains is due to some manifestation of the protected characteristic she has does not turn the complaint into one of direct discrimination. In **Azmi v Kirklees Metropolitan Borough Council** [2007] ICR 1154, the EAT found that an employer's refusal to allow a Claimant to cover her face with a veil (worn for religious reasons) while teaching amounted to a PCP that 'teachers and teaching assistants should not cover their faces when teaching or assisting'. The fact that the wearing of the veil was a result of the Claimant's religion, the protected characteristic on which she was relying, did not mean that the discrimination

occurred on the grounds of her religion, where the thing that offended her – the requirement to remove it – arose from a requirement that was applied to everyone. At paragraphs 75 of the judgment, the EAT says:

A great deal of time before the ET, and before the EAT, was taken up by an argument between the appellant and the respondent whether the appellant's wearing of the veil because of her genuinely held belief that it was a religious requirement of her to do so was a 'manifestation of a religious belief' or a 'religious belief' itself. It was perceived that the answer to this question determined whether the case was one of direct discrimination, without any justificatory defence, or indirect discrimination with a potential justificatory defence. As we have indicated above, the ET concluded that there was no direct discrimination by considering the comparator whom the ET concluded was appropriate, and that there was in any event no evidence of any motivation to discriminate on the grounds of religious belief. Furthermore, the ET concluded that the case was one of indirect discrimination, subject to the justificatory defence, because the ET concluded that the PCP was apparently neutral. It was not necessary for them to express a view whether or not the manifestation of a religious belief by wearing a veil comes within the provisions relating to direct discrimination. Nor is it necessary for us to do so.

83. In **Ladele v London Borough of Islington** [2009] IRLR 154, EAT (appealed on other grounds to the Court of Appeal in **Ladele v London Borough of Islington** [2010] IRLR 211, judgment of EAT upheld) the Claimant, a registrar, who had strong Christian religious beliefs, was dismissed for refusing to carry out same sex civil partnership ceremonies. She brought a claim for direct discrimination alleging that she had been directly discriminated against. The employment tribunal upheld her claim for direct discrimination. On the facts, all registrars were required to perform such ceremonies. However, the Employment Appeal Tribunal, Elias P presiding, held that her claim was one of indirect, and not direct, discrimination. Her complaint was not that she was treated differently from others; rather it was that she was not treated differently when she ought to have been. At paragraph 53, the EAT said:

It cannot constitute direct discrimination to treat all employees in precisely the same way. It could be direct discrimination if the employer was willing to make exceptions to the general rule but was not willing to do so for a particular worker by reason of a legally prohibited ground. But that is not this case. Of course, a failure to accommodate difference may well give rise to a claim of indirect discrimination; the very nature of that claim typically starts from the premise that the same apparently neutral rule applies equally to all but

Direct Discrimination: Intentional Discrimination

84. If the PCP were applied with the intention of creating adverse disparate impact, the claim would also become a claim of direct discrimination since the reason why the PCP was applied would be the protected characteristic of the victim. The question of whether a

PCP was applied with the intention to discriminate is therefore relevant to the question of whether a claim is one of direct or indirect Discrimination.

Disparate Impact in Claims Where the Claimant can choose to which group he belongs

85. Any tribunal faced with such a claim must therefore be in a position to identify with precision the group to which the Claimant says he belongs, who else belongs to that group and who falls outside that group. Membership of the protected group must be defined in order to assess whether the Claimant has suffered
86. At the heart of the law of indirect discrimination is the assessment of the effect a state of affairs differently affects different groups. The precise definition of the protected group will be very important in certain kinds of indirect discrimination claim under Section 20, since the claimant's own definition of his protected characteristic will shape the definition of the protected and unprotected groups. In cases of race discrimination, the Claimant will have a choice as to exactly how he defines the protected group to which he belongs. Section 9(4) of the Equality Act 2010 provides that "The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group". This statutory provision therefore gives the Claimant a wide choice of groups to which he could describe himself as belonging, which, in turn, could affect the statistics relating to adverse disparate impact. The Claimant in an age discrimination case has a similar choice. He defines for himself the age range of the group to which he says he belongs.
87. In cases of sex, discrimination, the Claimant's membership of a protected group will be obvious. The comparison is made between men and women (or between married and unmarried people) in the appropriate pool for comparison.
88. The comparison in cases of discrimination on the grounds of religion and belief and sexual orientation ought, in most circumstances, to be relatively straightforward, although not in every case. What adversely impacts on a particular sect of any given religion may not adversely impact on other sects of that religion or members of that religion as a whole.
89. In both race and age discrimination cases, there will be more than one way of defining the protected group to which the Claimant belongs. However, since the comparison is

between those who belong to the protected group and those who do not, the choice of whether race, colour, ethnicity or nationality, or the age range, is used may well have an effect on the breakdown on who falls into the protected group and who into the unprotected group. In age discrimination claims, this needs to be considered very carefully.

SUMMARY

The tests for adverse impact differ between Section 19 Indirect Discrimination and Section 20(3) Reasonable Adjustments

The key difference is ‘particular’ versus ‘substantial’ disadvantage

The disadvantage under Section 20(3) may be individual only. In a claim for indirect discrimination group disadvantage must be shown

Substantial disadvantage is shown if a policy ‘bites harder’ on disabled employees

Adverse disparate impact as between men and women is an equal pay claim not a claim under Section 19.

Where the PCP is inextricably linked with a protected characteristic the claim becomes one of direct discrimination

The manifestation of a person’s belief gives rise to an indirect discrimination claim, not a direct discrimination claim.

An allegation that an employer applied a PCP on purpose to discriminate is likely to be a claim for direct discrimination

In claims for race, religious and age discrimination, the Claimant chooses the group to which he or she belongs. The definition of the group can have an effect on the issue of adverse disparate impact.

90. DEFENCES

91. The defences are different. Under a claim under Section 19, the only defence is show that the application of the PCP constituted a proportionate means of achieving a legitimate aim.
92. Under a claim under Section 20, once the duty is established, there is a consideration of what steps are reasonable in order to avoid the disadvantage. The employer therefore has a defence of having taken reasonable steps or there being no reasonable step he could take. He has the further defence of arguing that he did not have actual or constructive knowledge of the disability or knew of the disability but did not have actual or constructive knowledge of the disadvantage it caused.

93. PROVING THE PCP

94. Section 136 of the Equality Act 2010 provides that all claims of discrimination are subject to a statutory reversal of the burden of proof. Section 136(2) provides that:

If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

95. There are many cases that deal with the application of this provision to claims of direct discrimination, especially where such discrimination is alleged to be covert. Indirect discrimination is rarely alleged to be covert. Usually, although not always, it is the overt act of the alleged discriminator that is under challenge. Further, the reason for doing that overt act is not usually relevant in claims for indirect discrimination, only the consequences of doing that act.

96. **In Nelson v Carillion Services Limited** [2003] IRLR 428, the Court of Appeal held (see paragraph 22) that it is for the employee to identify the comparator group and to produce the statistical evidence to show an appreciable difference in the effect of the treatment on those belonging to the protected group and those who do not belong to the protected group. However, the approach in that case was based at least in part on the view that the statutory reversal of the burden of proof had merely codified the existing law. Such a view was found to be wrong in **Igen Ltd v Wong** [2005] IRLR 258.

97. Currently, the best guidance on the application of Section 136(2) to claims brought under Section 19 is the decision of the EAT in **Latif v Project Management Institute** [2007] IRLR 579, EAT, which considered the application of the statutory reversal of the burden of proof to claims for failure to make reasonable adjustments under the Disability Discrimination Act 1995, whose provisions in part mirror those of Section 19. By analogy that case, it is suggested that:

- it is doubtful whether the burden shifts at all in respect of establishing the provision, criterion or practice, or demonstrating group or individual disadvantage, as they are simply questions of fact for the court or tribunal to decide after hearing all the evi-

dence, with the onus of proof resting throughout on the claimant. These are not issues where the alleged discriminator has information or beliefs within his own knowledge which the claimant cannot be expected to prove. To talk of the burden shifting in such cases is confusing and inaccurate; (see para 45);

- however, the burden of proof in respect of jurisdiction must fall squarely on the shoulders of the Respondent or Defendant to the action. The respondent is in the best position to prove his reasons for applying the PCP in the first place. If the Respondent fails to prove justification, then the claim must succeed. However, that consequence already arises out of the wording of Section 19 as opposed to the reversal of the burden of proof in Section 136.

98. The above reasoning was approved in the context of indirect discrimination claims in the case of **Bethnal Green & Shoreditch Educational Trust v Dippenaar** UKEAT/0064/15 (21 October 2015, unreported) for claims under Section 19.