

“DIRECT DISCRIMINATION: A PRACTICAL GUIDE TO COMPARATORS”

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A. Introduction

1. Direct discrimination cases are frequently won or lost on the basis of the claimant’s ability to identify a suitable actual comparator, or sometimes, to construct helpful hypothetical comparators.
2. The difficult question of the appropriate comparator in the case of *Cordell v Foreign & Commonwealth Office*¹ which was heard by the EAT on 16 June 2011 illustrates how the choice of relevant characteristics is not an exercise in identifying the one logical comparator but may often instead be a value judgment that the Employment Tribunal has to make.
3. In this paper, we present a step-by-step guide to the issues which arise in this thorny and often controversial area.

B. What is direct discrimination?

4. The definition of direct discrimination is set out in the Equality Act 2010 (“EA 2010”) at s.13(1) in the following terms:

13 Direct Discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

¹ UKEAT/0018/11/SM.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex –

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) In a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection 6(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

5. The protected characteristics referred to in s.13 (1) are defined in s.4 of the EA 2010 as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
6. The definition of direct discrimination contained in the EA 2010 broadly mirrors the concepts contained in the earlier now defunct legislation.² The one notable difference is that s.13(1) EA 2010 covers discrimination based on association with a person who has any of the protected characteristics or because the claimant is perceived to possess one of the protected characteristics. This is made plain by the language of s.13 (1) EA 2010 which makes no reference to the protected characteristic of any specific individuals. This interpretation is also confirmed by the Explanatory Notes to the EA 2010 at [59].³

² Sex Discrimination Act 1975, Race Relations Act 1975, Disability Discrimination Act 1995, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Religion or Belief) Regulation 2003, and Employment Equality (Age) Regulations 2006.

³ References to paragraphs are contained in [...].

C. What is the purpose of the comparative exercise?

7. At the heart of the definition of direct disability discrimination is a comparative exercise (other than in certain specified situations which are explored at [44 to 54] below).
8. The Government explained its decision to retain this concept in the definition of direct discrimination during the consultation process concerning the EA 2010 on the basis that, "... discrimination is principally about equal rather than fair treatment and courts and tribunals have flexibility on how to define comparators in each case. Removing the comparator would make it harder to ascribe actions to inequitable treatment based on a protected characteristic, which is a key and long-standing principle governing discrimination law".⁴
9. In practical terms, the comparative exercise can be an evidential tool used in order to assist the Employment Tribunal determine two issues as follows:
 - (i) Was the claimant treated less favourably?
 - (ii) If so, was the reason a protected characteristic?
10. However, as recognised by the House of Lords in *Shamoon v Chief Constable of the RUC*⁵, these issues whilst separate are so closely related that it may be more appropriate to simply ask: did the claimant, because of the protected characteristic, receive less favourable treatment than others?⁶ Often this is called "the reason why" question. Often, the Employment Tribunal will answer that question by examining or constructing a comparator against which the claimant's treatment can be assessed.
11. Nevertheless, it should be remembered that a comparator, hypothetical or otherwise, is not a *necessary* requirement in a direct discrimination case. That is,

⁴ "The Equality Bill – Government response to the Consultation", July 2008 (Cm 7454) at [7.10].

⁵ [2003] ICR 377.

⁶ See *Shamoon*, dicta of Lord Nicholls, p.341 at [8]. The phrase "because of the protected characteristic" rather than "on the proscribed ground" is used here as we are examining the EA 2010. *Shamoon* was decided before legislative provisions were enacted shifting the burden of proof in discrimination cases. However, the approach in *Shamoon* has been approved subsequently especially for cases involving a hypothetical comparator. See, for example, *Laing v Manchester City Council* [2006] ICR 1519.

a comparator may not be required where there is evidence which points to direct discrimination even without the benefit of the comparative exercise, for example, discriminatory comments. See the dicta of Lord Scott at [116] in *Shamoon*.

12. Equally, the attempt by a claimant to identify an actual comparator or to construct a hypothetical comparator can often distract the parties and the Employment Tribunal from focusing on the reason why question when that would be the more useful approach. Underhill P has been trenchant in his criticism of the use of hypothetical comparators, both judicially and extra judicially.
13. In *D'Silva v NATFHE*⁷ the claimant alleged that he had been discriminated against in two respects: the failure of NATFHE (now UCU) to provide him with legal representation and their failure to reply to correspondence. The Employment Tribunal concluded that the union had declined to provide legal representation because the claimant had explicitly expressed a lack of trust and confidence in the legal team and that the problems with correspondence had been due to a genuine oversight by the solicitor in question.
14. Despite these findings, the claimant appealed to the EAT to challenge the Employment Tribunal's conclusion that there had been no race discrimination by contending that it had failed to properly consider the position of a hypothetical comparator.
15. Underhill P was critical of the claimant's analysis and his reliance on a hypothetical comparator as it was plainly unnecessary in light of the Employment Tribunal's unchallengeable findings of fact as to the reason for the union's actions which wholly excluded any link with discrimination. He stated at [30]:

It might reasonably have been hoped that the Frankensteinian figure of the badly-constructed hypothetical comparator would have been clumping his way rather less often into discrimination appeals since the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 (see in particular paragraph 11 at p.289) and the decision of this tribunal, chaired by Elias J, in *Law Society v Bahl* [2003] IRLR 640, at paragraphs 103–115 (pp.652–654). We regard it as clear, taking the reasons as a whole, that the tribunal made an express finding that the only reason why

⁷ [2008] IRLR 412.

the union acted in the way complained of was that (as regards the initial decision and the first review decision) the appellant had expressed a lack of trust and confidence in his legal team and (as regards the subsequent review) that Mr Bryan had genuinely overlooked the appellant's further correspondence. Those findings necessarily exclude the possibility that the acts complained of were done, even in part, on racial grounds (or on grounds which would constitute victimisation). If that finding is unassailable it necessarily answers also the question whether he would have been treated more favourably if he had been white or if he had not previously supported Mr Deman or complained of racial discrimination. It is accordingly unnecessary to consider in detail the passages in which the tribunal referred to the nature of the hypothetical comparator. We would however say that we can see no sign that it failed to appreciate any essential feature of the necessary comparison.

16. Similarly, in *Edinburgh City Council v Dickson*⁸, a community learning and development worker was dismissed from his position after he was found to have watched pornography at work. He claimed that he had no recollection of the incident and must have suffered from a hypoglycaemic episode as he was diabetic. His employer (unreasonably) discounted this defence leading to a finding of unfair dismissal. As to the question of direct disability discrimination, the Employment Tribunal constructed a hypothetical comparator as follows:

... someone who offered an explanation that was, prima facie, equally capable of being a complete answer to the same kind of allegation of misconduct. Examples might be someone who offered to prove that they had been sleepwalking or had had a seizure, perhaps even have offered to prove temporary insanity. It would be an explanation that was not based in an employee's disability but that would nonetheless be one that meant that the comparator would not be held culpable for their actions”.

17. It then went on to find that this hypothetical non-disabled comparator would not have been treated in the same way as the claimant so the claim of direct disability discrimination succeeded.

⁸ UKEATS/0038/09/B1.

18. The employer appealed and Underhill P overturned the Employment Tribunal's analysis on the basis that there was no evidence that the claimant's disability had played any role in the decision to discount his explanation for his behaviour which was a key ingredient to any successful claim, so it followed that the construction of a comparator was largely irrelevant.
19. In light of the rather convoluted comparator relied upon in the claim, he unsurprisingly commented that, "The present case affords a good example of the complication and artificiality that can be involved in seeking to define the characteristics of the hypothetical comparator"⁹ and relied on the comments by Lord Nicholls in *Shamoon* that there is a risk of "arid and confusing disputes about the identification of the appropriate comparator"¹⁰ in direct discrimination claims.
20. It follows that parties should not rush head first into the comparative exercise without first considering whether it is truly necessary.

D. Who is a valid comparator?

Types of comparators

21. The phrase "treats or would treat others" in s.13 (1) EA 2010 makes it plain that direct discrimination encompasses differential treatment of an actual or hypothetical comparator.
22. However, it is important to remember that there is a further variation of the comparative exercise which invites the Employment Tribunal to construct a hypothetical comparator by examining the way in which an actual person has been treated by the employer, albeit an individual who cannot be an actual comparator because their circumstances are too dissimilar to that of the claimant.
23. The validity of this approach is confirmed by the Code of Practice which accompanies the EA 2010 at [3.26] where the following useful example is provided:

⁹ See [37].

¹⁰ See p.342 at [11].

An employer dismissed a worker at the end of her probation period because she had lied on one occasion. While accepting that she had lied, the worker explained that this was because the employer had undermined her confidence and put her under pressure. In the absence of an actual comparator, the worker compared her treatment to two male comparators; one had behaved dishonestly but had not been dismissed, and the other had passed his probation in spite of his performance being undermined by unfair pressure from the employer. Elements of the treatment of these two comparators could allow a tribunal to construct a hypothetical comparator showing the worker had been treated less favourably because of sex.

24. This approach was also articulated in *Shamoon* by Lord Scott at [109 – 110].

E. What are the characteristics of a valid comparator?

25. It is for the Claimant to choose the comparator but the Employment Tribunal is entitled to disregard it on the basis that it is invalid and select or formulate its own comparator.¹¹

26. Regardless of whether the Employment Tribunal uses a hypothetical or an actual comparator to assess the claimant's case, the issue which is likely to cause the greatest controversy is determining the exact characteristics of a valid comparator.

27. The nature of the comparative exercise is expanded upon at s.23(1) EA 2010 which states that:

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.

28. It follows that the Employment Tribunal must assess the treatment of the claimant in comparison with an actual or hypothetical comparator where they are the same or there is no material difference between the comparator and the claimant.

¹¹ *Balmoody v UK Central Council for Nursing, Midwifery and Health Visiting* [2002] IRLR 288.

“No material difference”

29. It is very common for claimants to pursue cases where there is a detailed factual history which provides the background to the treatment at the centre of the direct disability discrimination claim. The difficulty with assessing the validity of a comparator (actual or hypothetical) is that a judgement must be made as to which circumstances pertaining to the claimant are relevant and which are irrelevant. Indeed, as recognised by Lord Hope in *Shamoon*, the outcome of this analysis can be determinative of the case.¹²

30. The starting point to the comparative exercise and determining which factual matters are relevant is to remember that its purpose is to assist the Employment Tribunal understand whether the reason for the claimant’s treatment at the hands of the employer is a protected characteristic. See [9] to [10] above. Accordingly, it is the Employment Tribunal’s analysis of the factors which were relevant to the employer’s actions (or inaction) which should inform this process.

31. It follows, as a matter of logic, that the comparator must be the same as the claimant in all material respects relevant to the factual background for the treatment other than in respect of the protected characteristic. Then, if the Employment Tribunal concludes that the comparator would have been treated differently, the only explanation for that differential treatment must be the protected characteristic.

32. This analysis can be seen in a number of cases, such as Lord Scott in *Shamoon* at [110] where he stated that:

In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class.

33. More recently, Mummery LJ elaborated on this approach in *Stockton on Tees BC v Aylott*¹³ at [44] where he explained that:

¹² See p.351 at [39].

¹³ [2011] ICR 1279.

...in deciding upon the characteristics of a hypothetical comparator, it is necessary to determine the reason why the complainant received the treatment of which complaint is made. The relevant circumstances and attributes of an appropriate comparator should reflect the circumstances and attributes relevant to the reason for the action or decision of which complaint is made.

34. The facts in *Aylott* provide a good illustration of how to properly construct a comparator (or alternatively assess the validity of an actual one). The claimant, who suffered from bipolar affective disorder and was disabled for the purposes of the DDA 1995, experienced difficulties in his working relationships with colleagues and presented a list of complaints to his employers. His complaints were investigated under the employer's dignity at work procedure while he was on paid leave, but subsequently rejected, and after he returned to work he was placed in a different post with a different working team where he was required to meet deadlines and his work was monitored weekly. The claimant's performance and behaviour continued to be unsatisfactory and he was suspended on full pay pending a disciplinary investigation. As the claimant was then unwell, the suspension was withdrawn and the disciplinary proceedings discontinued. The claimant remained on sick leave for five months until he was dismissed on health grounds. He made a number of claims to an employment tribunal including allegations of unlawful direct disability discrimination.

35. The Employment Tribunal upheld those claims and concluded, in relation to the claim of direct disability discrimination, that an appropriate comparator was someone who had been absent from work for a similar period but did not have the claimant's disability.

36. Before the Court of Appeal, the respondent contended that the Employment Tribunal had erred by not adding in the further circumstances of (i) a move to a different post and (ii) past behaviour and performance causing concern. At [47], Mummery LJ robustly rejected those criticisms, upholding the Employment Tribunal's approach and stating that:

... some of the claimant's particular behavioural and performance difficulties and his move to another post stemmed from his particular disability. The employment tribunal are not, and cannot be, criticised for leaving the claimant's particular

disability out of the circumstances of the hypothetical comparator. Section 3A (5) stipulates that the comparator does not have the disability. In my judgment, there was no error in the employment tribunal also leaving out of those circumstances particular results caused by the claimant's disability: the move to another post and the behavioural and performance difficulties resulting from the particular disability would not be relevant circumstances of a hypothetical comparator who did not have that particular disability.

37. The importance of Mummery LJ's analysis in *Aylott* is that it reveals the way in which the comparator should be placed in the same or not materially different position to the claimant in respect of the decision or action complained of but with *all matters* flowing from the protected characteristic removed from the equation.

Valid comparators are not clones

38. A word of warning is required at this point. Whilst it is essential to ensure that the comparator is constructed in a way that he or she is subject to all material factors, it is erroneous to mould the comparator so closely to the claimant that the protected characteristic is reintroduced albeit under a different guise.

39. An example of where the EAT arguable fell into this trap is *Watts v High Quality Lifestyles Ltd*¹⁴. In that case, the claimant was HIV + and claimed that he had been the victim of direct disability discrimination in circumstances where he had been dismissed from his role as a support worker for persons with learning difficulties because a risk assessment concluded that injuries involving broken skin were common place due to cuts and bites from the nature of the work.

40. At [48], the EAT overturned the Employment Tribunal's analysis of the identity of a hypothetical comparator, as follows:

The error which the tribunal made in paragraphs 84 and 85 of its reasons was in failing to impute relevant circumstances to the hypothetical comparator. The circumstances were not, as the tribunal found, that the comparator should have a communicable disease. Assuming, as the tribunal correctly did, that the comparator has the same 'abilities, skills and experience', the comparator must

¹⁴ [2006] IRLR 850.

also have some attribute, whether caused by a medical condition or otherwise, which is not HIV positive. This attribute must carry the same risk of causing to others illness or injury of the same gravity, here serious and possibly fatal. If the tribunal found that the comparator would have been dismissed, then the claimant has not been less favourably treated. The facts which it is necessary for the claimant to have proved, in order to shift the burden of proof to the respondent, is not only a workable model for the hypothetical comparator but also some evidential basis upon which it could be said by the tribunal that the comparator would not have been dismissed. With respect, the employment tribunal failed to do this, as is seen by paragraph 85.

41. In *Watts*, the hypothetical comparator constructed by the EAT was essentially a clone of the claimant who was HIV+ albeit with a different label and as such lost sight of the purpose of the comparative exercise. By adopting this hypothetical comparator the claimant was bound to fail as the hypothetical comparator would almost certainly be treated in the same way. Hence the comparative exercise becomes pointless as an evidential tool. This type of approach is also flawed as it means that the stigma attached certain illness, like being HIV+ can never be properly tested.

Necessary changes to the circumstances of the comparator

42. There are some situations where it is necessary to alter the circumstances of the comparator in order to ensure that the comparative exercise does not become meaningless. This will occur when the alleged direct discrimination arises from the interplay between the protected characteristic and the identity of a third party.

43. Accordingly, in *Saunders v Home Office*¹⁵ a female prison guard complained that she was the victim of direct sex discrimination because she was required to conduct “rub-down searches” of male inmates whereas male prison guards were not permitted to search female inmates. The EAT upheld the Employment Tribunal’s conclusion that as the issue at the centre of the claim was the impact of cross-gender searches on female guards, the correct comparator was a male prison guard who was obliged to search female prisoners as opposed to a male

¹⁵ [2006] ICR 318.

guard searching a male prisoner which was contended for by the Home Office. It followed that the claimant was successful.

F. Comparators in specific cases

44. In certain scenarios the principles applicable to the comparative exercise are modified or expanded upon within the EA 2010.

Racial segregation

45. At s.13 (5) EA 2010 it is stated that racial segregation is less favourable treatment. This provision is designed to prevent employers from arguing that there is no discrimination in racial segregation as all races are being treated the same.

Sexual orientation

46. In cases of direct discrimination and sexual orientation, the EA 2010 provides additional detail on the comparative exercise. Specifically, it stipulates at s.23 that:

(3) If the protected characteristic is sexual orientation, the fact that one person whether or not the person referred to as B) is a civil partner while another is married is not a material difference between the circumstances relating to each case.

47. This means that a homosexual worker in a civil partnership who alleges that he has been discriminated against on the grounds of his sexual orientation could compare himself to a married colleague. The fact that his comparator is married, as opposed to being a civil partnership, does not prevent him or her from being suitable. See [3.31] in the Code of Practice. In other words, the same status is afforded to a civil partnership as marriage.

Disability

48. The comparative exercise in the context of disability is slightly different because of the requirement in s.23 EA 2010 for the comparator to have the same abilities as the claimant.

- (2) The circumstances relating to a case include a person's abilities if—
- (a) on a comparison for the purposes of section 13, the protected characteristic is disability;

49. This requirement also appeared in s.3A (5) DDA 1995. During the consultation process, the Government stressed that employers would not be liable for discrimination claims if they declined to employ a disabled person who was not able to undertake the job in question even with reasonable adjustments. The requirement in s.23(2) EA 2010 and previously s.3A(5) DDA 1995 ensures that there is no discrimination in these circumstances because a non-disabled comparator with the same abilities as the disabled complainant would also be rejected for a position which they were not able to perform.

50. A complaint that a disabled worker was treated unfavourably (as opposed to less favourably) because he or she lacked a particular ability would need to be pursued under s.15 EA 2010 which prevents discrimination arising from disability.

Pregnancy, pregnancy-related illness or maternity leave

51. The EA 2010 explicitly protects women from discrimination because they are pregnant, suffer from pregnancy-related illness or wish to take maternity leave.

- 18 Pregnancy and maternity discrimination: work cases
- (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
- (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—
- (a) because of the pregnancy, or
- (b) because of illness suffered by her as a result of it.

- (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
- (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
- (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
- (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
- (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
- (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
- (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
- (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
- (b) it is for a reason mentioned in subsection (3) or (4).

52. The language of s.18 is “unfavourable” rather than “less favourable” so there is no requirement for a comparator. However, with the exception of discrimination related to taking maternity leave, s.18 is only applicable within the “protected period”. Outside of these dates, a woman would still need to bring a claim under s.13 EA 2010.

53. On the face of s.13 EA 2010, there is a requirement for a comparator but there is a long line of authorities which establish that a comparator is not required for pregnancy as it is a condition which is unique to women. See *Dekker v Stichting Vormingscentrum voor Jong Volwassenen Plus*¹⁶ and *Webb v EMO Air Cargo (UK) Ltd*¹⁷.

54. However, in *Madarassy v Nomura International plc*¹⁸ the Court of Appeal explained that a comparator might be useful in order to determine whether

¹⁶ C-177/88, [1992] ICR 325.

¹⁷ [1994] ICR 770.

¹⁸ [2007] ICR 867.

pregnancy was the reason for the conduct at the heart of the discrimination complaint but once it was established the woman's pregnancy explained the treatment then a comparator was irrelevant. Interestingly, the Code of Practice does suggest at [8.19] that this approach would also be appropriate in respect of claims under s.18 too.

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