

# Indirect discrimination: those without the protected characteristic in question, but who suffer the same disadvantage as the protected group, may bring claims

In the recent case of *British Airways plc v Rollett and others* the EAT has held that individuals may bring claims of indirect discrimination despite not sharing the protected characteristic of the disadvantaged group, provided that they suffer the same disadvantage.

## What happened in this case?

The claimants are cabin crew members employed by British Airways (BA) who were adversely affected by scheduling changes following a restructuring exercise. The claimants argued that these changes unfairly disadvantaged groups with certain protected characteristics, namely: (i) non-British nationals who were required to commute to Heathrow Airport from abroad; and (ii) employees with caring responsibilities (who were predominantly women).

Some claimants had the relevant protected characteristic (i.e. they were non-British nationals and/or women), whereas others did not. Those who did not share the relevant protected characteristics nevertheless argued that they experienced the same disadvantage as those who did. For example, a *British* national commuting from France argued that she suffered the

same disadvantage as her non-British colleagues, as did a *male* employee with caring responsibilities.

### **What was decided?**

The Employment Tribunal (**ET**) held that claimants do not need to share the protected characteristic of the disadvantaged group, so long as they suffer the same disadvantage as a result of the employer's provision, criterion or practice (**PCP**). The PCP in this case was the scheduling change implemented by BA.

BA appealed, arguing that only those who shared the protected characteristic should be allowed to bring claims of indirect discrimination. BA argued that the ET's decision was incompatible with the statutory regime on indirect discrimination, since the Equality Act 2010 (**Equality Act**) requires claimants in indirect discrimination cases to have the same protected characteristic as the group disadvantaged by the PCP.

The EAT dismissed the appeal, holding that the Equality Act could be read compatibly with EU case law, particularly the European Court of Justice's decision in *CHEZ Razpredelenie Bulgaria* (**CHEZ**), which allowed individuals who did not share the protected characteristic to bring indirect discrimination claims if they faced the same disadvantage. The EAT stated that this interpretation of the Equality Act was in line with its purpose, namely to strengthen the law and support progress on equality.

On 1 January 2024, the Equality Act was amended to reflect the decision in CHEZ. BA also sought to challenge the validity of the amendment but the EAT rejected that line of argument.

## What does this mean for employers?

The indirect discrimination regime already requires employers to avoid PCPs which apply equally across the workforce, but which place groups with particular protected characteristics at a disadvantage. Claimants who share the relevant protected characteristic may bring indirect discrimination claims and will be successful if they can show that they were disadvantaged by the PCP, and the PCP cannot be objectively justified. The EAT's decision does not change this. However, the decision clarifies that Employment Tribunals also have jurisdiction to hear such claims even where the claimants do not share the protected characteristic of the disadvantaged group. Although this position was codified in the Equality Act on 1 January 2024, the EAT's decision remains relevant to claims predating that amendment (as well as also underlining that the amendment is valid).

Employers should remain cautious and consider the impact of any PCP on groups with different protected characteristics, but remember that the class of potential claimants in indirect discrimination cases is broader than it may first appear. For example, a policy of full-time office working may disadvantage workers with certain disabilities (e.g. CFS, depression or conditions affecting mobility), by causing them to suffer additional pain, exhaustion, distress or difficulty. Now, workers who do not meet the legal test of disability, but who experience the same types of disadvantages, may be able to bring indirect disability discrimination claims. For example, a menopausal worker whose symptoms were not considered to have a substantial enough effect on her day-to-day activities to amount to a disability, or a worker suffering from short-term reactive depression who did not pass the long-term element of the test might pursue claims for indirect discrimination on a "same disadvantage" basis. In theory, it might even extend to workers who are specifically *excluded* from the definition of

disability, such as those suffering from alcoholism.

[British Airways plc v Rollett and others and Minister for Women and Equalities \(Intervener\)](#)

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Abdullah Ahmed ([AbdullahAhmed@bdbf.co.uk](mailto:AbdullahAhmed@bdbf.co.uk)), Amanda Steadman ([AmandaSteadman@bdbf.co.uk](mailto:AmandaSteadman@bdbf.co.uk)) or your usual BDBF contact.**