

Indirect Sex Discrimination—A View from Across the Pond

By JOANNA WADE*

GEORGE BERNARD SHAW wrote that “England and America are two countries divided by a common language.”¹ This is very true when it comes to the laws prohibiting indirect sex discrimination. Both countries have similar statutes to legally provide for work-life balance: the Sex Discrimination Act (“SDA”) in the United Kingdom² and Title VII in the United States.³ The use of the Sex Discrimination Act in the United Kingdom, however, has been very different than the use of Title VII in the United States.

I. The United Kingdom’s Sex Discrimination Act of 1975

Section 1(2)(b) of the SDA is the cornerstone of the body of law used by mothers in the United Kingdom to realize “family friendly” working hours. The section was amended on October 1, 2005 to give effect to the provisions of the revised European Equal Treatment Directive.⁴ As amended, the SDA now applies such that

a person discriminates against a woman if [] (a) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or (b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but [] (i) which puts or would put women at a particular disadvantage when compared with men, (ii) which puts her at that disadvantage, and (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.⁵

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1. THE OXFORD DICTIONARY OF QUOTATIONS 638 (Angela Partington ed., 4th ed., Oxford Univ. Press 1992) (1941).

2. Sex Discrimination Act, 1975, ch. 65 (U.K.). See PETER WALLINGTON, BUTTERWORTH’S EMPLOYMENT LAW HANDBOOK (14th ed. 2006).

3. 42 U.S.C. §§ 2000e–2000e-17 (2000).

4. Council Directive 76/207, 2002 O.J. (L 269) 15 (EC) (amending Council Directive 76/207, 1976 O.J. (L 39) 40 (EC)).

5. Sex Discrimination Act, 1975, ch. 65, § 1 (2) (U.K.).

Women seeking to work flexible hours typically must use these provisions as follows. First, they must establish the provision criterion or practice ("PCP") in their workplace. This could be all or some of: (1) a requirement to work full-time, (2) a requirement to be office-based and not to work from home, (3) a requirement to work unplanned overtime and hours beyond the typical nine to five shift, or (4) a requirement that the claimant is not to job-share in her role.⁶

Second, they must show that the PCP could or would put women in general at a disadvantage.⁷ This can be done by using either the general knowledge of the court—such as an "employment tribunal"⁸—that mothers have problems working full-time, or by using national statistics to show that whilst eighty-nine percent of men are able to comply with a PCP to work full-time, only around fifty-six percent of women can do so.⁹ Alternatively, statistics from the particular workplace may be examined.

Third, the woman contesting the PCP must establish that she has suffered a detriment.¹⁰ This could mean anything from emotional distress to the loss of her job and career.

Fourth, women seeking to work flexible hours must show that the application of the PCP is not justified. European law has established that the justification must be objective and that the employer must show that the PCP is not just preferable, but necessary.¹¹ Also, the employment tribunal must weigh the effect of the discrimination on the woman against the effect on the business of having to accommodate her needs.¹² An expert witness who has experience in implementing flexible work schedules is typically called to rebut claims from the employer that, for example, clients would be unhappy if they had to deal with job-share partners.

6. Case C-243/95, *Hill v. Revenue Comm'rs and Dep't of Fin.*, [1998] E.C.R. I-03739, available at <http://homepage.univie.ac.at/elisabeth.holzleithner/EuGHHillStapleton1998.pdf>.

7. *Cross v. British Airways*, [2005] I.R.L.R. 423 (Employment Appeals Tribunal) (U.K.).

8. In the United Kingdom, employment tribunals are judicial bodies established to resolve disputes between employers and employees over employment rights. *Employment Tribunals*, <http://www.employmenttribunals.gov.uk/> (last visited Oct. 1, 2006).

9. See Equal Opportunities Commission, *Facts About Women and Men in Great Britain* (2003), available at <http://www.eoc.org.uk/PDF/factsgreatbritain2003.pdf>.

10. *Cross*, [2005] I.R.L.R. 423.

11. See, e.g., *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, [1986] 15 I.R.L.R. 317 (European Court of Justice) (F.R.G.).

12. *Id.*

II. How the United States Invented Indirect Sex Discrimination in *Griggs v. Duke Power Co.*¹³

It is ironic that the indirect sex discrimination arguments appear to have fallen into disrepair in the United States, since, as far as we in the United Kingdom are concerned, indirect sex discrimination was *invented* in the United States. In 1971, the United States Supreme Court held that corporate aptitude tests to assess candidacy for promotion must be job-related and a “demonstrably . . . reasonable measure of job performance.”¹⁴ The Court found that the performance tests at issue in *Griggs* disparately impacted protected groups and therefore amounted to indirect discrimination.¹⁵ “[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.”¹⁶

It seems that Parliament would not have incorporated indirect sex discrimination provisions in the SDA at all had it not been for a fortuitous visit to the United States by senior United Kingdom politicians shortly after *Griggs* and just before the SDA’s enactment in 1975. Lord Anthony Lester, a distinguished United Kingdom barrister, and Roy Jenkins attended a seminar in Philadelphia in December of 1974.¹⁷ There, they heard Professor Louis Pollak discuss the *Griggs* opinion and the danger of defining discrimination too narrowly.¹⁸ Upon his return to the United Kingdom, Lord Lester amended his White Paper on Racial Discrimination¹⁹ to include indirect sexual discrimination in the Sex Discrimination Bill.²⁰

The trailblazing vision of the *Griggs* court made the United Kingdom politicians realize that by illegalizing only direct sex discrimination, they would only be doing half of the job. The *Griggs* decision is so influential that United Kingdom briefs on behalf of plaintiff-victims of indirect sex discrimination often cite the United States Supreme Court’s aforementioned powerful language. The Court understood that the justification for indirect sex discrimination is to have a high

13. 401 U.S. 424 (1971).

14. *Id.* at 436.

15. *Id.*

16. *Id.* at 431.

17. Anthony Lester, *Nailing the Lie and Promoting Equality*, *Jim Rose Lecture* 8 (Oct. 15, 2003), <http://www.runnymedetrust.org/events/aLesterSpeech.pdf>.

18. *Id.*

19. *Id.* (a “white paper” is the official document setting out the British government’s legislative plans).

20. *Id.*

threshold so that employers would not be able to easily pull the wool over the court's eyes.

III. The United Kingdom's Progress with Laws Prohibiting Sexual Discrimination

How is it that United States indirect sex discrimination law has evolved so differently from United Kingdom law when the bases of both laws originated in the 1970s from the same place? The purpose of this Article is not just to recite the successes that women in the United Kingdom have had, but to look at how we got to where we are in the United Kingdom. This may partly explain why United Kingdom law treats parents differently from those in the United States. It may just be a matter of timing.

In 1975, four years after *Griggs*, the law of indirect sex discrimination was implemented in the United Kingdom.²¹ Very shortly thereafter, the European Equal Treatment Directive was issued, defining equal treatment as "no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."²²

Despite this progressive legislation, it would be nine years before the first appellate case that addressed this issue was reported. In *Home Office v. Holmes*,²³ the Employment Appeal Tribunal ruled that a single mother who had been refused part-time work as a public servant was a victim of indirect discrimination.²⁴ In 1986, the European Court of Justice ruled in *Bilka-Kaufhaus GmbH v. Weber Von Hartz*²⁵ that the "justification defence" for the application of the PCP could only be made if the justification was "objective" and based on "necessity."²⁶

Subsequently, there were a number of setbacks where courts declined to apply the law in the progressive, tough-on-sex discrimination manner as they had done in *Holmes* and *Bilka-Kaufhaus*. The decision

21. Sex Discrimination Act, 1975, ch. 65, § 1 (U.K.).

22. Council Directive, *supra* note 4. See also Press for Change, The EEC Equal Treatment Directive (76/207/EEC), available at <http://www.pfc.org.uk/node/299> (last visited Oct. 2, 2006) (providing a definition of the Equal Treatment Directive as "a Directive issued by the Council of Ministers of the European Economic Community (now the European Union), requiring member states to ensure the principle of equal treatment for men and women in employment training").

23. [1984] 13 I.R.L.R. 299 (Employment Appeal Tribunal) (U.K.).

24. *Id.*

25. [1986] 15 I.R.L.R. 317, 320-21 (European Court of Justice) (F.R.G.).

26. *Id.*

of *Clymo v. Wandsworth London Borough Council*²⁷ marked the low point. The thrust of the *Clymo* decision mirrors those that have been made recently in the United States. In *Clymo*, the Employment Appeal Tribunal held that the employer did not apply a "requirement" (what is now referred to as a PCP) to the female employee when it refused to offer her part-time employment due to her pregnancy. The tribunal found that "full-time working was one of the terms of employment which she was initially offered and accepted when she took the job."²⁸ Thus, having failed to comply with the requirement (now PCP) element, Ms. Clymo could not have suffered indirect discrimination under section one of the SDA.²⁹

Five years earlier, the *Holmes* tribunal had confronted, and explicitly rejected, this same argument accepted by the tribunal in *Clymo*. Instead, the *Holmes* tribunal found that a condition or requirement of full-time service was not justifiable and, therefore, unlawful under the SDA.³⁰

Another decade would pass before an employment appeal tribunal unequivocally re-rejected the *Clymo* approach. In *Briggs v. North Eastern Library Board*,³¹ the Northern Ireland Court of Appeal held that in order for an employer to require full-time work, the employer must show an objective justification" for that requirement.³² This decision revealed agreement with the guidance issued in *Holmes*, which provided that the terms

"requirement" and "condition" are plain, clear words of wide import fully capable [for example] of including an obligation of [full-time work, and there is] no basis for giving them a restrictive interpretation in the light of the policy underlying the Act, or in the light of public policy.³³

As a result of the *Holmes* standard and the ruling in *Briggs*, it is possible to successfully litigate an indirect sex discrimination case where the employer tries to require a woman to work full-time, without an objective justification.

Nonetheless, despite this progress in sex discrimination law, a victory in a case where there was *unintentional* indirect sex discrimination was still a hollow one as courts refused to award compensation.³⁴ This

27. [1989] 18 I.R.L.R. 241 (Employment Appeal Tribunal) (U.K.).

28. *Id.* at 247-48.

29. *Id.*

30. *Holmes*, [1984] 13 I.R.L.R. at 301.

31. [1990] I.R.L.R. 181.

32. *Id.*

33. *Holmes*, [1984] 13 I.R.L.R. at 301.

34. Sex Discrimination Act, 1975, ch. 65, § 66 (3) (U.K.).

was remedied in 1996, when Parliament responded by adding an amendment to the SDA. As amended, the SDA now allows compensation to be awarded in all indirect sex discrimination cases, whether the discrimination is intentional or not.³⁵

Now, over thirty years after the SDA was first implemented, aggrieved parties face no impediments to bringing a successful and financially rewarding claim of indirect sex discrimination before an employment tribunal. Not-for-profit organizations and campaigning lawyers jump at the opportunity to bring claims, as they have successfully litigated many cases. Courts have become increasingly familiar with the concepts involved and appear to be more willing to find that the employer did not have a justifiable reason to reject a request for "family friendly" hours.³⁶ In *London Underground, Ltd. v. Edwards*,³⁷ the employer wanted to introduce a new shift system but an employee who was a single parent could not comply. The employer argued that the new system was "necessary" to reduce costs, staffing problems, and also to improve efficiency. Because the employer was unable to show that the new arrangements were justified, the Tribunal found that it could have accommodated the temporary family demands of a long-serving employee without losing the benefits of its reorganization.³⁸

A. The Five "Environmental" Conditions

What is it about the past thirty years, since the implementation of the SDA, that has allowed for the proliferation and successful litigation of indirect sex discrimination cases in the United Kingdom? My inclination is that it is due to the efforts of inspired lawyers. While there is surely truth to that statement, there are also some environmental factors that have served to make the conditions just right.

First of all, over the last eight years, the government has increasingly acknowledged the business case for flexible working arrangements. Key women in the majority Labour government, who have

35. Sex Discrimination Act, 1975, ch. 65, § 1 (1)(b) (U.K.) (inserted by The Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996, S.I. 1996/438, available at http://www.opsi.gov.uk/si/si1996/Uksi_19960438_en_1.htm (Crown Copyright 1996) (last visited Oct. 6, 2006) (Statutory Instrument abbreviated as "S.I.")). The Explanatory Note to S.I. 1996/438 states that the amendment "enables an [employment tribunal] to award compensation to a person who has suffered indirect discrimination under . . . the 1975 [Sex Discrimination Act], even where the respondent did not intend to treat the claimant unfavourably on the ground of his sex . . . , where it would not be just and equitable to grant other remedies alone." *Id.*

36. See, e.g., *Hill*, [1998] E.C.R. I-03739.

37. [1999] I.C.R. 494 (Court of Appeal) (U.K.).

38. *Id.*

campaigned on feminist issues for many years, delivered on campaign pledges made whilst they were in opposition. For example, in 2002, the Employment Rights Act of 1996³⁹ was amended to provide a statutorily-protected right to ask for flexible working schedules.⁴⁰ The amendment does not guarantee any definite substantive rights to employees; it does, however, prescribe a set of regulated procedures for requesting flexible working schedules, a set of rational guidelines employers must follow in handling such requests, and remedial measures available to the employee if those guidelines are not followed.⁴¹

Secondly, the economy in the United Kingdom is healthy and employment levels are high. As a result, employers need part-time in addition to full-time staff.

Third, changes to the way unemployed people are supported by the state—again inspired to a large degree by the United States—have made it increasingly desirable for unemployed people to work, even for the low wages available to part-timers. The thrust of the Clinton-inspired changes in the United Kingdom has been to reconfigure the system so that those who work but earn low-wages (perhaps as a result of their part-time employment) receive more financial support by having their incomes subsidized by the government. Those who do not work at all are, therefore, at a distinct disadvantage, which compels them to work. In the past, those who were unemployed and received governmental benefits believed that they could not afford to work for low-wages or as a part-time worker because they would be worse-off than when they were solely relying on the benefits.

Fourth, “downshifting,” by choosing quality of life over wealth, has become a popular concept that has captured the national imagination in the United Kingdom. It is increasingly common to reject long hours in favor of a part-time schedule. High-quality staff is available if the employer is willing to recruit part-timers or job-share partners.

Finally, the fifth environmental factor is the erosion of discriminatory stereotypes. In the United Kingdom, the discriminatory stereotype that a “woman’s place is in the home” has, to a great degree, been obliterated, and it is understood that the cost of living and the high costs of housing require both parents to work in all but the

39. Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, S.I. 2002/3236, available at <http://www.opsi.gov.uk/si/si2002/20023236.htm> (Crown Copyright 2002) (last visited Oct. 6, 2006).

40. *Id.*

41. *Id.*

wealthiest households. Despite much conflict in the research community, there are no studies that show definitively that to have a parent working—certainly working only part-time—is bad for children. Further, although early feminism was slow to recognize the importance of motherhood, it is now universally understood in the United Kingdom that treating a woman unfairly simply because she is a mother is sex discrimination.

B. Bringing a Claim Is Economically Feasible

In the court system, the employment tribunal has a unique costs regime in that it is highly unlikely that a losing party will have to pay costs. If required, however, paying your own costs in a tribunal is relatively cheap.⁴² This low cost decreases the risk of bringing an indirect sex discrimination claim, making it an attractive option to those who have suffered adverse employment actions. Further, many employees in the United Kingdom have low-cost insurance, which covers full legal costs so long as the legal issue fits within the terms of the insurance policy.

IV. The Dark Side of Working Part-Time

There are, naturally, practical disadvantages to working part-time that preclude women from leaving their full-time jobs in the first place. Part-time work is not all it is thought to be. A mother who works full-time and is contemplating part-time employment will find that the flexibility she will have is often more in her employer's interests than her own. For example, a part-time employee may have absolutely no security in the number of work hours she is guaranteed nor the stability in having a consistent schedule.⁴³ The part-time employee is subject to what is known as a "zero hours" contract,⁴⁴ which can result in the employee being offered no work and, therefore, no compensation at all. Furthermore, part-time women are typically paid forty percent less per hour than their full-time equivalents.

42. Typically for our firm, Palmer Wade, costs range between £7,000 and £15,000 (approximately \$13,331.85 to \$28,568.25) if the case settles and around £25,000 (approximately \$47,613.75) if it does not. See OANDA, *FXConverter Result Currency Converter for 164 Currencies*, <http://www.oanda.com/convert/classic> (last visited Nov. 8, 2006) (stating a current conversion rate of 1 British Pound (G.B.P.) to 1.90455 U.S. Dollar (U.S.D.)).

43. See generally Patricia Leighton, *Note: Problems Continue for Zero Hours Workers*, 31 *INDUS. L.J.* 71 (2002) (describing a recent case dealing with a zero hours contract).

44. A "zero hours" contract is a recently emerging type of contract under which an employer does not guarantee the employee a fixed number of hours per week; rather, the employee is expected to be on call and receive compensation only for hours worked. *Id.*

Moreover, many women do not want to litigate if they are refused part-time work and will accept a lower status job or leave altogether rather than get into a conflict with the employer. The upside of bringing a claim is that a claimant will likely get monetary compensation. The downside is that, in the process, she might have jeopardized, or even lost, her career. Taking legal action is akin to shutting the stable door after the horse has bolted.

V. Employers Need Part-Time Employees

It has often been said by an angry employer facing what he or she sees as more and more rights for parents, "I will never employ a woman of childbearing age again." But the simple fact is that they do. Whether it is because women are better or cheaper sources of labor than men is to be debated, but every year, more women join the workforce. As a result, the consequences for employers refusing part-time schedules are becoming even more financially onerous.

Additionally, the achievements of women in the workplace have resulted in greater numbers of women in important positions with more leverage and influence, which in turn requires more employer flexibility.⁴⁵ That this is not a simple situation is undoubtedly true, but the availability of flexible work has grown exponentially over the last ten years. Now, we have in place a statutory procedure that allows a parent to seek flexible work and requires the employer to legitimately consider the request.

Conclusion

The situation continues to evolve, and a recent proliferation of men seeking flexible work schedules has emerged. A recent study shows that there is a slow, but steady, rise in the numbers of men working part-time.⁴⁶ If men take more responsibility for children, there will, of course, be no "particular disadvantage" to women compared to men, eventually making the indirect sex discrimination argument obsolete. In the meantime—and since, in reality, the development of the idea that men take principal responsibility for their children is quite the sluggish endeavor—I hope that this view of where we are in the United Kingdom and how we got there will be of

45. See, e.g., Equal Opportunities Commission, *supra* note 9 (listing the gender pay gap in individual incomes in 2000–01 at fifty-one percent and in 2002–03 at forty-six percent).

46. *Id.*

interest. I also hope that it will be of help to lawyers in the United States seeking to re-ignite the flame lit all of those years ago in *Griggs*. Indirect sex discrimination is a sound and important concept, and one that merits the undivided attention of not only the United Kingdom, but the United States as well.