



Unite the Union’s response to/comments on the consultation on improving protection from disability discrimination

Response due by 6 January 2009 to office-for-disability-issues@dwp.gsi.gov.uk

This response is submitted by Unite the Union (“Unite”). Unite is the UK’s largest trade union with 2 million members across the private and public sectors. Unite’s members work in a range of industries including manufacturing, financial services, print, media, construction, transport and local government, education, health and not for profit sectors. A large number of our members are or will become disabled during their working lives. Any changes to the definitions or concepts of disability discrimination will therefore impact either immediately or in the future upon a large number of Unite’s members. It will also impact upon Unite’s representatives who may attend and represent disabled members at grievance and disciplinary hearings and who may support or advise disabled members.

Executive Summary

1. Unite welcomes the Government's recognition of the concerns caused by the decision of the House of Lords in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* ("the *Malcolm* decision") and its intention to address and remedy these concerns. However, Unite considers that the suggested means of remedying the situation, simply by introducing the concept of indirect discrimination into the disability discrimination legislation, will not provide a proper resolution to the difficulties raised and will not have the desired effect. Unite considers that the most appropriate means of remedying the issue and of addressing the need to meet anticipated European requirements as referred to in the consultation document is to adopt the concept of indirect disability discrimination as well as amending the concept of disability-related discrimination to remove the requirement for a comparator.
2. Unite welcomes and agrees with the Government's suggestion that the Equality Bill should include a provision that requires a duty holder to fulfill the duty to make reasonable adjustments before that duty holder can seek to objectively justify indirect discrimination.

Consultation question 1 - Do you agree that the Equality Bill should adopt the concept of indirect discrimination for disability?

If you disagree, please explain your reasons for this and whether you consider any adverse consequences would arise from adopting indirect discrimination.

3. Unite does not consider that simply adopting the concept of indirect discrimination in relation to disability will be an effective means of

remedying the concerns that have arisen as a result of the Malcolm decision. However, Unite recognises the anticipated European requirements and considers that the concept of indirect discrimination should be adopted together with an amended disability-related discrimination concept (removing the need for a comparator), which together would have the effect of both remedying the difficulties that have arisen as a result of the Malcolm decision and also of complying with the anticipated European law requirements. This is for the following reasons.

4. Unite recognises that the Malcolm decision has narrowed the concept of disability-related discrimination by effectively reducing it to a type of direct discrimination rather than enabling it to be applied to situations of both direct and indirect discrimination. Unite therefore recognises the need for increasing the scope of indirect disability discrimination beyond its current remit, which effectively now primarily encompasses reasonable adjustments claims.

5. However, it is not clear that introducing the concept of indirect discrimination as suggested extends the reach of indirect discrimination either satisfactorily or indeed to the point where it was prior to the Malcolm decision. Whilst there are a number of situations which, following the Malcolm decision, could no longer successfully form the basis of claims for disability-related discrimination but could instead form the basis of successful reasonable adjustment claims, there are some situations that cannot simply now be successfully brought as reasonable adjustment claims. For example, those situations where it might at an earlier stage have been possible to make reasonable adjustments, but such adjustments might not be appropriate because the circumstances at the time of dismissal are different and the opportunity to make the adjustments may have been lost. It is not clear that the suggested indirect discrimination provisions would necessarily provide the same level

of protection that the individual would have had by bringing a disability-related discrimination claim prior to the Malcolm decision.

6. The intended concept of indirect discrimination, with its suggested focus upon considering whether members of the protected group (in this case, disabled people) are more likely to suffer the disadvantage complained of than the comparator group (in this case, non-disabled people), is not completely suited to the concept of disability, given the very personal and individualised nature of disability. The same condition may well impact very differently upon different people, and conditions may progress, or indeed go into remission, at different rates. As a result, particular practices or policies may impact very differently upon one individual than upon another individual with a similar disability. It is therefore extremely difficult to apply a group-focused approach in this context, and Unite considers that the use of the indirect discrimination concept is a less appropriate concept than disability-related discrimination, which focuses much more upon the individual nature of disability discrimination.

7. So for example, the consultation paper analyses the fact situation that arose in the Malcolm case itself in the context of the suggested concept of indirect disability discrimination. It suggests that the housing association's practice of taking eviction proceedings against those tenants that sublet would place disabled people at a particular disadvantage compared with those who were not disabled, on the grounds that there would be a greater likelihood of disabled people being subjected to eviction proceedings for subletting (as a consequence of their inability to understand that they may not sublet) than non-disabled people. However, Unite considers that this suggestion is contentious and that many arguments could be raised and evidence supplied to the effect that non-disabled people might be equally as likely to sublet, or that most disabled people would not have sublet had they been in Mr Malcolm's position. Such arguments did not and would

not arise in respect of the disability-related discrimination claim given the emphasis on the individual disability and the treatment that resulted.

8. Given the above, Unite considers that any introduction of an indirect disability discrimination concept must be coupled with the introduction of an amended disability-related discrimination concept. The amendments that Unite considers must be made are that the requirement for a comparator in disability-related discrimination should be removed and it should be made clear that the knowledge or otherwise of the respondent/defendant is not relevant to whether disability-related discrimination has taken place, although it will be relevant in relation to justification. Unite notes the concerns set out in the consultation document about the removal of a comparator, but does not agree with these, primarily on the basis that adopting such an amendment would not radically alter the position as it was in relation to disability-related discrimination prior to the Malcolm decision, given that the Clark v Novacold test for the comparator introduced a fairly low threshold for the purposes of the comparison in any event, a point noted by both Lords Neuberger and Scott in the Malcolm decision. Unite considers that the removal of the comparator would not lead to a dramatic and disproportionate increase in the number of successful disability-related discrimination claims than there were prior to the Malcolm decision, given both that the situation would in effect return to the position as it was in Clark v Novacold and given that the defence of justification would obviously still be available to a respondent/defendant.
9. Unite considers that the quandary faced by the House of Lords in Malcolm is much better addressed by applying the justification defence that applies in employment cases to housing cases. This, we understand, is the Government's intention in any event, and Unite considers that this should allay any concerns similar to those that arose in the Malcolm case itself in

relation to the very limited justification defence available in housing cases.

10. In relation to the indirect discrimination concept itself, Unite considers that any concept of indirect discrimination that is introduced should include specific provision to the effect that, in disability cases, a one-off act, omission or decision falls within the definition of a "provision, criterion or practice". Unite notes that the consultation document makes reference to the fact that this is the intention, following the decision of the Employment Appeal Tribunal in Starmmer v British Airways, but considers that specific legislative provision should be included given that the issue could arise in higher courts. In addition, Unite considers that specific legislative provision should be included to explain that the "modern approach" as set out in the consultation document is intended to apply to the concept of indirect discrimination as it does not believe that reliance on parliamentary statements or other guidance is sufficient (as can be seen with striking effect in the Malcolm decision itself. In addition, the House of Lords decision in Pepper v Hart [1993] confirms that there is a general rule excluding the use of Hansard or parliamentary material by courts as an aid to statutory construction). Unite also considers that it should be made clear in any legislative definition of indirect disability discrimination that the employer's knowledge of the disability is not relevant to a finding on liability (although it may of course be relevant when considering justification).

11. Unite notes the concerns set out at various points in the consultation document about harmonising the different areas covered by discrimination legislation. However, Unite considers that there are certain aspects of disability discrimination, such as the issue of knowledge, that do not apply to all areas of discrimination and that there cannot therefore be complete uniformity, although it believes that the approach suggested will ensure that there is as much uniformity as is possible. Unite also notes the

concern in the consultation document for legislative certainty, and considers that its proposals as set out above, including in particular its proposals for specific legislative provisions and definitions, will deliver this.

Consultation question 2: Do you agree that the Equality Bill should include a provision that requires a duty holder to fulfil the duty to make reasonable adjustments before that duty holder can seek to objectively justify indirect discrimination?

12. Unite does agree with and welcomes this suggestion. This reflects the similar provision in relation to disability-related discrimination in section 3A(6) of the Disability Discrimination Act 1995 and its inclusion is appropriate.

Roger Jeary
Director of Research
Unite the Union
Transport House
128 Theobalds road
Holborn
London WC1X 8TN

Tel 020 7611 2630