

OLD SQUARE
CHAMBERS





**Demonstrating
Disparate Impact**
(Somerset CC v Pike)

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The context

- *Somerset CC v Pike* is one of a “holy trinity” of cases dealing with the proper approach to **identifying the pool** for comparison in a case where **statistical disparate impact** is relied on to show indirect discrimination
- The other two cases are:
 - *Secretary of State for Trade and Industry v Rutherford (No. 2)* [2006] ICR 785, HL
 - *Grundy v British Airways plc* [2008] IRLR 74, CA
- *Pike* and *Grundy* interpret, apply and generally try to make sense of what the House of Lords (not “speaking with one voice”) decided in *Rutherford*



The wider context

Note, however: assessing disparate impact within a pool is only one way in which indirect discrimination may be proved; there are others:

Ministry of Defence v Armstrong [2004] IRLR 672, EAT:

- The categories of indirect discrimination are not closed
- The fundamental issue in any case is causation: is the difference in treatment is indirectly linked **in any way** to sex?
- The traditional analysis for disparate impact using a pool will not always be appropriate
- *MoD v Armstrong* is one example; length of service cases another



***Rutherford* – a difficult case**

- Concerned statutory bar on redundancy pay over 65
- More men than women worked beyond 65
- But majority of HL held that correct pool is only those working beyond 65
- Therefore everyone (male or female) subject to same statutory bar
- So no disparate impact
- But even the majority of the HL did not “speak with one voice”



Grundy and Pike – interpreting and applying Rutherford

- Identification of pool is part of tribunal’s fact-finding exercise
- But – limited by the dictates of logic
- May or may not be more than one logical pool
- Failure to apply proper “logic” will allow appellate court to interfere



- The key determinant for the application of logic in any case will be the allegation or issue which the claimant has raised
- That will involve an allegation of either a disadvantage to the claimant and others of the same sex, or an advantage to the comparator
- The pool must be one which is suitable to test the particular allegation about the particular advantage/disadvantage



- The pool should be one which covers **all** those people, **but only** those people who have an interest in the advantage/disadvantage
- And to whom the measure which determines who has the advantage or who is disadvantaged is applied
- It should not include people who have no interest in the advantage or disadvantage



- Thus in *Pike* the only people with an interest were retired teachers who had returned to work
- That worked to the advantage of the claimants in that case
- But see some worrying recent developments, with what may be regarded as a misapplication of the *Rutherford/Grundy/Pike* principles to favour employers – *Hacking & Paterson v Wilson*, EAT (Scotland), 27 May 2010

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