# Application of direct discrimination to male and female employees sharing one set of toilets – *Earl Shilton Town Council v Miller* [2023] EAT 5

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*Arrangements that are the "same" between the sexes can nonetheless constitute direct discrimination, and there is no need for any group disadvantage to establish direct discrimination – an arrangement can simultaneously be directly discriminatory against both sexes.*

## Introduction

1. This was an appeal brought by the Respondent town council to a finding that it had directly discriminated, on grounds of sex, against its employee in relation to the toilet facilities it provided to staff.

2. The council was a very small employer who operated from premises which it shared with a playgroup. The male toilets, consisting of a urinal trough and a single cubicle, were in the part of the building used by the council, but the female toilets were in the part of the building used for the playgroup. As a result, when female employees wished to use the toilets they needed to ask the playgroup staff to check the toilets to ensure there were no children in them.

3. The council then instead made an arrangement whereby a sign was provided to put on the previously male-only toilets to indicate when a female employee was using them. Perhaps unsurprisingly this method was not fool proof, and female employees would sometimes enter the toilets, or exit the cubicle, while a male employee was using the urinal (and, of course, male employees using the urinal would by the same token sometimes be "walked in on" by female employees).

4. Ms Miller brought a claim in direct sex discrimination based on a number of issues in the above arrangements, along with a failure to make adequate provision for a sanitary bin which required her to inform a member of maintenance staff when it needed to be emptied. The Tribunal found in her favour, and the Respondent brought an appeal on a number of bases.

5. The most interesting aspect of the appeal concerns the correct approach to the application of direct discrimination to the situation when male and female employees "shared" the one set of toilets where, on first consideration, one might think that neither sex is less or more favoured by the arrangement.

The Appeal and Consideration by the EAT

6. The Respondent brought an appeal on this point on the basis that a claim in direct discrimination requires a comparator, and the Tribunal failed to consider whether any detriment to female employees by the arrangement was equivalent to that of the male employees – that is, that the risk of "walking in on" and "being walked in", while not ideal for either, was not discriminatory.

7. HHJ James Taylor, giving the judgment of the EAT, noted that Section 13 of the Equality Act was concerned with *less favourable* treatment rather than *different* treatment: for example, uniform requirements can permit of different requirements between the sexes without being discriminatory, where the code as a whole does not treat either sex less favourably (as per ***Smith v Safeway Plc [1996] 2 WLUK 311***).

8. Similarly, the Court of Appeal more recently made clear that *same* treatment can nonetheless be less favourable in ***Chief Inspector of Education, Children's Service and Skills (Secretary of State for Education and others intervening) v Interim Executive Board of Al-Hijrah School [2018] IRLR 334***. In that case, the school operated segregated playing areas for boys and girls.

9. The Court of Appeal in that case stressed the individual nature of direct discrimination, not requiring (as indirect discrimination does) any group disadvantage. It was sufficient that a particular boy or girl, from their individual perspective, suffer the detriment of being segregated from the other sex, and they do so because of the protected characteristic of their sex. In particular, the fact that a person of the opposite sex could bring a "mirror image" claim does not invalidate the ability of either to do so.

10. The result is, as HHJ observed in paragraph 20 of his judgment, that “in certain circumstances treatment that is the “same” could be less favourable treatment and in other circumstances treatment that is “different” would not be less favourable”.

11. In the same paragraph, the judge makes something of a plea for the use of “robust common sense” by Employment Tribunals in determining whether less favourable treatment is made out.

12. He then applies the above approach to this case:

> *“Taken from her perspective the claimant was treated less favourably than men in that she, a woman, was at risk of seeing a man using the urinals. While a man might see another man use the urinals, the treatment of the claimant, as a woman, was less favourable. A woman being at risk of seeing a man using the urinals is obviously not the same as the risk of a man seeing another man using the urinals”.*

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