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Consider two competing definitions of indirect discrimination:

- (i) Indirect discrimination occurs when an apparently neutral procedure, criterion or practice in fact *imposes a specific disadvantage* on the members of a certain group, and cannot be justified as a measure pursuing a legitimate objective by proportionate means.
- (ii) Indirect discrimination occurs when an apparently neutral procedure, criterion or practice *disproportionately affects* the members of a certain group, and cannot be justified as a measure pursuing a legitimate objective by proportionate means. This is sometimes referred to as "disparate impact" discrimination.

Now try to answer the following questions, before turning to the answers and explanations.

### INDIRECT DISCRIMINATION - EXERCISE 1 (1/1 point)

1. A sikh wears a turban in his daily life, as he considers this part of his religious duties. He therefore refuses to wear safety headgear during his work on a construction plant. This results in the termination of his labour contract, because safety rules impose a "hard hat" policy on the site. Would you call this:

- ☐ A restriction of freedom of religion;
- ☐ A potential instance of indirect discrimination; or,
- ☒ Both a restriction of freedom of religion and a potential instance of indirect discrimination. 

#### EXPLANATION

The facts of this case correspond to *Karnel Singh Bhinder v. Canada*, a communication (No. 208/1986) presented to the Human Rights Committee, who adopted its final views on the case on 9 November 1989. The author of the communication alleged both a violation of Article 18 ICCPR (freedom of religion) and of Article 26 ICCPR (non-discrimination). Canada on the other hand argued that the author was not discharged from his employment because of his religion as such but rather because of his refusal to wear a hard hat, and contends that a neutral legal requirement, imposed for legitimate reasons and applied to all members of the relevant work force without aiming at any religious group, cannot violate the right defined in article 18, paragraph 1, of the Covenant. Though the Human Rights Committee did not accept this reasoning, which would have shielded from scrutiny any measure not directly targeting addressees on grounds of a prohibited ground, it did not find a violation of the Covenant. According to the

Committee: 'If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3 (according to which the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others). If the requirement that a hard hat be worn is seen as a discrimination *de facto* against persons of the Sikh religion under article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant'.

It is unclear whether this would still be the position of the Committee today. Clearly, it may be asked whether a turban is not as protective as a hard hat as worn by other employees on the site. Moreover, it might have been possible for the employer to search for means to accommodate the specific needs of M. Singh Bhinder, for instance by training him into a position that would not fall under the hard hat policy.

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