Hilary Term
[2017] UKSC 27
On appeals from: [2015] EWCA Civ 609 and [2015] EWCA Civ 1264

JUDGMENT

Essop and others (Appellants) *v* Home Office (UK Border Agency) (Respondent)
Naeem (Appellant) *v* Secretary of State for Justice (Respondent)

before

Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

5 April 2017

Heard on 14 and 15 November 2016

Appellant (Essop and ors)
Karon Monaghan QC
Nicola Braganza
(Instructed by Thompsons Solicitors LLP)

Respondent (Home Office)
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Appellant (Naeem)
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LADY HALE: (with whom Lord Clarke, Lord Wilson, Lord Carnwath and Lord Hodge agree)

1. Ideally, discrimination ought to be an easy concept, although proving it may be harder. But we do not live in an ideal world and the concepts are not easy, as these two cases illustrate all too well. The law prohibits two main kinds of discrimination - direct and indirect. Direct discrimination is comparatively simple: it is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. Indirect discrimination, however, is not so simple. It is meant to avoid rules and practices which are not directed at or against people with a particular protected characteristic but have the effect of putting them at a disadvantage. It is one form of trying to "level the playing field".

2. The two cases before us are about indirect discrimination on grounds of race and/or age and/or religion. Indirect discrimination is defined in section 19 of the Equality Act 2010 in this way:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> > (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> >
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Subsection (3) lists the relevant protected characteristics, which include age, race and religion or belief.

3. Mr Essop's case relies upon both age and race; Mr Naeem's case relies on both race and religion but primarily religion. Section 9 explains what is meant by race:

> "(1) Race includes - (a) colour; (b) nationality; (c) ethnic or national origins.
>
> (2) In relation to the protected characteristic of race -
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.
>
> (3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.
>
> (4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group."

Section 5(1) and (2) makes provision equivalent to section 9(2) for people who belong to or share a particular age group, which may be defined either by reference to a particular age or an age range. Section 10(3) makes equivalent provision for people of, or who share, a particular religion or belief.

4. The concept of discrimination obviously involves comparisons between groups or individuals. Section 23(1) provides that:

> "On a comparison of cases for the purpose of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

5. Having defined what is meant by discrimination, the Act goes on to define the circumstances in which it is unlawful. Relevant to these appeals is section 39(2):

> "An employer (A) must not discriminate against an employee of A's (B) - (a) as to B's terms of employment; (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service."

6. Finally, the Act deals with the burden of proof in civil proceedings before a court or a list of tribunals which includes an employment tribunal. Relevant to these appeals are section 136(2) and (3):

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

The Essop case

7. Mr Essop is the lead appellant in a group of 49 people, six of whom have been chosen as test cases. They are, or were, all employed by the Home Office. Mr Essop is an immigration officer who has been employed by the Home Office since 1995. It is common ground that the relevant "provision, criterion or practice" (PCP) in this case is the requirement to pass a Core Skills Assessment (CSA) as a pre-requisite to promotion to certain civil service grades.

8. At the relevant times, the Home Office required all employees to take and pass a CSA in order to become eligible for promotion to the grades of Higher Executive Officer (HEO) original, HEO interim or Grade 7. The CSA was a generic test required for each of these grades, irrespective of the particular role. Its stated purpose was to test the core skills required to operate as a civil servant at those grades, rather than the knowledge and skills required for the particular post sought.

Candidates who passed the CSA would then be required to sit and pass a Specific Skills Assessment relevant to the particular post. All the appellants have, at some time, failed the CSA and were thus not, at that time, eligible for promotion.

9. In 2010, a report commissioned by the Home Office from a firm of occupational psychologists, Pearn Kandola, revealed that Black and Minority Ethnic (BME) candidates and older candidates had lower pass rates than white and younger candidates. All non-white candidates were pooled into a single BME grouping, although a more detailed breakdown of ethnicity was available, in order to maximise the size of the group and thus the reliability of the analysis. (Whether this is an appropriate approach is not in issue before this Court but was left open by the Employment Tribunal.) The BME pass rate was 40.3% of that of the white candidates. The pass rate of candidates aged 35 or older was 37.4% of that of those below that age. In each case, there was a 0.1% likelihood that this could happen by chance. Of course, they did not all fail. No-one knows why the proportion of BME or older candidates failing is significantly higher than the proportion of white or younger candidates failing.

10. Proceedings were launched in the London South Employment Tribunal. It was agreed between the parties that a pre-hearing review was required to determine whether the claimants were required for the purposes of section 19(2)(b) and/or (c) to prove what the reason for the lower pass rate was. The Home Office argued that they did need to do so. The claimants argued that they did not. The Employment Judge held that they did have to prove the reason. The claimants appealed to the then President of the Employment Appeal Tribunal, Langstaff J, who sat alone on this occasion. He held that they did not have to prove the reason. It was enough to show that the group had suffered, or would suffer, the particular disadvantage of a greater risk of failure and that each individual had in fact suffered the disadvantage of failure: [2014] UKEAT/0480/13; [2014] ICR 871. The Home Office appealed to the Court of Appeal, which held that the claimants had to show why the requirement to pass the CSA put the group at a disadvantage and that he or she had failed the test for that same reason and gave general guidance for the Employment Tribunal handling the claims: [2015] EWCA Civ 609; [2015] ICR 1063.

11. The principal issue of law on appeal to this Court, therefore, is whether section 19(2)(b) and (c) of the 2010 Act requires that the reason for the disadvantage suffered by the group be established and that the reason why the individual has suffered from that disadvantage be the same. Also in issue are how the disadvantage is to be defined in this case and how and by whom the burden of proving the reason for it is to be discharged.

The Naeem case

12. Mr Naeem is an imam who works as a chaplain in the Prison Service. Some prison chaplains are employed on a salaried basis under contracts of employment. Some are engaged on a sessional basis as and when required and paid at an hourly rate. Both groups are required to undergo training. Before 2002, Muslim chaplains were engaged on a sessional basis only, because the Prison Service believed that there were not enough Muslim prisoners to justify employing them on a salaried basis. Mr Naeem began working as a prison chaplain at HMP Bullingdon in June 2001, at first on a sessional basis, but in October 2004 he became a salaried employee. It is common ground that the PCP in question is the Prison Service pay scheme for chaplains, which incorporates pay progression over time and thus pay is related to length of service.

13. Like many public sector employers, the Prison Service operates an incremental pay scale, with (usually) annual increments in pay in addition to any cost of living increases until the top of the scale is reached. When Mr Naeem became an employee it would take 17 years to progress from the bottom of the pay scale (where employees normally began) to the top. The Prison Service has since reduced the time taken to climb from the bottom to the top, with the eventual aim of reducing the ladder to six years. This was done gradually, so that a new joiner in 2009 would take only nine years to do so. Existing chaplains were granted accelerated progress up the scale so that they could keep pace. But the whole process was interrupted by government constraints and a pay freeze from 2010/11 onwards.

14. These proceedings were launched in April 2011. On 1 April 2011, the average basic pay for Muslim chaplains was £31,847, whereas the average basic pay for Christian chaplains was £33,811. This was because Muslims had only been employed on a salaried basis since 2002, whereas a substantial number of Christian chaplains had started their employment before that date. Hence their average length of service was longer and they had had more time to climb the ladder. Of course, a Christian chaplain who started in salaried employment on the same date as a Muslim chaplain, and who had the same appraisal record, would be paid the same.

15. Mr Naeem brought proceedings in the Reading Employment Tribunal complaining that the incremental pay scheme was indirectly discriminatory against Muslim or Asian chaplains. It resulted in his being paid less than Christian chaplains in a post where length of service served no useful purpose as a reflection of ability or experience. The Tribunal held that the pay scheme was indirectly discriminatory in relation to both race and religion, but that it was objectively justified as a proportionate means of achieving a legitimate aim. Each side appealed to the Employment Appeal Tribunal, which held that the pay scheme was not indirectly discriminatory at all, because chaplains employed before 2002 should be excluded

from the comparison between the two groups. However, if the EAT were wrong about that, the pay scheme had not been shown to be a proportionate means of achieving a legitimate aim. There were various possible ways of modifying the scheme so as to avoid the disadvantage suffered by people such as the claimant, which the tribunal ought to have considered: UKEAT/0215/13/RN; [2014] ICR 472. Mr Naeem's appeal to the Court of Appeal was dismissed. It was not enough to show that the length of service criterion had a disparate impact upon Muslim chaplains. It was also necessary to show that the reason for that disparate impact was something peculiar to the protected characteristic in question: [2015] EWCA Civ 1264; [2016] ICR 289.

16. Thus, although the reason for the differential impact of the length of service criterion is known, one issue in Mr Naeem's case is whether the reason for the disadvantage which he suffers has also to be related to the protected characteristic of his religion or race. It is also in issue whether the pool for comparison should be all prison chaplains or only those employed since 2002 and whether the EAT was entitled to interfere with the decision of the Employment Tribunal.

Direct and indirect discrimination

17. Under the Sex Discrimination Act 1975 and the Race Relations Act 1976, direct discrimination was defined as treating a person less favourably than another "on the ground of her sex" or "on racial grounds". Under section 13(1) of the Equality Act 2010, this has become treating someone less favourably "because of" a protected characteristic. The characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment: an example is *Preddy v Bull* [2013] UKSC 73; [2013] I WLR 3741, where reserving double-bedded rooms to "hetero-sexual married couples only" was directly discriminatory on grounds of sexual orientation. At other times, it will not be obvious, and the reasons for the less favourable treatment will have to be explored: an example is *Nagarajan v London Regional Transport* [2000] 1 AC 501, where the tribunal's factual finding of conscious or subconscious bias was upheld in the House of Lords, confirming the principle, established in *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 and *James v Eastleigh Borough Council* [1990] 2 AC 751, that no hostile or malicious motive is required. *James v Eastleigh Borough Council* also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it.

18. The concept of indirect discrimination has proved more difficult to define in statutory terms. The original version in section 1(1)(b) of the Sex Discrimination Act 1975 provided that a person discriminates against a woman if

> "he applies to her a requirement or condition which he applies or would apply equally to a man but - (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and (iii) which is to her detriment because she cannot comply with it."

Essentially the same definition was contained in section 1(1)(b) of the Race Relations Act 1976, as originally enacted.

19. Much, but by no means all, of the Equality Act 2010 is derived from our obligations under European Union law. Those parts which are so derived must be interpreted consistently with EU law (as it is now called) and it is inconceivable that Parliament intended the same concepts to be interpreted differently in different contexts. Although EU law has always recognised both direct and indirect discrimination, the first legislative definition of indirect discrimination was contained in Council Directive 97/80/EC *on the burden of proof in cases of discrimination based on sex*, article 2(2) of which provided that, for the purposes of the principle of equal treatment,

> "indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."

This introduced the term "an apparently neutral provision, criterion or practice" (or PCP as it is generally known) and the concept of disproportionate group disadvantage. There was no reference to individual disadvantage, but article 4 required that, where persons who considered themselves wronged by the non-application to them of the principle of equal treatment established facts from which it might be presumed that there had been direct or indirect discrimination, it was for the respondent to prove that there had been no breach of the principle of equal treatment.

20. In 2001, a new section 63A was added to the Sex Discrimination Act to cater for this in relation to particular fields of activity covered by European Union law. A new section 54A was added to make equivalent provision in the Race Relations Act, although not yet required by European law (although it soon would be, by article 8 of Council Directive 2000/43/EC, referred to below). Section 136 of the Equality Act 2010 (above, para 6) has extended the shifting burden of proof to all activities covered by the Act (although not to criminal proceedings).

21. The next European definition of indirect discrimination came in Council Directive 2000/43/EC *implementing the principle of equal treatment between persons irrespective of racial or ethnic origins* ("the Race Directive"). Article 2(2)(b) provided that:

> "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

Thus it was sufficient that the PCP "would put" such persons at a particular disadvantage when compared to others. Article 8 made the same provision for shifting the burden of proof as had the earlier Directive in relation to sex. The same definition of indirect discrimination was adopted in article 2(2)(b) of Council Directive 2000/78/EC *establishing a general framework for equal treatment in employment and occupation* on grounds other than sex or race, in article 2(b) of Council Directive 2004/113/EC *implementing the principle of equal treatment between men and women in the access to and supply of goods and services* and article 2(1)(b) of Council Directive 2006/54/EC *on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).*

22. In 2003, both the Sex Discrimination Act and the Race Relations Act were amended to apply this new concept of indirect discrimination to specified fields of activity covered by European Union law. Thus a new section 1(2)(b) in the 1975 Act provided that, for those purposes, a person discriminated against a woman if

> "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."

Equivalent provision was made in a new section 1(1A) of the 1976 Act. That is the same concept of indirect discrimination as has now been applied to all the areas of activity covered by the Equality Act 2010.

23. It is instructive to go through the various iterations of the indirect discrimination concept because it is inconceivable that the later versions were seeking to cut it down or to restrict it in ways which the earlier ones did not. The whole trend of equality legislation since it began in the 1970s has been to reinforce the protection given to the principle of equal treatment. All the iterations share certain salient features relevant to the issues before us.

24. The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons *why* a particular PCP puts one group at a disadvantage when compared with others. Thus there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

25. A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

26. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them "context factors"). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15; [2012] ICR 704, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).

28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the "particular disadvantage" might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

29. A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in *Essop*, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result.

The arguments in Essop

30. All the above salient features of the definition of indirect discrimination support the appellants' case that there is no need to prove the reason why the PCP in question puts or would put the affected group at a particular disadvantage.

31. The respondent relies upon two main arguments to counter this. The first is that the individual claimant has to show that he has been put at "that disadvantage", that is, the same disadvantage that the group to which he belongs is, or would be, put. How, it is said, can one know what that disadvantage is unless one knows the reason for it? But what is required by the language is correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual. This will largely depend upon how one defines the particular disadvantage in question. If the disadvantage is that more BME or older candidates fail the test than do white or younger candidates, then failure is the disadvantage and a claimant who fails has suffered that disadvantage. If the disadvantage is that BME and older candidates are more likely to fail than white or younger candidates, then the likelihood of failure is the disadvantage and any BME or older candidate suffers that disadvantage.

32. That leads to the second argument - that "undeserving" claimants, who have failed for reasons that have nothing to do with the disparate impact, may "coat tail" upon the claims of the deserving ones. This is easier to answer if the disadvantage is defined in terms of actual failure than if it is defined in terms of likelihood of failure (because only some suffer the first whereas all suffer the second). But in any event, it must be open to the respondent to show that the particular claimant was not put at a disadvantage by the requirement. There was no causal link between the PCP and the disadvantage suffered by the individual: he failed because he did not prepare, or did not show up at the right time or in the right place to take the test, or did not

finish the task. A second answer is that a candidate who fails for reasons such as that is not in the same position as a candidate who diligently prepares for the test, turns up in the right place at the right time, and finishes the tasks he was set. In such a situation there would be a "material difference between the circumstances relating to each case", contrary to section 23(1) (para 4 above). A third answer is that the test may in any event be justified despite its disparate impact. Although justification is aimed at the impact of the PCP on the group as a whole rather than at the impact upon the individual, as Langstaff J pointed out, the less the disadvantage suffered by the group as a whole, the easier it is likely to be to justify the PCP. If, however, the disadvantage is defined in terms of likelihood of rather than actual failure, then it could be said that all do suffer it, whether or not they fail and whatever the reason for their failure. But there still has to be a causal link between the PCP and the individual disadvantage and it is fanciful to suppose that people who do not fail or who fail because of their own conduct have suffered any harm as a result of the PCP. It must be permissible for an employer to show that an employee has not suffered harm as a result of the PCP in question.

33. The appeal has come before us as a matter of principle. In principle, the arguments put forward by the respondent do not justify importing words into the statute (and the Directives which lay behind it) which are simply not there and which, as the Court of Appeal recognised, could lead to the continuation of unlawful discrimination, which would be contrary to the public interest (para 34). In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual. This may be easier to prove if the reason for the group disadvantage is known but that is a matter of fact, not law.

34. Secondly, the parties are not agreed on how the disadvantage should be defined. The case came before the Employment Tribunal on the basis that the disadvantage was the greater likelihood of failure. In the Employment Appeal Tribunal, Langstaff J treated the "mere fact of failure of the test" as the disadvantage (para 25). The Court of Appeal favoured the approach in the Employment Tribunal. Before this Court the appellants identify the disadvantage in essentially the same terms as did Langstaff J: the disadvantage was that members of the group failed the test disproportionately and the appellants suffered that same disadvantage.

35. In my view, the appellants (and the EAT) are in principle correct. As already noted, it is a typical feature of indirect discrimination that some members of the disadvantaged group will not in fact suffer the disadvantage. At the level of the group the disadvantage may be no more than likely but that does not make it a different disadvantage from the actual disadvantage suffered by those who are affected. The difference is between potential and actual disadvantage but the disadvantage is the same. Thus, in the typical example of a height requirement,

women are statistically more likely to fail to meet it, but only some will fail and others will pass. The disadvantage in each case is the same - the failure to meet the height requirement. Any other approach would deprive indirect discrimination of much of its content.

36. I would therefore allow the appeal in the *Essop* case and remit the claims to be determined by the Employment Tribunal in accordance with this judgment.

The arguments in Naeem

Disadvantage

37. In Mr Naeem's case, the reason why the pay scale puts Muslim chaplains at a disadvantage is known: essentially it depends upon length of service and they have, on average, shorter lengths of service than Christian chaplains. But the respondent raises two main arguments.

38. The first argument is that the reason why the PCP puts the group at a disadvantage - the "context factor" - has itself to be related to the protected characteristic. This was the view taken by Underhill LJ in the Court of Appeal in this case (and in the EAT in the earlier case of *Haq v Audit Commission* [2011] UKEAT/0123/10/LA but not upheld by the Court of Appeal at [2012] EWCA Civ 1621; [2013] Eq LR 130). Thus, at para 22, he held that it cannot

> "properly be said that it is the use of the length of service criterion which puts Muslim chaplains at a disadvantage, within the meaning of section 19(2)(b). The concept of 'putting' persons at a disadvantage is causal, and, as in any legal analysis of causation, it is necessary to distinguish the legally relevant cause or causes from other factors in the situation. In my view the only material cause of the disparity in remuneration … is the (on average) more recent start-dates of the Muslim chaplains. But that does not reflect any characteristic peculiar to them as Muslims: rather, it reflects the fact that there was no need for their services (as employees) at any earlier date."

39. But this cannot be right. The same could be said of almost any reason why a PCP puts one group at a disadvantage. There is nothing peculiar to womanhood in taking the larger share of caring responsibilities in a family. Some do and some do not. But (in the context of equal pay) it has been acknowledged that a length of

service criterion can have a disparate impact on women because they tend to have shorter service periods as a result of career breaks or later career starts flowing from their child care responsibilities: see *Wilson v Health and Safety Executive* [2009] EWCA Civ 1074; [2010] ICR 302, following *Cadman v Health and Safety Executive* (Case C-17/05) [2006] ICR 1623. Indeed, it could be said that the lack of need for the Muslim chaplains is more "peculiar to them as Muslims" than are many of the reasons why women may suffer a particular disadvantage. All that this means is that the employer may have to justify the PCP. In principle, a length of service criterion may be justified as a reward for greater experience and skill, but this gets harder to do the longer the time taken to achieve parity with others.

40. The second argument relates to the group or "pool" with which the comparison is made. Should it be all chaplains, as the Employment Tribunal held, or only those who were employed since 2002? In the equal pay case of *Grundy v British Airways plc* [2007] EWCA Civ 1020; [2008] IRLR 74, at para 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in *Allonby v Accrington and Rossendale College* [2001] EWCA Civ 529; [2001] ICR 1189, at para 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of Appeal in this case, he observed that "There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition".

41. Consistently with these observations, the *Statutory Code of Practice* (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that:

> "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively."

In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it" - ie the PCP in question - puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison.

42. In this case, the PCP identified was the incremental pay structure which affected all the chaplains employed by the Prison Service. This did put the Muslim chaplains at a particular disadvantage compared with the Christians. The appellant suffered this disadvantage and so section 19(2)(b) and (c) were satisfied. The question, therefore, is whether the respondent can justify it as "a proportionate means of achieving a legitimate aim".

Justification

43. The Employment Tribunal held that it could. The original pay scale had been intended to reward loyalty and experience. The Prison Service had been trying to move away, as quickly as possible, from the long incremental pay scale to a much shorter one, where increments would depend to a limited extent on experience and a greater extent on assessed performance. The Employment Tribunal identified the objective as "the single one of rewarding length of service and increasing experience, while at the same time managing an orderly and structured transition, over a period of time, to the shorter, single pay scale … That is clearly a serious objective, which represents a real organisational need …" (para 27). The EAT agreed that the Employment Tribunal had properly identified a legitimate aim. Mr Naeem does not now challenge that conclusion.

44. The EAT however disagreed that the means adopted to meet that organisational need had been shown to be proportionate. The Employment Tribunal had found as a fact that six years' service was the most required for newly appointed chaplains to have attained the professional standards which should entitle them to be rewarded at the top of the scale, as fully trained and experienced in their role (para 10.7). The Prison Service was trying to achieve that in an orderly manner, by agreement with the Trade Union, but the process had been halted by government pay restraint. The Tribunal simply concluded that "We accept that the need for orderly management of the process renders the element of particular disadvantage in this case necessary, but having regard to the totality of the circumstances, we find that such disadvantage to the claimant is no more than is necessary to achieve the objective" (para 27). They had not considered alternative ways in which the Prison Service could have eliminated the discrimination against Mr Naeem and the other Muslim chaplains affected within the constraints to which they were subject.

45. Not surprisingly, Mr Naeem agrees with the EAT and asks this Court, should we accept his arguments on the earlier issues, as I would do, to remit the claim to the Employment Tribunal for reconsideration of the justification issue.

46. The EAT records that the Employment Tribunal had been offered the example of a larger group of Prison Service employees, psychotherapists, for whom

a suitable adjustment had been made to eliminate discriminatory treatment (para 41). The EAT did not place much, if any, weight on this, as it had been done in the context of an equal pay rather than a discrimination claim. But the EAT made other suggestions for alternative ways of continuing to apply the PCP in question without disadvantage to the claimant - backdating his length of service, adding an additional increment at the start of his service, or refusing further pay increases for those higher up the scale while improving the position of those lower down the scale. The Tribunal should have thought of these, especially as they had been given an example of a successful search for solutions.

47. Neither the EAT nor any higher court is entitled to disturb the factual findings of an Employment Tribunal. It must detect an error of law. The Tribunal had adopted the "no more than necessary" test of proportionality from the *Homer* case and can scarcely be criticised by this Court for doing so. But we are here concerned with a system which is in transition. The question was not whether the original pay scheme could be justified but whether the steps being taken to move towards the new system were proportionate. Where part of the aim is to move towards a system which will reduce or even eliminate the disadvantage suffered by a group sharing a protected characteristic, it is necessary to consider whether there were other ways of proceeding which would eliminate or reduce the disadvantage more quickly. Otherwise it cannot be said that the means used are "no more than necessary" to meet the employer's need for an orderly transition. This is a particular and perhaps unusual category of case. The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the Tribunal to consider them. But this is a question of fact, not of law, and if it was not fully explored before the Employment Tribunal it is not for the EAT or this Court to do so.

48. I would therefore dismiss the appeal in Mr Naeem's case.