



5 April 2017

PRESS SUMMARY

Essop and others (Appellants) v Home Office (UK Border Agency) (Respondent)
Naeem (Appellant) v Secretary of State for Justice (Respondent) [2017] UKSC 27
On appeals from: [2015] EWCA Civ 609 and [2015] EWCA Civ 1264

JUSTICES: Lady Hale (Deputy President), Lord Clarke, Lord Wilson, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEALS

These two appeals were heard together because both raise issues arising from claims of indirect discrimination on grounds of race and/or age and/or religion. Indirect discrimination occurs when an employer applies a provision, criterion or practice ("PCP") both to people who have and people who do not have the protected characteristic in question but which puts people with that characteristic at a particular disadvantage when compared with others and puts, or would put, the individual at that disadvantage, unless the employer can show that the PCP is a proportionate means of achieving a legitimate aim.

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. They were required to pass a Core Skills Assessment (CSA) as a pre-requisite to promotion to certain civil service grades. A report in 2010 established that Black and Minority Ethnic (BME) candidates, and older candidates, had lower pass rates than white and younger candidates. No-one has been able to identify why this is. The appellants issued claims alleging that the requirement to pass the CSA constituted indirect discrimination on the grounds of race or age. The Home Office argued that section 19(2)(b) of the Equality Act 2010 required the appellants to prove the reason for the lower pass rate. The Court of Appeal agreed, upholding the decision of the Employment Judge.

Mr Naeem is an imam who works as a chaplain in the Prison Service. Before 2002, Muslim chaplains were engaged on a sessional basis only, because it was believed that there were too few Muslim prisoners to justify employing them on a salaried basis as some Christian chaplains were. Mr Naeem worked on a sessional basis from 2001 but in 2004 became a salaried employee. At this date the pay scheme for chaplains incorporated pay progression over time. The average length of service of Christian chaplains was longer which led to a higher average basic pay. Mr Naeem argued that the incremental pay scheme was indirectly discriminatory against Muslim or Asian chaplains, resulting in lower pay in a post where length of service served no useful purpose as a reflection of ability or experience. Mr Naeem's claim was rejected by the Employment Tribunal which found that the indirect discrimination was justified. The Employment Appeal Tribunal held that the scheme was not indirectly discriminatory at all because chaplains employed before 2002 should be excluded from the comparison between the two groups. The Court of Appeal held that 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 of race or religion.

JUDGMENT

The Supreme Court unanimously allows the *Essop* appeal. It remits the claims to be determined by the Employment Tribunal in accordance with the judgment. It unanimously dismisses Mr Naeem's appeal. Lady Hale, with whom all the other Justices agree, gives the only judgment.

REASONS FOR THE JUDGMENT

The concept of indirect discrimination has following salient features:

- There has never been any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. It is enough that it does [24].
- Indirect discrimination, unlike direct discrimination, does not require a causal link between the characteristic and the treatment but does require a causal link between the PCP and the particular disadvantage suffered [25].
- The reason for the disadvantage may not be in itself unlawful, or within the control of the employer, but both the PCP and the reason for the disadvantage must be ‘but for’ causes of the disadvantage [26].
- The PCP need not put every member of the group sharing the protected characteristic at a disadvantage. In the *Essop* case, it was irrelevant that some BME or older candidates could pass the CSA: the group was at a disadvantage because the proportion who could pass was smaller than the proportion of white or younger candidates [27].
- It is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence [28].
- It is always open to a respondent to show that the PCP is justified. There may well be a good reason for it. A wise employer will, however, try to see if PCPs which do have a disparate impact can be modified to remove that impact while achieving the desired result [29].

The disadvantage suffered by the individual must correspond with the disadvantage suffered by the group. The disadvantage in *Essop* was that members of the group failed the CSA disproportionately and the appellants suffered this disadvantage. However, a candidate who fails the CSA because he did not prepare or did not turn up for or finish the CSA has not suffered harm as a result of the PCP in question and in such a case it is open to the respondent to show that the causal link between the PCP and the individual disadvantage is absent. The *Essop* appeal is therefore allowed and the claims are remitted to the Employment Tribunal [30-36].

In Mr Naeem’s case the reason why the pay scale puts Muslim chaplains at a disadvantage is known. It is because they have on average shorter lengths of service than Christian chaplains [37]. The Court of Appeal was wrong to require the reason to relate to the protected characteristic [39]. The pool of comparators comprises all workers affected by the PCP in question. In this case the incremental pay structure affected all chaplains in the Prison Service and this did put the Muslim chaplains at a disadvantage compared with the Christians [42]. As regards justification, it was not in dispute that the pay scheme had a legitimate aim but the means adopted needed to be proportionate. The Employment Tribunal found as a fact that six years was the most required for newly appointed chaplains to have the skills and experience for reward at the top of the scale, but that in the circumstances the disadvantage suffered by Mr Naeem was no more than was necessary as the transition to a new shorter pay scale took its course. This was the correct test. It is not open to the courts on an appeal to disturb that finding, even if there were alternative means to reduce the disadvantage more quickly which could have been considered [43-47]. Mr Naeem’s appeal is therefore dismissed.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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