



25 April 2012

PRESS SUMMARY

Homer (Appellant) v Chief Constable of West Yorkshire Police (Respondent) [2012] UKSC 15 *On appeal from the Court of Appeal [2010] EWCA Civ 419*

JUSTICES: Lord Hope (Deputy President), Lady Hale, Lord Brown, Lord Mance and Lord Kerr.

BACKGROUND TO THE APPEALS

This case concerns the scope of indirect discrimination on the ground of age. It was heard alongside the case of *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16 which concerned the scope for justification of direct discrimination on the ground of age.

Mr Homer began working for the Police National Legal Database (PNLD) as a legal advisor in 1995 at the age of 51. When he was appointed the role did not require a law degree or equivalent if the post-holder had exceptional experience or skills in criminal law combined with a lesser qualification in law. Mr Homer fell within this latter category. PNLD began to experience problems in attracting suitable people for the role of legal advisor. In 2005 the organisation introduced a new grading structure to improve career progression and offer more competitive salaries. The new structure provided for three promotion “thresholds” above the starting grade, the third and final of which requiring a law degree. In 2006 Mr Homer was graded under the new system as reaching the first and second thresholds but not the third.

Because of his previous skills and experience he was, under the old grading structure, effectively at the top grade. In order to reach the third and highest threshold under the new structure Mr Homer would have been required to study for a law degree part-time alongside his work. This would take four years to complete. At this time Mr Homer was 62 years old and, being due to retire at 65, would have been unable to reach or benefit from being at the third threshold before leaving the employment. His various internal appeals and grievances were dismissed and, in April 2007, he issued proceedings under the Employment Equality (Age) Regulations 2006, SI 2006/1031 (“the Age Regulations”) which came into force in October 2006.

Regulation 7 of the Age Regulations (which have since been repealed but substantially re-enacted under the Equality Act 2010) makes it unlawful for an employer to discriminate against employees such as Mr Homer in respect of, amongst other things, opportunities for promotion or receiving of other benefits. Regulation 3 provides that indirect discrimination occurs when a person (‘A’) applies to another person (‘B’) “... a provision, criterion or practice which he applies... to persons not of the same age group as B, but which puts... persons of the same age group as B at a particular disadvantage when compared with other persons, and which puts B at that disadvantage and A cannot show the . . . provision, criterion or practice to be a proportionate means of achieving a legitimate aim.”

In contrast to the *Seldon* case, it was accepted that regulation 3 had properly transposed article 2(2)(b) of Council Directive 2000/78/EC on equal treatment in employment and occupation into UK law in cases of indirect age discrimination.

In January 2008 the Employment Tribunal found that the appropriate age group was employees aged between 60 and 65 as these persons would have been unable to obtain any real benefit from obtaining a law degree before retiring. It went on to hold that Mr Homer had been indirectly discriminated against on the ground of age and that this was not objectively justifiable on the facts. The Employment Appeal Tribunal held that there had been no indirect discrimination, but that if there had been then it would not be objectively justified. The Court of Appeal dismissed Mr Homer’s appeal against the first finding, and dismissed the Respondent’s cross-appeal against the second finding. Both findings were then appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows Mr Homer's appeal on the first issue, finding that he was indirectly discriminated against by the Respondent. The Court remits the case to the Employment Tribunal to reconsider the issue of justification. Lady Hale gives the lead judgment with which all other members of the Court agree. Lord Hope and Lord Mance add some comments of their own.

REASONS FOR THE JUDGMENT

References in square brackets are to paragraphs in the judgment

The Employment Appeal Tribunal and the Court of Appeal had been persuaded by the argument that Mr Homer was put at a disadvantage, not by his age but by his impending retirement [12]. It was accepted that his retirement was what prevented him from gaining any real benefit from acquiring a law degree. What “*put B*” at a particular disadvantage was not his age as such but the fact that he was due to leave employment within four years, his position being comparable with any other employees nearing the end of their employment for whatever reason.

The Supreme Court disagrees with that analysis. Its flaw is to ignore the fact that persons in the position of Mr Homer were disadvantaged because of a reason (retirement) that directly related to their age. Persons similarly disadvantaged for reasons not related to their age would not fall within the scope of the Age Regulations and were not the intended recipients of its protection [13]. The form of words used under the Age Regulations was intended to make it more straightforward to establish claims of indirect discrimination with claimants simply having to establish that they in particular, and persons of their age group in general, were, in fact, disadvantaged when compared with other persons [14]. In any event, there are material differences between leaving work because of impending retirement and other reasons for doing so [15]. The law on indirect discrimination “...is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic.” [17].

As to justification, the issue is to be remitted to the Employment Tribunal for consideration in the light of the Supreme Court's findings. The range of aims capable of justifying indirect discrimination is greater than those available in the context of direct discrimination (see *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16) [19]. In particular, a real business need on the part of the employer alone may be sufficient. In addition to pursuing a legitimate aim, the treatment must be proportionate which means it is “...*both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so.” [22]. It is the criterion itself that must be justified as opposed to its discriminatory effects on the individual [23]; however part of that assessment includes comparing the likely impact of the criterion on the affected group as against the importance of the aim to the employer [24]. It is noted that Mr Homer was not dismissed or downgraded for not having a law degree, but was simply denied the additional benefits attaching to the newly introduced third threshold. The question was whether it was reasonably necessary in order to achieve the legitimate aims of the scheme to deny those benefits to people in his position [24]. It was not clear whether the Employment Tribunal had been suggesting a specific exception for Mr Homer alone: that was not an appropriate response to a discrimination claim. There has to be some way of modifying the criterion for everyone adversely affected but without introducing discrimination against another group [16, 25].

Lord Hope addresses the argument made that exempting Mr Homer from the third threshold requirements would unfairly *advantage* persons of Mr Homer's age group. He does not accept that discrimination on grounds of age can be regarded as justified simply because eliminating it would put others at a disadvantage which is not related to their age [30]. Lord Mance however expresses some concern about the possibility of making an exemption for Mr Homer personally or for all those persons in the same age group as him, on the basis that it might unjustifiably discriminate against younger employees on the ground of their age [36].

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. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html