



# HR Bulletin

E-Update 71 – April 2017

## Essop and Naeem

*On 5<sup>th</sup> April the Supreme Court issued a judgment explaining how indirect discrimination works. Considering the concept was first introduced into UK law with the Sex Discrimination Act of 1975, it may seem surprising that it needed to do that. But in two cases the Court of Appeal had seriously muddied the waters with the result that nobody was quite sure where the law stood. The Supreme Court has, hopefully, restored some common sense to a subject that had become overly complex.*

The Supreme Court heard the two cases together. In *Essop v The Home Office* the issue was a requirement for all employees to pass a 'Core Skills Assessment' in order to qualify for promotion to the position of Higher Executive Officer. As a good public sector employer, the Home Office commissioned an impact assessment to see if there were any equality issues raised by the requirement – and it turned out that there were. The pass rate for Black and Minority Ethnic (BME) employees was just 40.3% of the pass rate for white candidates. There was, however, no information to suggest why that was.

There was less mystery in the case of *Naeem v The Ministry of Justice*. This case concerned the pay of prison chaplains. Muslim chaplains, on average, were paid less than their Christian counterparts – a direct result of a pay system based on length of service. Muslim chaplains had only been recruited directly since 2002 with the result that they tended to be lower down the pay scale than Christian chaplains whose average length of service was longer.

Both situations may strike you as pretty obvious examples of indirect discrimination. There is a provision criterion or practice (PCP) which puts a group (BME staff, Muslim chaplains) at a particular disadvantage.

The question should then be whether the test used by the Home Office or the Prison Service Pay Scale could be justified as a proportionate means of achieving a legitimate aim.

But in each case the Court of Appeal held that it was not obvious at all. In *Essop*, the Court pointed out that in an indirect discrimination claim, both the individual bringing the claim and the disadvantaged group as a whole had to suffer from the 'same disadvantage'. But in the absence of any evidence as to the reason for the difference in pass rates, that could not be determined. Without knowing why the group as a whole had a lower pass rate, how could it be shown that the individual bringing the claim had failed the test for the same reason? In *Naeem* the Court held that there would be no indirect discrimination when there was a clearly non-discriminatory explanation for the difference in pay rates. Here the difference was length of service and there was no difference in the pay between Muslim and Christian Chaplains, once that was taken into account.

The Supreme Court has now made it clear that the Court of Appeal took the wrong approach in both cases. There was nothing in the Equality Act that required those claiming indirect discrimination to show the 'reason why' they suffered a disadvantage; it was enough to show that the disadvantage was a real one.

Everyone who failed the test suffered the same disadvantage in that they were denied opportunities for promotion. When it came to the pay system in the prison service, the 'explanation' for the disadvantage did not matter, indirect discrimination could not be avoided simply by factoring out the very issue (length of service) that lay behind the disadvantage suffered by Muslim chaplains.

The upshot of all of this is that the Supreme Court has restored indirect discrimination as a statistical exercise and stripped away considerations of whether the disadvantage shown by the statistics might be caused by something other than a protected characteristic. If a practice can be seen to adversely affect a particular group, we do not need to get bogged down in asking why that disadvantage has arisen. Instead the focus should be on whether the practice in question is a proportionate and reasonable one.

We often fall into the trap in indirect discrimination cases of talking about the 'justification defence' as though justification is a consideration only when indirect discrimination has been established. But that is not quite right. It is not that justification is a defence to a claim of indirect discrimination, but rather that the absence of justification is an essential element of what indirect discrimination is. In the leading judgment of the Supreme Court, Baroness Hale stresses that getting to the stage where you have to show the justification for a provision criterion or practice is nothing to be ashamed of. It does not mean that a practice was found to be discriminatory but you managed to get off on a technicality. If you can show that any provision criterion or practice you operate is a proportionate means of achieving a legitimate aim then, by definition, it is not discriminatory.

The key thing about justification is that while the employer cannot always foresee the statistical impact that a PCP might have, it should at least be able to explain why the PCP is being applied and why it is needed. The Home Office was no-doubt surprised to discover that the pass rate for BME employees was so low. But presumably it has very good evidence that the test was an effective way of predicting which candidates for promotion would be suitable and which would not. Otherwise – why have the test at all?

In the *Naeem* case, the Supreme Court actually restored the finding of the Employment Tribunal that there was no discrimination, because the pay scale was in the process of being reformed and it was proportionate for the employer to seek to do that in stages rather than all at once.

The convoluted reasoning of the Court of Appeal had got in the way of the real issue. Once it is clear that a practice has a disproportionate impact on a particular group then the question to ask is whether that practice is really necessary or whether things can be done differently so that the disadvantage is removed. If the practice can't be changed without compromising an important business need, then that should be enough to answer any indirect discrimination claim. It is not often that a decision of the Supreme Court actually simplifies the law – but that is what has happened here. Let's hope it lasts.

## Keep in Touch

**Twitter** - @DazNewman

**Blog** – [darrennewman.wordpress.com](http://darrennewman.wordpress.com)

# In the SPOTLIGHT

## LA CHALLENGE

### Have you got what it takes?

Thursday 28<sup>th</sup> September 2017



**The Local Authority Challenge – do you have what it takes to be a winner (or a volunteer)? 28<sup>th</sup> September 2017 at Wolverhampton Wanderers FC.**

LA Challenge is a team competition in which authorities across the region can pit their skills against each other for the chance to be crowned Best Team - experiencing the challenges facing the sector through scenario role play.

Organisations put forward teams of six participants to spend the day acting as the Management Team of a fictional local authority, encountering many of the challenges and issues that face a real corporate team.

There are 6 award categories up for grabs but only one team will be crowned overall LA Challenge Winners 2017. To win, teams will have to work with neighbouring councils, stakeholders and partners to deliver a new strategy for their council. They'll have to identify which areas to prioritise, deal with politically sensitive issues and maintain customer focus when determining how to provide the public with the best services possible despite limited resources.

The LA Challenge has developed a strong reputation in terms of quality and engagement. In true WME style we are planning to spice things up a little and put our own stamp on what is going to be an exciting and action packed learning experience. Win or lose, participants will definitely benefit from the experience and return to work reenergised!

The overall Challenge Winner of 2016 was the **City of Wolverhampton**. To find out what a winning team looks like please [click here](#)

#### **Your WME needs you!**

To add to the realism and challenge of this simulation exercise we need a range of volunteers to act as stakeholders and potential partners to meet with competing teams. We need people with local government/public sector experience who know how to fill these roles.

Volunteers are critical to the success of the event – ensuring that competitors are able to practice, and demonstrate a range of skills! You could be playing the role of a CEO of a large company one minute and a local resident or Police commissioner the next! WME staff have been volunteers at an LA Challenge event in another region and thoroughly enjoyed the experience!

- Want to be a **volunteer** – [click here](#) to sign up
- Want to **find out more or book** a team - email [m.douglas@wmemployers.org.uk](mailto:m.douglas@wmemployers.org.uk)

Want to find our more please visit

<http://lachallenge.wmjobs.org.uk/>