Appeal No. UKEAT/0524/13/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 July 2014
Judgment handed down on 25 November 14

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR B BEYNON

MR M WORTHINGTON

MR STEPHEN GAMES — APPELLANT

UNIVERSITY OF KENT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS DIYA SEN GUPTA (of Counsel) Instructed by: Dentons UKMEA LLP One Fleet Place London EC4M 7WS
For the Respondent	MR DESHPAL PANESAR (of Counsel) Instructed by: Furley Page LLP 39 St Margaret's Street Canterbury Kent CT1 2TX

SUMMARY

AGE DISCRIMINATION

The Employment Tribunal erred in law in its approach to the question of "particular disadvantage" for the purposes of section 19(2)(b) of the **Equality Act 2010** and did not give **Meek** compliant reasons for its conclusion on the question whether the PCP which the Respondent applied was a proportionate means of achieving a legitimate aim for the purposes of section 19(2)(d). **Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704 applied.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Stephen Games ("the Claimant") against a judgment of the Employment Tribunal sitting in Ashford (Employment Judge Druce presiding) dated 10 July 2013 dismissing a claim of indirect age discrimination which he had brought against the University of Kent ("the Respondent").

2. Put shortly, the Claimant had applied for a full-time post as lecturer in the Respondent's School of Architecture. It was an essential criterion for appointment that the applicant should hold a PhD in the subject area. The Claimant had no PhD. His application was rejected on paper at the short-listing stage. His claim of indirect age discrimination related to the requirement that he should hold a PhD in the subject area.

3. The jurisdiction of the Employment Appeal Tribunal is limited to deciding questions of law arising out of decisions of Employment Tribunals: see section 21(1) of the **Employment Tribunals Act 1996**. The question for us is whether the Employment Tribunal decided the case on correct legal principles and gave reasons for its decision to the extent which the law required. Ms Diya Sen Gupta, who appeared pro bono for the Claimant, argued that it did not. Mr Deshpal Panesar who appeared for the Respondent, argued that it did.

4. Because the Employment Appeal Tribunal is concerned only with questions of law it is not our task to decide for ourselves the underlying factual issues. We therefore express no view of our own whether applicants of the Claimant's age are placed at a disadvantage by the requirement of a PhD or whether the Respondent was justified in imposing such a requirement. Deciding these questions is the function of the Employment Tribunal. If it has done so

correctly the appeal will be dismissed. If it has not, the appeal will be remitted with guidance as to the correct legal approach.

Statutory provisions

5. An employer must not discriminate against a person in the arrangements made for deciding to whom to offer employment, or by not offering employment: see section 39(1)(a) and (c) of the **Equality Act 2010**.

6. Section 19 of the **Equality Act 2010** is entitled "Indirect discrimination". It provides:

> **"(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."**

7. Section 4 provides that age is a protected characteristic. Section 5 provides:

> **"(1) In relation to the protected characteristic of age--**
>
> > **(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;**
> >
> > **(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.**
>
> **(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."**

8. Section 23(1) provides that on a comparison of cases for the purposes of section 19 there must be no material difference between the circumstances relating to each case.

The background facts

9. The Claimant was born on 11 July 1952. He obtained a degree in graphic design at the Central School of Art and then a degree in architecture at Cambridge. He became an architectural writer and historian, working for the media and writing books. His specialist subjects have been Betjeman and Pevsner. The first volume of his biography of Pevsner was published in 2010. He was invited to lecture part-time, one day a week, at the Respondent's School of Architecture. A PhD was not required for an hourly paid lecturer. His lectures were enthusiastically received.

10. The School of Architecture had become part of the University in 2005. A review of its activities took place in 2010. The review specified a desire to increase the reputation of the School by research, aiming to become a leading research intensive institution in the South East of England. This required funding, which in turn depended on positive assessments under a system known now as the Research Excellence Framework. The review stressed the importance of an active PhD cohort in the School.

11. In two recruitment rounds following the 2010 review the Dean of the Faculty insisted on the need for candidates to possess a PhD. In 2012 the Respondent advertised five new full-time lectureship posts for the School. It was an essential requirement that the appointee in each case should hold a PhD. The Claimant had been given encouragement to apply, and he did so. But he was rejected during the short-listing procedure because he did not have a PhD and there was no reasonable expectation of his being awarded a PhD before he would take up the post. He stated a grievance to the Respondent and commenced Employment Tribunal proceedings.

The PhD degree

12. It is convenient now to summarise some of the Employment Tribunal's findings concerning the degree of PhD.

13. As to the current importance of a PhD, the Employment Tribunal said:

> **"9. A PhD is now a standard requirement of research intensive universities when making academic appointments and is the standard training recognised throughout the world for the academic profession. External funders of research have an expectation that those they fund have demonstrated that they have been adequately trained for the academic profession usually by having a PhD."**

14. The word "usually" in this paragraph would tend to indicate that a PhD is not the only means by which external funders could be satisfied of adequate training for the academic profession. There are, however, no further findings by the Employment Tribunal on this question.

15. The Employment Tribunal noted that a PhD could be obtained by a mature candidate applying to a university with which they had a connection in reliance on published material which had not been prepared for a PhD provided it was of sufficient quality. The Claimant had applied to Cambridge for such a PhD relying on published work concerning John Betjeman, but it had lacked the requisite scholarly annotation and textual apparatus. He was told he could resubmit with annotation and apparatus – but the rules dictated that the earliest he could re-apply was 2014. The Claimant could also seek a PhD in the usual way by research and dissertation but he did not wish to do so.

The case for the parties

16. The Claimant represented himself before the Employment Tribunal. It quoted the following passage from his written statement of grievance:

> **"I am 60 and was 59 when I applied for the post in question. When I was a student in the 1970s a doctorate was an unusual qualification for people in the field of architecture most of whom studied architecture in order to become qualified as practising architects and gain not a PhD but an RIBA qualification. Even among members of the teaching staff doctorates were by no means the norm. My own tutor at university was a Mr not a doctor. Since then with growing competition for jobs among young graduates and with HEFCE's (Further and Higher Education Act 1992) rating system putting even greater pressure on universities to compete for funds the PhD appears to have become a minimum not an optimal requirement. As such people of my age are discriminated against because we did not anticipate that we would have to have doctorates if we wished to teach when we were older."**

17. The Claimant supported his case as to the disadvantage by his own evidence and by statistical evidence. The Employment Tribunal said:

> **"22. The Claimant's evidence that the requirement for a PhD discriminates against those who are older than 56 was the incidence of the award of PhDs in the UK. In 1970 it was 5,130. In 1990 it was 8,188, in 2000 14,117 and in 2010 20,079. There has been a significant increase in the rate at which doctorates were awarded which the Claimant explains by the growing professionalisism of the education sector which was accelerated by the Further and Higher Education Act 1992 and a growing awareness amongst students that they would need doctorates to further their career prospects to a greater extent than previously. Before 1993 the idea that one could succeed in academia without a PhD was common whereas it is now a requirement. Doctorates awarded in architecture show a similar trend. In the 1980s no more than 20 per year were awarded, this increased to 30 in 2000 and 91 in 2011. The trend is similar. In both examples the statistics do not reveal the ages of the recipients."**

18. There were other statistics within the Claimant's witness statement. He had obtained data from the Respondent which showed, on a very small sample, that a lower proportion of candidates in the 56 plus age group had a PhD. This sample was of candidates who did apply: others may have been put off by the requirement of a PhD in the particulars given for the job. He also quoted statistics from the Higher Education Statistics Agency tending to show that the chance of a candidate without a PhD being appointed to a permanent teaching post had substantially reduced over the last 15 years. There were still many successful candidates for architectural lectureships without a PhD (nearly half) but the Claimant said these appointments were usually qualified architects teaching architectural design, as opposed to history and theory, which was his discipline.

19. The Respondent did not admit any disadvantage at all. It did not challenge the Claimant's statistics as such, but it pointed out that they were not age-related and it denied that

he had established the necessary group disadvantage. The Employment Tribunal did not summarise the Respondent's case on the question of disadvantage, but Mr Panesar told us, and we accept, that an important feature of it was a contention that the Claimant and his age group were not at a disadvantage because it was possible at any age to obtain a PhD either by research or by submitting existing work. The older the candidate, the more time and opportunity they had to acquire a PhD.

20. On the question of justification, the Respondent's case was set out in the following way in its ET3 response form.

> **"41. ... the University contends that the condition imposed requiring a PhD was justifiable irrespective of the age of the applicant to whom it was applied. This on the basis of the University's legitimate aims (real business need) including, but not limited to: the need to recruit candidates of the highest calibre; to strengthen KSA's research credentials; to optimise research output and guaranteed submission to REF with increased funding; the strategic aim of moving KSA from being a teaching only focussed school to being a research and teaching school; and the requirement for those possessing a PhD to supervise PhD students.**
>
> **42. The University contends that the condition imposed was appropriate and necessary for the purpose of achieving the legitimate aims, and there were no other reasonable or practicable non-discriminatory method by which the University could achieve this."**

21. The Claimant did not dispute that it was a legitimate aim for the Respondent to boost its research credentials and outputs (see paragraph 156 of his witness statement) and recruit candidates of the highest calibre (see paragraph 167) but he said that imposing a requirement of a PhD was not necessary or justified for this purpose.

22. He denied that a PhD was a standard requirement of research-intensive universities when making academic appointments, a point which the Respondent's witnesses had made. He gave a substantial number of apparently distinguished examples from other universities and schools of architecture of senior appointments who did not have PhDs and who supervised students for PhDs. He pointed out that several of the Respondent's own senior officers did not have PhDs - including its then Senior Deputy Vice Chancellor, its Deputy Vice Chancellor, its Pro-Vice

Chancellor and one of its Deans. He pointed out that there were persons at a high level in the REF body concerning architectural research who did not themselves have PhDs.

23. He said that he did not wish to belittle the PhD, but that there had to be a balance. The Respondent, he suggested, had "put so much faith in the PhD that it failed to recognise the limitations of its chosen tool".

24. This is, we think, a sufficient summary of the issues on liability. However, we should note one other feature of the case. The Respondent had pleaded in its ET3 that the Claimant would in any event have been unsuccessful in obtaining an appointment because his submission compared unfavourably to that of other candidates when assessed against essential criteria. This is a point which was relevant only to remedy, not to the question whether there was indirect age discrimination in the first place. The Employment Tribunal commented that a significant amount of the evidence it heard was related to this point – including a comparison of the Claimant's academic and publishing achievements with those of the ultimately successful candidate. The Employment Tribunal thought this was unfortunate. We agree. In retrospect it might have been better to have dealt with issues of liability first.

The Employment Tribunal's Reasons

25. After a brief introduction the Employment Tribunal defined the issues it had to decide by reference to the provisions of section 19 of the **Equality Act 2010**. It then set out the background facts; we have drawn on its findings already in this Judgment. It set out the provisions of sections 19 and 39 of the **Equality Act**. It did not refer to any case law on the question of indirect discrimination.

26. The Employment Tribunal's key conclusions are set out in two paragraphs (paragraphs 23 and 24) which we will reproduce in full.

> **"23. The Respondent did apply a provision, criterion or practice, namely the requirement of an applicant for a full-time lectureship post to possess a PhD. This provision, criterion or practice applies equally to persons not of the same age or age group as the Claimant. We have considered whether the provision, criterion or practice puts persons of the same age group as the Claimant, namely over 56, at a particular disadvantage when compared with other persons. It is for the Claimant to establish that it does. The figures quoted by the Claimant make no reference to the age of the applicants and simply show that far more PhDs have been granted in recent years than was the practice in the 1970s. There is a procedure for obtaining a PhD by use of established publications and the Claimant himself made such an application in 2009. The Claimant could have enrolled on a course to obtain a PhD but chose not to do so. The statistics also do not differentiate between institutions that wish to be research intensive or institutions that simply wish to concentrate on teaching. On the basis of these statistics the Claimant has not proved that the requirement of a PhD places persons of his age group at a particular disadvantage.**
>
> **24. Even if we are wrong about this, the evidence that the Respondent produced satisfies us that a provision, criterion or practice imposed by the Respondent was a proportionate means of achieving a legitimate end. The legitimate end was the need to recruit candidates of the highest calibre to strengthen KSA's research credentials and would be expected by funding institutions. A PhD is the recognised academic qualification and to require one is a proportionate means of achieving this aim."**

27. The Employment Tribunal did not make any findings in respect of the evidence it heard relating to issues of remedy.

Submissions

28. Ms Sen Gupta took two main points concerning the Employment Tribunal's reasoning.

29. Firstly, she argued that the Employment Tribunal's approach to the question of disadvantage was flawed. It did not refer to, or adopt, the approach to section 19 explained by the Supreme Court in **Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704, especially at paragraph 14. It placed undue weight on the statistics without evaluating the Claimant's own evidence. Its reasoning also depended to a significant extent on a finding that he could have obtained a PhD by using established publications or enrolled on a course to obtain a PhD but did not do so. In doing so it accepted the argument put forward by Mr Panesar. That argument was, however, incorrect. It was no answer for the Respondent to say

that he could at some stage in the past have obtained a PhD if the requirement in fact placed the Claimant and others of his age at a particular disadvantage when it was applied to him.

30. Secondly, she argued that the Employment Tribunal's conclusion on the question of proportionality was substantially unreasoned. It did not explain the test which it had to apply (summarised in **Homer**, but set out in more detail in **R (Elias) v Secretary of State for Defence** [2006] 1 WLR 3213, approved by the Supreme Court in **R (on the application of E) v Governing Body of JFS and others** [2010] AC 728). It did not set out or resolve the essential submissions of the parties on this issue. Therefore the reasons were not **Meek** compliant (see **Meek v City of Birmingham District Council** [1987] IRLR 250).

31. Ms Sen Gupta made subsidiary submissions concerning various aspects of the Employment Tribunal's Reasons. She suggested that it erred in the following ways. (1) Applying a "because of" test appropriate to direct discrimination (this she based on the use of this phrase at the beginning and end of the ET's reasons, rather than anything within the substantive part of the reasons). (2) Requiring the Claimant to identify the age group which he said was subject to the comparative disadvantage. (3) Failing to mention or consider the statutory provisions concerning the comparison exercise (section 23) or the burden of proof (section 136). (4) Misunderstanding the statistical evidence which the Claimant did produce. (5) "Rolling up" two separate aims into one.

32. In response to these submissions Mr Panesar argued that the Employment Tribunal stated and applied the correct legal test by reference to section 19 of the **Equality Act 2010**. It was entitled to doubt whether the statistical evidence which the Claimant put forward proved comparative disadvantage: the statistics were not directed to such a question and provided no

direct answer to it. It was not bound to accept the Claimant's evidence. It was entitled to take into account that there were means available to the Claimant to obtain a PhD: this went to the question whether any disadvantage was substantial.

33. Mr Panesar repeated the submission which he made below: the Claimant had a working lifetime to obtain a PhD; he could have done so, and could still do so, either by conventional means or by submitting a piece of work to a university with which he had connections. The same would apply to anyone else in his age group who was an applicant or potential applicant. Therefore the Claimant could not show disadvantage to himself or to the group to which he belonged.

34. Mr Panesar further argued that there was no error of law in the Employment Tribunal's approach to proportionality. It was not required to set out the law in more detail than it did. While its reasoning was brief, it informed the parties of its essential findings. There had been very little challenge in cross examination as to the truth or validity of the Respondent's evidence as to justification.

35. In response to Ms Sen Gupta's subsidiary submissions Mrs Panesar said (1) The Employment Tribunal's use of "because of" at the beginning and end of its Reasons did no more than identify that it was dealing with an age discrimination claim. It plainly understood that the claim was for indirect discrimination. (2) It was not an error of law to require the Claimant to identify the age group on which he relied for the purposes of comparative disadvantage. (3) It was not necessary for the Employment Tribunal to mention section 23(1) or section 136; indeed the provisions of section 19 itself dealt with the burden of proof. (4)

There was no misunderstanding of the statistical evidence. (5) There was no reason why an employer should not have, and the ET should not find, one aim in support of another aim.

36. Both counsel recognised that the starting point in the authorities for any consideration of a claim of indirect age discrimination was the decision of the Supreme Court in **Homer**. There was discussion of an earlier, House of Lords, decision on the question of indirect discrimination – **Secretary of State for Trade and Industry v Rutherford** [2006] ICR 785 because, at one point in her submissions, Ms Sen Gupta appeared to be arguing that no comparative exercise at all was involved in evaluating a claim of indirect discrimination. She asked to be permitted to lodge further written submissions relating to this case. Her submissions when lodged ranged much wider than was required by a consideration of **Rutherford**. It was made clear that the Employment Appeal Tribunal would only accept them in so far as they related to **Rutherford**; and this was accepted by the Claimant's representatives.

Discussion and conclusions

Homer

37. Counsel were plainly correct to recognise that **Homer** is the starting point in the cases for consideration of an indirect discrimination claim under the **Equality Act 2010**. In **Homer** the Supreme Court was concerned with the definition in regulation 3 of the **Employment Equality (Age) Regulations 2006** (the "Age Regulations"). However the definition adopted in the **2010 Act** is largely the same, as Baroness Hale recognised (see paragraph 14 of her Judgment, which we will quote in due course). Both definitions stand in contradistinction to earlier statutory definitions which led courts and tribunals to look for statistical evidence of proportionate disparity.

38. It is, we think, important to keep in mind a key factual distinction between **Homer** and the present case. Both are concerned with a requirement to have a degree: in **Homer** the requirement was to have a law degree in order to progress to the highest pay grade. Both are concerned with the question whether that requirement worked to the comparative disadvantage of persons in the age group of the respective claimants. But the nature of the disadvantage in issue is different. In **Homer** the disadvantage was said to be that persons in the claimant's age group would not be able to obtain a law degree before they retired, and it was not argued that he was put at a disadvantage because fewer people in his age group had law degrees: see paragraph 11 of the Judgment of Baroness Hale. In this case the retirement age is not an issue: indeed in 2010 legislation which undergirded a compulsory retirement age was largely swept away. The argument with which we are concerned was not run in **Homer**.

39. It is therefore for its statements of principle rather than its factual decision that **Homer** is central. Within **Homer** there are, to our mind, two passages of importance to the resolution of this appeal. One relates to the question of particular disadvantage, the other to the question of justification. We will consider the appeal separately in these two respects.

Particular Disadvantage

40. Section 19(2)(a)-(c) of the **Equality Act 2010** contains the formulation of the test for indirect discrimination. Baroness Hale, in a Judgment with which the other Judges agreed, said in **Homer** (paragraph 14):

> **"Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But, as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in Equality: the New Legal Framework, Hart 2011, pp 64 to 68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic**

in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages."

41. It follows that it was not necessary for the Claimant, in order to establish particular disadvantage to himself and his group, to be able to prove his case by the provision of relevant statistics. These, if they exist, would be important material. But the Claimant's own evidence, or evidence of others in the group, or both, might suffice. This is, we think, as it should be: the experience of those who belong to groups sharing protected characteristics is important material for a court or tribunal to consider. They may be able to provide compelling evidence of disadvantage even if there are no statistics at all. A court or tribunal is, of course, not bound to accept such evidence. It should, however, evaluate it in the normal way, reaching conclusions as to its honesty and reliability, and making findings of fact to the extent that it accepts the evidence.

42. It is striking that the Employment Tribunal's reasons contain no evaluation of the Claimant's own evidence. As we have seen, quite apart from such statistical evidence as he put forward, it was his evidence that the particular disadvantage existed. The Employment Tribunal, in paragraph 23, said that "on the basis of the statistics" the Claimant had not proved that the requirement of a PhD placed persons of his age at a particular disadvantage. It did not go on to consider the Claimant's own evidence and to decide whether the Claimant's evidence, perhaps to some extent supported by the statistics he produced, provided the required proof. In our judgment this was an error of law. As **Homer** makes clear, statistical proof is not essential.

43. We turn next to Mr Panesar's argument that the Claimant could not show disadvantage because he had already had a lifetime in which to obtain the PhD qualification. As we have said, the Employment Tribunal did not record this argument in its Reasons. It is not entirely

clear from paragraph 23 of its Reasons whether it accepted it. We think, however, that it probably did: the reference to the Claimant "choosing" not to enrol on a PhD course and the reference to his earlier, unsuccessful, attempt to obtain a PhD by reason of published work tend to indicate that it was assessing the case in accordance with Mr Panesar's submission.

44. In our judgment the question whether a Claimant or persons sharing his characteristic is placed at a particular disadvantage by a PCP must be assessed at the time when the PCP is applied. The question is whether, at that time, it places them at a particular disadvantage. If it does, it is not an answer for the person applying the PCP to say that it would not have placed them at a disadvantage if they had behaved differently at some earlier time.

45. This seems to us to be the natural reading of section 19 of the **Equality Act 2010**. It also seems to us to be implicit in the reasoning of the Supreme Court in **Homer**. The Supreme Court held that Mr Homer was at a particular disadvantage because he did not have time to acquire an LLB by his retirement age. He had, however, had many years in which to acquire an LLB. The Supreme Court did not suppose that this undermined his case – and this must, it seems to us, be because the time at which the PCP is applied is the time at which the assessment of disadvantage must be made.

46. It would, indeed, be odd and unsatisfactory if the law were otherwise. Ms Sen Gupta gave an example. Suppose it was a requirement for a job that applicants must have worked full-time in their previous role. If a woman was not short-listed for the role because she had worked part-time in her previous role it would surely be no answer for the potential employer to say that she could have worked full-time and was not placed at a particular disadvantage by the requirement.

47. For these reasons we conclude that the Employment Tribunal's reasoning on the question of particular disadvantage cannot stand.

Justification

48. The second key passage in **Homer** relates to what is now section 19(2)(d) – the issue of justification. The whole passage in Baroness Hale's Judgment from paragraphs 19 to 27 repays careful study.

49. Consideration of section 19(2)(d) involves approaching the issue of justification in a structured way, asking the right questions (paragraph 26). These questions were outlined in paragraphs 19-20.

> **"19.The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.**
>
> **20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:**
>
> > **". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."**
>
> **He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:**
>
> > **"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"**
>
> **As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."**

50. Applying these standards, we do not think the Employment Tribunal has dealt adequately with justification. Although it identified an aim which was legitimate the Employment

Tribunal's Reasons did not grapple with the arguments which were put before it on the question whether the requirement for a PhD was a proportionate means of achieving the aim. In particular, the Employment Tribunal did not ask or answer the question whether the requirement for a PhD was necessary, and no more than was necessary, for achieving that aim. As we described earlier in this Judgment, the Claimant placed before the Employment Tribunal evidence which cast some doubt on the proposition that it was necessary to stipulate the holding of a PhD as an essential requirement (without any room for an alternative) for a lectureship, even in a department which sought to undertake research. The Employment Tribunal made no findings about this evidence. In effect it stated a conclusion with no reasoning. To our mind its reasons were not **Meek** compliant.

Subsidiary points

51. We can deal with Ms Sen Gupta's subsidiary points quite briefly. (1) The Employment Tribunal's use of the phrase "because of" at the beginning and end of its Judgment was intended only to indicate that it was dealing with an age discrimination claim. It did not confuse the concepts of direct and indirect discrimination. (2) The Employment Tribunal was entitled to expect the Claimant to identify the "persons with whom [he] shared the characteristic" – see section 19(2)(b). It would have been impossible to evaluate the evidence he called without knowing what his case was on this point. (3) Failing to refer to section 23 or section 136 was not in itself an error of law. We heard only very limited argument on the way in which the burden of proof provisions in section 136 might apply to this case. We do not think given the limited argument we heard, that it would be helpful to express any views in this Judgment. (4) We see no reason to suppose that the Employment Tribunal misunderstood the statistical evidence. In any event, the Employment Tribunal's assessment of factual evidence is not susceptible of appeal unless it can be characterised as perverse. We do not think it can. (5)

We do not accept that the Employment Tribunal rolled up two separate aims. The aim was to recruit candidates of the highest calibre to strengthen research credentials.

Outcome

52. It follows from what we have said that the Employment Tribunal erred in law. The appeal must be allowed. As we explained at the start of this Judgment it is not the function of the Employment Appeal Tribunal to reach conclusions for itself on the underlying questions at issue in the litigation. Recent decisions of the Court of Appeal have re-iterated that this is the position: see **Jafri v Lincoln College** [2014] IRLR 544 and **Burrell v Micheldever Tyre Services** [2014] IRLR 630. The matter must be remitted; and we consider that the best course is to remit to a freshly constituted Employment Tribunal. This Employment Tribunal should approach the matter entirely afresh, making its own findings upon the evidence it hears.

53. Particular care should be taken by the parties, and the Employment Tribunal, in deciding whether questions of liability should be tried in advance of questions of remedy. On the one hand, the cost to the parties is potentially less if all issues are tried at the same time. On the other hand, there is a danger that the parties will devote disproportionate energy to the question whether the Claimant would have been appointed if he had been short-listed for interview – an issue which relates only to remedy and which, as we have seen, the Employment Tribunal thought had been an unfortunate feature of the case before it.

54. The parties should make any written submissions they wish to make to the Employment Tribunal within 21 days of the seal date of the order disposing of this appeal. If they are in disagreement about the way in which the case should be managed, there should be a preliminary hearing (either by telephone or in person) before an Employment Judge to decide

the point. In this way when the case comes on for hearing next, there will be no doubt as to the issues to be decided. It goes without saying that if remedy is to be heard with liability the eventual reasons should deal with the issues even if the Claimant is not successful on liability: it is doubly unfortunate in this case that the Employment Tribunal heard a great deal of evidence on issues which related only to remedy, but then made no findings at all on any issue relating to remedy.