Appeal No. UKEAT/0215/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 November 2013
Judgment handed down on 15 January 2014

Before

MR RECORDER LUBA QC

DR B V FITZGERALD MBE LLD FRSA

MRS L S TINSLEY

MR M NAEEM — APPELLANT

THE SECRETARY OF STATE FOR JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CATRIN LEWIS (of Counsel) Instructed by: Prospect New Prospect House 8 Leake Street London SE1 7NN
For the Respondent	MR NIAZI FETTO (of Counsel) Instructed by: Treasury Solicitor's Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

RACE DISCRIMINATION – Indirect

RELIGION OR BELIEF DISCRIMINATION

Until 2002 the only Chaplains employed by the Prison Service were Christians. Since then, Chaplains of other faiths have been recruited. The pay scale for Chaplains reflects – inter alia - length of service.

The Claimant, a Muslim Chaplain, was appointed in 2004.

His claim of indirect discrimination on grounds of race and/or religion or belief was rejected. The Tribunal were satisfied that, although he had been subject to a PCP which had put him at a particular disadvantage, the employer had established that the PCP was a proportionate means of achieving a legitimate aim: **Equality Act 2010** section 19

The Claimant appealed on 'justification'.

The employer cross-appealed on whether the Tribunal had been wrong to include - as members of the "pool" of comparators - pre-2002 Chaplains.

Cross-appeal allowed: the Tribunal had erred in including pre-2002 Chaplains. Their circumstances were materially different to those of subsequent chaplains: **Equality Act 2010** section 23. The Claimant had been treated in exactly the same way as any chaplain, of whatever race or religion, appointed at the same time as him.

Appeal dismissed: although the Tribunal had erred in determining that the employers had established 'proportionate means' (because it had failed to consider obvious alternatives), the appeal failed in light of the success of the cross-appeal and the Claimant's claims stood dismissed.

MR RECORDER LUBA QC

Introduction

1. This is an appeal by Mr Mohammed Naeem from the dismissal by the Employment Tribunal, sitting at Reading (Employment Judge R Lewis and members), of his claims of race discrimination and of discrimination on grounds of religion or belief. In short, the Reading Tribunal found that although there had prima facie been indirect discrimination on the grounds of religion or belief (and race) the claims failed because the Respondent employer had been able to establish 'justification'. By way of cross-appeal the Respondent challenges the finding of the Tribunal that the other requisite elements of the definition of indirect discrimination had been made out in this case.

Factual summary

2. Mohammad Naeem is a prison chaplain in Her Majesty's Prison Service. His ultimate employer is the Respondent, the Secretary of State for Justice. Mr Naeem is of the Muslim faith. He has had permanent employment with the Respondent since 25 October 2004. He remains in the chaplaincy service and is a well-respected member of staff with a creditable service history. The present litigation is entirely concerned with the Claimant's standing on the Respondent's pay scales.

3. There are only two bands of salary for chaplains in the Prison Service. Payband 1 is the senior of those two bands. On engagement, the Claimant entered payband 1 at the lowest of its scales. Over the subsequent years, he has moved up the payband 1 scale, with his progression achieved by a combination of length of service and the outcomes of an appraisal system known as 'SPDR'.

4. Until 2002 the only chaplains employed by the Prison Service were Christian chaplains. It follows that there have only been Muslim chaplains since 2002. The emphasis given to progression within payband 1 on the basis of length of service means, as a consequence, that white or Christian chaplains are to be found more strongly represented in the upper echelons of payband 1 than Asian or Muslim chaplains.

5. The Claimant accepts that a Christian chaplain who had joined the Service when he did (2004), and who had had the same outcome of SPDR assessments as he had had, would have received the exact same pay and increments in pay as the Claimant himself. However, the gravamen of the Claimant's complaint, as presented in his claim to the Employment Tribunal, was that he was disadvantaged by being a Muslim chaplain because the length of service criterion within payband 1 meant that longer serving chaplains, who were exclusively white and Christian, were more likely than he to be found in the upper echelons of payband 1 because only they had been able to join the Prison Chaplaincy Service before 2002. He was being paid less than those who had worked longer in a context where length of service could serve no useful purpose as a reflection of experience or ability.

6. The Claimant had used the statutory questionnaire procedure to glean information from the Respondent employer as to the distribution of Christian/Muslim, white/Asian chaplains amongst the payband. An analysis of the responses indicated that Christian chaplains were highly represented in the upper two quartiles of the chaplains' payband and that Muslims were highly represented in the lower two quartiles. The figures for white chaplains when compared with Asian chaplains demonstrated a similar pattern.

7. The material before the Tribunal also showed that the pay arrangements within the Respondent department were "inherently complex" as a result of a combination of factors.

Indeed, the chaplains' pay scale alone had involved 101 spinal points and provided for 16 years of progression from minimum to maximum. The evidence before the Tribunal also showed that the aspiration of the Respondent employer was that, for the future, all pay scales should consist of only six points, with progression being achieved dependent on assessment of performance, within six years from the bottom to the top of the requisite scale. Additionally, the Respondent proposed to move away from a pay system where progression was related primarily (or in large part) to length of service to one related to the assessment of performance. However, the necessary changes to the Respondent's pay scheme for chaplains had not been implemented before the Claimant presented the present claim.

The Tribunal's Judgment

8. The Tribunal distilled the issue before them in the following terms:

> **"The Respondent has a long pay ladder with slow progression up the ladder. Most entrants start at the bottom rung. Muslim chaplains have been unable to join the ladder before 2002. Anglican chaplains have been able to do so for many years. Until the Claimant reaches the top of the ladder, it is likely that he will be paid less than his Christian comparators, because they were able to start on the ladder long before him, and pay relates predominantly to time spent on the ladder."**

9. The Tribunal identified this correctly as a claim of indirect discrimination. Any reliance on direct discrimination was expressly disavowed by the Claimant's representatives. As we have already recorded, the Tribunal ultimately rejected the claim. We will deal with its reasoning in more detail, but in short it found that the application of the current pay arrangements did produce discriminatory effects when comparing Christians and Muslims, but the Tribunal determined that 'justification' had been made out.

The relevant law

10. The modern definition of indirect discrimination is set out in section 19 of the **Equality Act 2010** in these terms:

> **"(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) …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."**

11. The Equality Act, section 19(3), then lists the relevant protected characteristics, which include race and religion or belief. Finally, section 23 provides that:

> **"(1) On a comparison of cases for the purposes of section … 19 there must be no material difference between the circumstances relating to each case."**

Elements of section 19

(i) The provision, criterion or practice

12. The Tribunal found (para. 20.2) that the provision, criterion or practice which was applied to the Claimant was "the non Phase 1 pay system, which incorporates pay progression over time, which in turn is related to length of service". This was not in dispute on this appeal.

(ii) Did the employer apply the provision, criterion or practice to others?

13. The Tribunal held that the PCP "applied equally to non-Muslim chaplains as it did to Muslims" (para. 20.3). Again, there is no dispute with that finding by the Tribunal.

(iii) Disadvantage

14. The next sequential question, posed by section 19(2)(b) for the Tribunal, was whether the PCP put Muslim chaplains at a particular disadvantage when compared to non-Muslim chaplains. The Tribunal found that it did (20.9).

(iv) 'Material difference'

15. The Tribunal next considered whether there was a 'material difference' between the Muslim and non-Muslim groups (para. 20.10). This, self-evidently, is a question of comparison and it engages the requirement of section 23 of the 2010 Act, which is essentially that the circumstances of like should be compared with like. On that point the Respondent employers submitted, as they had before the Tribunal, that on a proper comparison, there was a material difference in treatment between chaplains of each group. The Employment Tribunal recorded the submission in these terms (para. 20.10):

> **"It is improper to compare the Claimant with colleagues (of any race or religion) who started employment before 2004 – that is simply not a like for like comparison (ie there is a material difference for the purposes of section 23). Similarly it is improper to compare the Claimant or the relevant groups to which he belonged with Chaplains who were employed prior to 2002. No such Chaplains are Muslim, which means that one cannot compare like with like. In those circumstances, the comparison will simply point to the consequences of the pre-2002 state of affairs."**

The Tribunal recognised that if the Respondent was correct as to that submission, that was determinative of the claim before them. They rejected the submission. The same point was pursued again before us by way of cross-appeal. The helpful submissions that we received were to the same effect as the submissions received by the Tribunal below and as summarised in their reserved judgment (paras. 20.10-20.14).

16. In the event the Employment Tribunal accepted the submissions of Ms Lewis, who appeared before them as counsel for the Claimant as she appeared before us. The Tribunal say as follows at paragraph 20.14:

> **"It seemed to us that Miss Lewis's was the correct approach. We bore in mind that the purpose of indirect discrimination is to address a seemingly neutral employment rule or practice which has a greater negative impact on one group than another, and that the purpose of comparison is to illuminate the relationship between the PCP and the protected characteristic. In Grundy v BA [2008] IRLR 74 the Court of Appeal described the approach in these words:**
>
> > **'The correct principle... is that the pool must be one which suitably tests the particular discrimination complained of.'**
>
> **In Miss Lewis's words, removal of the advantaged group (of Christian Chaplains appointed before 2002) would defeat the purposes of the comparison and indeed the purposes of the**

section. We therefore consider the appropriate group to be the Payband 1 chaplains as a whole, and we find that the test of section 23 is met."

Having thus taken the pool of comparators as being the pool comprised of all prison chaplains, the Tribunal were able to find that, to the extent that pay progression was in part dependent on length of service, Christian chaplains had been able to accrue length of service from any past start date and Muslims only since 2002. Accordingly, they found that Muslim chaplains were placed at a particular disadvantage by the PCP and that the PCP had put the Claimant personally at that disadvantage. Accordingly, subject only to the determination of the question of justification, the Claimant's claim would succeed.

17. By the cross-appeal Mr Fetto, counsel for the Respondent employer, contended that the Tribunal had erred in law on the question of the appropriate comparator group for the purposes of section 23. We accept his submission that, if the Tribunal were in error on this matter, it was indeed a matter of *law.* This is not one of the matters that falls for determination by an Employment Tribunal which can be properly characterised as exclusively a matter of *fact*. If the Employment Tribunal erred in principle, as Mr Fetto alleged, then it is the duty of this Appeal Tribunal to intervene.

18. Mr Fetto's submission was attractive in its simplicity. He suggested that in order to determine whether there had been a disadvantage suffered by the Claimant one should compare his situation as a 2004 entrant with the situation of a non-Muslim chaplain entering in 2004. If the comparison was made in those terms, then the discrimination or disadvantage alleged could not be made out because any difference in advancement on the pay scales between those individuals would be restricted to any adjustments consequent on the performance appraisals. The other side of that coin was the submission that if the Tribunal included in the pool of comparators those chaplains in the Service before 2002, then there could be no true "like for

like" comparison, because prior to 2002 there had been no non-Christian chaplains in the permanent employment of the Respondent employer. On Mr Fetto's submission the only way of producing a pool which included not only the advantaged group (described by the Employment Tribunal in the extract we have quoted above) but also the corresponding disadvantaged group, would have been to add into the pool those Muslim chaplains who would have taken up employment full-time in the chaplaincy service before 2002 if they could have done so.

19. The pool that the Tribunal assembled, that is to say of all chaplains irrespective of date of joining the service as permanent employees, was not, submitted Mr Fetto, a pool which properly enabled the comparison of like with like. The submission was in essence that there was a "material difference" between those employed pre- and post-2002. That material difference was the existence of a then applied provision, criterion or practice, which was that only Christian chaplains were required for permanent employment in the Respondent service.

20. For her part, Ms Lewis submitted that the Tribunal had been right to take as the relevant pool the wider group comprising all chaplains in the pay scale at the point of time at which the Claimant made his claim. She took our attention to the guidance issued by the Equality and Human Rights Commission on the indirect discrimination provisions of the **Equality Act 2010** as contained in the Code of Practice on Employment (2011). At paragraph 4.15 and 4.16 the guidance reads as follows:

> **"Once it is clear that there is a provision, criterion or practice which puts (or would put) people sharing a protected characteristic at a particular disadvantage, then the next stage is to consider a comparison between workers with the protected characteristic and those without it. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances."**

She also drew our attention to the example following those paragraphs. However, it is right to record that the guidance continues, under the heading "The pool for comparison", at paragraph 4.18:

> **"In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the Employment Tribunal will decide which of the pools to consider."**

21. The competing submissions of the parties were put to us no less cogently than we imagine they were put to the Employment Tribunal below. They found the point a troubling one, and neither representative before them was able to refer to authority on the precise point. The Tribunal recorded that they were particularly troubled because the point was determinative of the whole claim either way.

22. Subsequent to the delivery of the reserved judgment of the Employment Tribunal, neither of the parties has been able to draw our attention to any authority of this Appeal Tribunal or any higher judicial Tribunal on the point at issue in this case. This we found surprising because it cannot be wholly exceptional for an employer to operate a primarily length-of-service-based pay scale but to have at some stage changed entry requirements so that persons with particular protected characteristics can only have been more recent entrants to the pay scheme.

23. The parties both took us to what assistance was available, first from the decision of the Court of Appeal in **Grundy**, to which reference has already been made, and then to the subsequent decision of the Supreme Court in **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601. As it happened, the judgments in the latter case were handed down on the very day on which the Employment Tribunal in our instant case concluded their deliberations. The Tribunal did, however, have the assistance of post-hearing written submissions on **Homer** from both the parties.

24. We turn first to **Grundy**. That was an equal pay claim, which turned in part on a determination of what was the relevant "pool". The Employment Tribunal in that case had focussed their attention on a smaller group of employees described as the SCC group. It had not focussed on a larger group of employees described as the CC group. The EAT held that the only permissible group for consideration was that latter group. Mrs Grundy appealed to the Court of Appeal on the basis that the Tribunal had, amongst other things, made no error in focussing their attention on the smaller group. The holding in the report of the Court of Appeal's judgment is to this effect:

> **"The correct principle, is that the pool must be one which suitably tests the particular discrimination complained of: but that is not the same thing as the proposition that there is a single suitable pool for every case."**

25. That summary of the holding is amply justified by the judgment given by Sedley LJ, with which the other two members of that division of the Court of Appeal agreed. Although what was said was in the context of an equal pay claim, Sedley LJ said this at paragraph 33:

> **"I mention the comparison of like with like because it seems to me a relevant guide. Section 5(3) of the Sex Discrimination Act 1975 requires comparisons made for, inter alia, indirect discrimination purposes to 'be such that the relevant circumstances in the one case are the same, or not materially different, in the other'. This seems to me a useful indicator of how the pool should be chosen. It needs to include, but not be limited to, those affected by the term of which complaint is made, which can be expected to include both people who can and people who cannot comply with it."**

Sedley LJ had earlier said in the same Judgment, at paragraph 27:

> **"The correct principle, in my judgment, is that the pool must be one which suitably tests the particular discrimination complained of: but this is not the same thing as the proposition that there is a single suitable pool for every case."**

26. The dilemma for fact-finding Tribunals is that they can neither select a pool deliberately in order to give a desired result nor be bound always to take the widest or narrowest available pool, yet have no principle which tells them what is a legally correct or defensible pool. In

discrimination claims, the key determinant is the issue which the Claimant has elected to pose and which the Tribunal is therefore required to evaluate by finding a pool in which the specificity of the allegation can be realistically tested. Provided it tests the allegation against a suitable pool, the Tribunal cannot be said to have erred in law, even if a different pool with a different outcome could legitimately have been chosen.

27. The choice for us is as stark as the choice that faced the Employment Tribunal. Is it permissible to take as the pool *all* chaplains employed by HM Prison Service when the necessary consequence of doing so will be to include pre-2002 employees in a context where the inclusion of those persons simply serves to highlight a material difference between the treatment of Muslims and Christians prior to 2002: viz that no Muslim chaplains were on the permanent staff or recruited to be so at that time.

28. We have reluctantly concluded that the Tribunal were in error. We accept that they erred in principle in failing to focus on the need to compare like with like. The inclusion of pre-2002 Christian chaplains distorted the true comparison. The PCP in question here could only properly be tested as to its effect by limiting the pool to those persons employed since 2002, from which point forward Muslim chaplains and Christian chaplains had been on a level playing field.

29. In reaching this conclusion we have had the advantage, not available to the Employment Tribunal, of oral argument about the decision and implications of the decision of the Supreme Court in the **Homer** case. Unlike **Grundy**, that was a discrimination case. The PCP complained of in that case was a criterion that an employee could not be admitted to the upper pay threshold without holding a law degree. Mr Homer, the Claimant in that case, was coming up to retirement and did not have a sufficient period of service remaining to enable him

to obtain that qualification in time. The question, or one of the questions, for the Supreme Court was how one draws the pool of comparators. Mr Clive Lewis QC, for the employer in the **Homer** case, suggested that one would have to build in to the comparator group not simply those persons who were and were not facing retirement on the grounds of age but also any other persons in reasonable proximity to the termination of their employment for whatever reason. Thus, submitted Mr Lewis, there could be no unlawful discrimination in Mr Homer's case, because there was no connection between the disadvantage he was labouring under and the fact that he was approaching retirement. In short, his age bore no reference to the application of the criteria, and in those circumstances no drawing of the pool could produce a result which showed him to be at a disadvantage by reason of the protected characteristic of 'age'. In her judgment, Lady Hale, speaking for the majority of the Supreme Court, rejected Mr Lewis's argument. She said (at paragraph 17):

> **"The law of 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. A requirement which works to the comparative disadvantage of a person approaching compulsory retirement age is indirectly discriminatory on grounds of age."**

30. Both parties relied upon this judgment. We are satisfied that the interpretation of **Homer** advanced by Mr Fetto for the Respondent employer is the correct one. In **Homer**, the prescribed characteristic 'age' was inseparably linked to the question of the time needed to undertake the qualification required. In contrast, there is no link between 'religion' or 'belief' or 'race' and time in our case. In truth, Mr Fetto submitted, the real gravamen of any complaint that the present Claimant may have relates to the straightforward fact that prior to 2002 HM Prison's Chaplaincy Service had simply not required the permanent employment of non-Christian chaplains. To expand the pool of comparators taken into account, for the purposes of testing the present claim, to include pre-2002 chaplains was incorrect in principle. We accept that submission.

31. In the result, it seems to us inexorable that the cross-appeal must be allowed. The Employment Tribunal did err in principle in fixing the parameters of the relevant pool. The only principled way of drawing the pool on the facts of the present case would be to restrict the pool to those who had joined the Chaplaincy Service since 2002. That pool would include both Muslims and non-Muslims and they would be persons to whom the same PCP would have been applied. That pool would allow a correct analysis to see whether the present Claimant had been disadvantaged and, on any analysis, applying that pool, there had been no such disadvantage.

32. The result of allowing the cross-appeal is to produce the consequence that, in any event, the Claimant's claim falls to be dismissed, as indeed the Tribunal did dismiss it on other grounds.

(v) 'Proportionate means of achieving a legitimate aim'

33. Although allowing the cross-appeal is determinative of the present matters before us, in deference to the very helpful arguments we have had from counsel, we proceed to consider the appeal itself. For these purposes, it is therefore necessary to assume that the Tribunal were correct on the matter in respect of which we have found them to be in error and that the point that had been properly reached was that the burden had shifted to the employer to demonstrate, for the purposes of section 19(2)(d), that the PCP applied in this case was "a proportionate means of achieving a legitimate aim". As we have already indicated, the Tribunal was satisfied that such 'justification' was made out.

34. The grounds of appeal set out in the Notice of Appeal are seven in number. In the event, the Claimant did not pursue grounds 5 and 7 and we say no more about them.

(vi) 'Legitimate aim'

35. Grounds 1 and 2 of the grounds of appeal contend that the Tribunal erred in its approach on the question of whether the employers were able to establish a 'legitimate aim' for the PCP applied by them in this case: that is to say, the application of a pay scale or pay banding system which gave emphasis to length of service in a lengthy 'ladder' of increments.

36. The Tribunal dealt with this matter at paragraphs 20.15 and 20.16 of their judgment. In the first of those paragraphs they record the employers' case on 'legitimate aim' as set out in the final version of the response to the Claimant's claim.

> **"The Respondent contends that the length of service criterion represents a proportionate means of achieving a legitimate aim. It is wholly legitimate to seek to retain and reward those who have served loyally as Chaplains over time and built up associated experience and knowledge of the prison system and personnel and their particular role in relation thereto. That experience and knowledge is an asset not only because it tends to enhance the performance of those who have it, but is valuable as an example and resource for those who do not. It is obviously proportionate to meet that aim by increasing salary in measured increments as service accumulates, since salary is the most potent and measurable of a reward for service, and increased salary is a powerful morale booster and incentive towards sustained future service."**

At paragraph 20.16 the Tribunal accept that that is a description of a legitimate aim.

37. Up to that point, Ms Lewis takes no issue with the Tribunal's approach or findings. However, it is incontrovertible that the evidence before the Tribunal showed that the Respondent employer had been endeavouring to get away from the largely length-of-service-driven pay scales. The Tribunal sets out the history of the pay systems adopted by the Respondent from 1994 to date. They record acceptance by the Respondent employer of the need "to rationalise and modernise this legacy" of prior pay systems. The migration to a new simplified pay arrangement placing more emphasis on assessed achievement than length of service was to be, as the Tribunal found, "a prolonged and complex task". The submission which embraces grounds 1 and 2 of the grounds of appeal is that the Tribunal, having heard the requisite evidence, failed to grasp the point that the legitimate aim of the Respondent employer

had moved on from the legitimate aim which had been the foundation of the earlier length of service related pay scale to a more nuanced aim in relation to the payment of staff. The high water mark of the Tribunal's acceptance of that proposition appears from paragraph 10.5 of their judgment, in which they say:

> **"The Respondent's management aspiration is that all pay scales should consist of 6 points, with progression within 6 years from minimum to maximum. The further aspiration is to achieve a pay system where progression is related to assessed performance, and not merely related to length of service."**

38. Faced as they were with a claim brought by a man who had achieved almost ten years' service (including a period of part-time service before permanent employment) Ms Lewis asked rhetorically how the employers could advance as a legitimate aim, and how the Tribunal could adopt as a legitimate aim, that which had been originally adopted some years earlier, and from which the employers were seeking to move away at the fastest speed available to them. Ms Lewis placed reliance on the decision of the Court of Appeal in **Wilson v The Health and Safety Executive** [2010] IRLR 59. She deployed that case as authority for the proposition that any indirect discrimination must be justified not only by reference to the legitimate aim of a policy or practice when adopted, but also at the time that it had been actually applied to the Claimant in question.

39. The difficulty for Ms Lewis' submission, and thus in consequence for grounds 1 and 2 of the grounds of appeal, is that the Tribunal here were alive to the difficulties that this intended shift in approach posed for the Respondent employer on the justification question. They record that matter, the submissions of the parties upon that matter, and more importantly the evidence that they heard. At paragraph 25 of their judgment they say as follows:

> **"Drawing these matters together, we find that the original scale represented the objective stated, that of rewarding service incrementally. We find that the Respondent has embarked on the complex task of modernising the Chaplain's pay scale, among many other such scales, operating within the framework and constraints which we have described above. We accept and find that progress has been inherently slow as a result of the scale and complexity of the task, and has now been effectively stalled by government economic policy relating to pay in the public services."**

Having drawn those threads together, the Tribunal then conclude as follows in paragraph 27:

> **"In our Judgment, and forming our own view of the matter, we find that the Respondent has demonstrated that its defence of justification has been made out and that the claim fails. We have considered 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 scales described above. That is clearly a serious objective, which represents a real organisational need of the Respondent."**

40. In that context it is our unanimous judgment that the Tribunal has not lost sight of the need to identify the legitimate aim. It has identified, in the passages we have extracted, the employers' aim at the material time and has described it as legitimate, even though the aim was shifting away from that which had underpinned the originally adopted and still currently applied pay scale scheme to one which the Respondent employer wished to move. We can identify no error in this respect by the Employment Tribunal.

(vii) 'Proportionate means'

41. By grounds 3 and 4 of the Notice of Appeal, the Claimant contended that the Tribunal had erred on the question of whether the PCP represented a proportionate response to the impact of the legitimate aim upon persons such as the Claimant. More particularly, the submissions of Ms Lewis asserted that the Tribunal had erred in finding that the disadvantage caused to the Claimant was no more than was necessary to achieve the legitimate aim. Put shortly, her case was that the Chaplaincy group was a relatively small group of employees within the Respondent's department. A relatively modest adjustment, in her submission, was needed to deal with or address the consequences of the application of the PCP. Moreover, the Tribunal had been offered the example of an adjustment to the treatment of a significantly larger group of Prison Service employees (psychotherapists) in whose case a suitable adjustment had been made in order to eliminate discriminatory treatment. Ms Lewis prayed in aid the observation made by Lady Hale in **Homer** at paragraph 25 to the effect that the answer to the justification

question at least depends to some extent "upon whether there were non-discriminatory alternatives available." She makes the point that the Employment Tribunal in the instant case have found that the Claimant has suffered a disadvantage that was "no more than is necessary to achieve the objective" without spelling out a consideration of any of the possible alternatives.

42. Replying to the submissions, Mr Fetto countered that although the burden of proof was on the Respondent, it did not need to canvas any particular alternative and less disadvantageous practices if none were advanced or suggested by the Claimant himself. The Claimant's reliance on the example of the psychotherapists had been inappropriate given that the adjustment in relation to the psychotherapists was made in order to address an equal pay claim. In the instant case all that was being done was that the employers were seeking to justify a scheme based on length of service which caused disadvantage to the Claimant only because he had lesser service than others. The employers had recognised the need to shift to a different system, but had been prevented from making the change in a timely manner for the reasons that the Tribunal had identified and accepted.

43. There is some merit in Mr Fetto's proposition that the Claimant ought at least to have expressly indicated to the Tribunal some means by which there might have been a lesser disadvantage to him from the application of the PCP. But, in our judgment, the Tribunal should themselves have seized and addressed the obvious proposition that there were manifest alternative ways in which the employers could have continued to apply the PCP in question but without disadvantage to the Claimant. One example would be to backdate length of service. Another would be to have added an additional increment at the start of his service, and yet another would have been, in the light of restraints on the public purse generally, to have constrained any further pay increments for those higher up the scale whilst deploying such financial resources as were available to improve the position of those with lesser lengths of

service. All of those alternatives were sufficiently obvious as alternatives that in our judgment the Tribunal ought to have addressed them.

44. For those reasons, we are satisfied that the appeal should succeed in relation to grounds 3 and 4 of the Notice of Appeal. It would ordinarily therefore follow that we would have remitted the question of justification to the Tribunal for reconsideration. However, given the outcome of the cross-appeal that matter does not arise.

(viii) The relevance of pay controls

45. The final ground of appeal before us was ground 6. The contention of the Claimant was that the Tribunal had erred in law in deciding that a blanket pay freeze imposed on the public sector could amount to a legitimate justification for discrimination by this particular government department. In support of that proposition Ms Lewis relied on the recent judgment of the Supreme Court in **O'Brien v Ministry of Justice** [2013] IRLR 315. We accept that that decision is authority for the proposition that an employer cannot justify a PCP by exclusive reliance upon a lack of financial resources caused by its own decision as to how much money to expend on the pay of particular staff.

46. However, we are not satisfied that the ground of appeal is made out in the instant case. We accept Mr Fetto's submission that the context of restraint of public expenditure was only one of the factors in the instant case that had led to the PCP being maintained in the way that it was rather than being replaced earlier with a more assessment-sensitive system. In particular, as the extracts we have already mentioned from the Employment Tribunal's judgment made clear, there were multiple other factors explaining why the PCP had been maintained and it was far from a case of adopting or continuing to apply the PCP by reason only of a decision to restrict spending by the government department in question. Here, as we have already recounted, there

was a historic anomaly of a huge number of pay scales and grades and there was a long and complex process in operation to produce the elimination of unnecessary differentials. The fact that the reform programme had been delayed in consequence of restrictions on available public funds was but only one dimension of the portfolio of matters which the Tribunal were rightly taking into consideration in forming their overall judgment that the PCP in question could be and was justified.

Conclusion

47. For the reasons we have given the cross-appeal will be allowed, and in consequence the discrimination claims brought by the Claimant will remain dismissed. The appeal will have achieved a measure of success on grounds 3 and 4 but that produces no material advantage to the Claimant and no different result. This is best ultimately expressed by simply dismissing the appeal.