Appeal No. UKEAT/0323/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 January 2015
Judgment handed down on 28 January 2015

Before

THE HONOURABLE MR JUSTICE LEWIS

MR T STANWORTH

MRS L S TINSLEY

ANTHONY GREENLAND — APPELLANT

SECRETARY OF STATE FOR JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

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SUMMARY

RACE DISCRIMINATION - Indirect

This is an appeal against a decision of the employment tribunal dismissing a claim for indirect discrimination. The case concerned the remuneration paid to different categories of members of the Parole Board. For a period between November 2009 and 1 April 2014, the Secretary of State determined that retired judges serving as members of the Parole Board and who chaired oral hearings were to be paid a higher fee than non-judicial members who chaired certain oral hearings. All the retired judges were white. The Appellant, who was a non-judicial member of the Parole Board, was black. He contended that the fixing of a higher fee for the retired judges constituted indirect discrimination as it amounted to a practice which put persons who shared his protected characteristic (race) at a particular disadvantage as compared with persons who did not share that characteristic. The employment tribunal found that the practice did not fall within section 19 of the Equality Act 2010 as the Appellant was the only black non-judicial member appointed to chair oral hearings and the Appellant had not demonstrated that there was any other person sharing the Appellant's protected characteristic whom the practice put, or would put, at a particular disadvantage. Further, the tribunal decided that there were material differences between the circumstances of the cases of retired judges and non-judicial members. Furthermore, the tribunal considered that, in any event, the practice of paying an increased fee to retired judges serving as members of the Parole Board was objectively justified in the particular circumstances of the case.

On the first issue, the determination by the Secretary of State to pay a different, and lower, fee to retired judges serving as members of the Parole Board put, or would put, a non-judicial member sharing the protected characteristic of the Appellant at a particular disadvantage when compared with persons not sharing that characteristic. The question was whether there was a

non-judicial member of the Parole Board (not whether there was a non-judicial member appointed to chair) who shared the Appellant's protected characteristic at the material time. The Tribunal did not address that issue. In any event, however, the tribunal were entitled to find on the facts that there were material differences between the circumstances of the retired judges and the non-judicial members. Only the former were eligible to sit on cases involving prisoners sentenced to life imprisonment and the work that the retired judges did, and the qualifications and skills they had, were materially different from those of the non-judicial members. The tribunal were also entitled to find that the increase in remuneration for retired judges was objectively justified as it was both an appropriate and necessary means of achieving the legitimate aim of reducing the backlog of oral hearings involving prisoners sentenced to life imprisonment and imprisonment for public protection.

THE HONOURABLE MR JUSTICE LEWIS

INTRODUCTION

1. This is an appeal against a decision of an employment tribunal, comprising Employment Judge Lewzey, Ms Seddon and Mr Ferns, dismissing a claim by the Appellant, Mr Greenland, for indirect race discrimination. In essence, the claim challenged the practice of the Secretary of State for Justice of fixing a different, and higher, level of remuneration for a certain category of members of the Parole Board, namely retired judges, as compared with non-judicial members. All the 36 retired judges serving as members of the Parole Board were white. The Appellant was the only non-judicial member of the Parole Board who was black and who chaired certain types of oral hearings. He received a lower fee when chairing those oral hearings than that received by a retired judge who was a member of the Parole Board. The Appellant contended that that practice amounted to indirect race discrimination contrary to section 19 of the Equality Act 2010 ("the 2010 Act").

2. The tribunal considered that the claim failed on each of three grounds. First, the tribunal considered section 19(2)(b) of the 2010 which requires that the practice put other persons who shared the Appellant's protected characteristic (race) at a particular disadvantage before the practice could be said to be discriminatory. The evidence showed that the Appellant was the only black, non-judicial member of the Parole Board who chaired oral hearings of the Board. There were no other black persons who chaired oral hearings of the Parole Board. The tribunal considered therefore that the practice neither put, nor would put, other persons sharing the Appellant's protected characteristic at a disadvantage so the practice was not discriminatory for the purposes of section 19(2) of the 2010 Act. Secondly, the tribunal considered that there were material differences between the cases of the retired judges and the non-judicial members of the

Parole Board. Thirdly, the tribunal considered that the increase in remuneration paid to retired judicial members was objectively justified. The Parole Board had a need to reduce the backlog of oral hearings and needed to recruit retired judges to serve as judicial members of the Parole Board for that purpose. Increasing the daily fee paid to retired judicial members was justified in the particular circumstances of this case. The Appellant appeals against each of those findings.

3. From 1 April 2014, the system changed. Judicial and non-judicial members of the Parole Board became eligible to chair any oral hearing. The remuneration fixed for chairing oral hearings became the same for both retired judges and non-judicial members of the Parole Board. This claim, therefore, concerns the period between January 2012 and 31 March 2014 when the Appellant was paid different, and lower, remuneration for chairing certain oral hearings as compared with retired judges.

THE LEGAL FRAMEWORK

4. Section 50 of the 2010 Act applies to public offices, that is to an office or post, appointment to which is made by a member of the executive. That section applies to members of the Parole Board as the Secretary of State appoints the chairman and members of the Parole Board: see paragraph 2 of Schedule 19 to the Criminal Justice Act 2003 ("the 2003 Act"). Section 50(6) of the 2010 Act provides that:

> **"(6) A person (A) who is the relevant person in relation to a public office within subsection 2(a) or (b) or (d) must not discrimination against a person (B) appointed to the office –**
>
> **(a) as to B's terms of appointment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by terminating the appointment;**
>
> **(d) by subjecting B to any other detriment.**

5. Section 19 of the 2010 Act defines indirect discrimination in the following terms:

"Section 19 Indirect Discrimination

"(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.

(3) The relevant protected characteristics are—

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation."

6. The question of whether a provision, criterion or practice ("PCP") is objectively justified is to be determined in accordance with the approach set out in *Chief Constable of West Yorkshire v Homer* [2012] ICR 704 and, in particular, that set out in paragraphs 19 to 26 of the judgment of Baroness Hale.

7. Section 23 of the 2010 Act deals with the need to ensure that a proper comparison is made between the relevant persons or groups. Section 23(1) of the 2010 Act provides as follows:

"23 Comparison by reference to circumstances

"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

THE FACTS

The Composition of the Parole Board

8. The facts are set out in full in the written reasons of the employment tribunal. The essential facts are these. The Parole Board is a body corporate created by the Criminal Justice Act 1967 and continued in being by section 239 of the 2003 Act. The constitution of the Parole Board is prescribed by paragraph 2(1) and (2) of Schedule 19 to the 2003 Act in the following terms:

> **"(1) The Board is to consist of a chairman and not less than four other members appointed by the Secretary of State.**
>
> **"(2) The Board must include among its members—**
>
> **(a) a person who holds or has held judicial office;**
>
> **(b) a registered medical practitioner who is a psychiatrist;**
>
> **(c) a person appearing to the Secretary of State to have knowledge and experience of the supervision or after-care of discharged prisoners; and**
>
> **(d) a person appearing to the Secretary of State to have made a study of the causes of delinquency or the treatment of offenders."**

9. For convenience, those categories can be divided for present purposes into judicial members and non-judicial members. Judicial members comprised serving and retired judges. The judicial members were required, or were in practice, persons who were or had been circuit judges (or more senior judges) and who were or had been authorised to try murder, attempted murder or rape cases or had experience of chairing Mental Health Review Tribunal hearings.

The Work of the Parole Board

10. The Parole Board's functions included considering whether to direct the release of persons sentenced to life imprisonment (once they had served the minimum time that they were ordered to serve in prison) as the Parole Board no longer considered it necessary for the protection of the public that the prisoner should be confined.

11. New forms of sentence were introduced by 2003 Act known as sentences of imprisonment for public protection ("IPP"). That was a sentence of imprisonment for an indeterminate term imposed where the offender was considered by the court to be dangerous as defined by chapter 5 of the 2003 Act. The Parole Board again had to determine whether a prisoner sentenced to IPP was safe for release into the community on the expiry of the minimum term which he had to serve in prison. In addition, the Parole Board considered cases involving certain determinate sentences including prisoners on whom an extended sentence was imposed, that is they were sentenced to serve an appropriate time in custody and to serve an extended period on licence by reason of the fact that they were assessed as dangerous under the provisions of the 2003 Act. Such prisoners were eligible for release on licence once they had served one-half of the appropriate custodial sentence and the Parole Board directed that they be released as it was satisfied that their confinement in prison was no longer necessary for the protection of the public. Sentences of IPP and extended sentences could only be imposed upon persons convicted of offences committed on or after 4 April 2003. Those sentences have been replaced with extended determinate sentences from 3 December 2012. In relation to those sentences, the Parole Board also considers whether to direct the release of those who have completed the minimum term they must spend in prison as they may be released safely into the community. The Parole Board also determines whether prisoners released on licence but recalled to prison following a breach of the conditions of the licence are safe for re-release into the community.

12. The evidence before the employment tribunal was that the Parole Board initially considers cases by reviewing the documents but cases involving prisoners sentenced to life imprisonment, or to IPP following recall to prison after a breach of the conditions of their licence, almost always proceed to an oral hearing. Cases involving other prisoners sentenced to

IPP may also involve an oral hearing. Prior to April 2009, oral hearings were chaired by a judicial member (either a serving or a retired judge).

13. In April 2009, the Parole Board Rules 2004 were amended so that not all oral hearings were required to be chaired by a judicial member. Oral hearings involving prisoners sentenced to life imprisonment still had to be chaired by a serving or retired judge but other oral hearings could be chaired either by a judicial or a non-judicial member. That was achieved by amending rule 3 of the Parole Board 2004 Rules so that the rule provided that, in respect of a hearing of a prisoner mandatory or discretionary life sentences, the oral panel had to consist of or include a sitting or retired judge and, in relation to such panels, the sitting or retired judge should chair the panel. That position continued under the Parole Board Rules 2011, rule 5 of which provided as follows:

> **"Appointment of panels**
>
> **"5.—(1) The Chairman shall appoint a single member of the Board to constitute a panel to deal with a case where the Board is to consider the initial release of a prisoner serving an indeterminate sentence.**
>
> **"(2) The Chairman shall appoint one or more members of the Board to constitute a panel to deal with a case where—**
>
> **(a) the case is to be heard in accordance with Part 4 of these Rules;**
>
> **(b) the Board is to consider the release of a prisoner serving a determinate sentence; or**
>
> **(c) the Board is under a duty to give advice to the Secretary of State.**
>
> **"(3) The Chairman shall appoint one member of each panel to act as chair of that panel.**
>
> **"(4) In respect of a hearing in the case of a prisoner serving a life sentence or a sentence during Her Majesty's pleasure—**
>
> **(a) an oral panel shall consist of or include a sitting or retired judge; and**
>
> **(b)the sitting or retired judge shall act as chair of the oral panel.**
>
> **"(5) A person appointed under paragraph (1) may not in the same case sit on a panel appointed under paragraph (2)(a)."**

14. Following those changes, the Parole Board put in place arrangements to determine which non-judicial members of the Parole Board would be considered as suitable to chair oral

hearings involving prisoners sentenced to IPP. The Parole Board introduced a system which required members to be trained to sit on panels consisting of a single member and considering (on the papers) initial release for indeterminate sentence prisoners and to have undertaken 40 such cases in the previous year. They were also required to have considered 54 cases involving a prisoner who had been released on licence and recalled, and was being assessed for re-release. The non-judicial members had to have been subject to satisfactory observation in such cases. If a non-judicial Parole Board member satisfied those criteria, the chairman of the Parole Board was prepared to appoint him or her to chair an oral hearing involving a prisoner sentenced to IPP.

15. As at 28 January 2014, there were 223 members of the Parole Board of whom 113 were non-judicial members. There were 39 non-judicial members who had satisfied the Parole Board requirements for appointment to chair oral hearings involving prisoners sentenced to IPP. The Appellant was one of these 39 non-judicial members. He has been appointed to chair, and has chaired, oral hearings involving those sentenced to IPPs since January 2012. He was the only black person appointed to chair oral hearings involving prisoners sentenced to IPP during the material period.

16. The evidence does not contain specific figures for the racial background of the members of the Parole Board. The evidence does record that the proportion of Parole Board members from black and other ethnic minority backgrounds as at 2009 was 4.2% and that had risen to 5.23% in 2010. The employment tribunal does not give figures for subsequent years. There was no evidence of the number or proportion of Parole Board members with the same racial background as the Appellant (that is black, as opposed to other, ethnic minority).

17. The system changed again with effect from the 1 April 2014. The Parole Board Rules were amended so that the Chairman of the Parole Board appointed one or more members to constitute a panel and appointed one member of each panel to chair the panel. From 1 April 2014, there were no restrictions on which type of member could chair oral hearings. In particular, from that date, oral hearings involving prisoners sentenced to life imprisonment (as well as those involving prisoners sentenced to IPP) could be chaired by a judicial or a non-judicial member of the Parole Board.

Remuneration of Members

18. Paragraph 2 of Schedule 19 to the 2003 Act provides, so far as material, that:

> **"(1) The Board may pay to each member such remuneration as the Secretary of State may determine.**
>
> **…**
>
> **(4) A determination or direction of the Secretary of State under this paragraph requires the approval of the Treasury".**

19. Serving judges who are members of the Parole Board are not paid any remuneration in respect of the duties they undertake on behalf of the Board. They are salaried and are released from their usual judicial duties for up to 15 days a year to undertake Parole Board duties. Retired judges and non-judicial members are remunerated in respect of the activities they undertake.

20. The fee fixed for retired judges was, it appears, a daily fee. That fee was fixed in April 2009 at £448 a day. On a particular day, a retired judicial member could be chairing an oral hearing involving a prisoner sentenced to life imprisonment (and only judicial members could chair such oral panels). He could be chairing an oral hearing dealing with a prisoner sentenced

to IPP. He could, on any particular day be chairing more than one panel and that could include oral panels dealing with prisoners sentenced to life imprisonment or to IPP.

21. When non-judicial members began chairing oral hearings involving prisoners sentenced to IPP, they were also paid a fee of £448 a day. That rate of remuneration remained unchanged until April 2014. The Appellant began chairing oral panels involving prisoners sentenced to IPP in January 2012 and has been paid a fee of £448 a day for oral hearing chaired by him between that date and 1 April 2014.

22. In 2009, there was a serious shortage of judges available to undertake the work of judicial members of the Parole Board. A number of reasons were identified for this. These included the process of appointment for judicial members and the amount of unpaid days, in addition to days for which they were paid, they were required to spend in order to complete the work. The reasons for the shortage also included the fees paid to retired judges. The daily sitting fee of £448 was lower than the fee paid to retired judges for undertaking other work. A business case was made to increase the daily fee paid to retired judges.

The Determination of Remuneration

23. The Secretary of State made a determination increasing the remuneration payable to retired judges to £583 a day for chairing oral hearings (that is, oral hearings dealing with prisoners sentenced to life or to IPP). That occurred, it seems, with effect from 4 November 2009. The Secretary of State did not increase the remuneration for non-judicial members and when they chaired oral hearings of prisoners sentenced to IPP they were paid £448 a day. The Appellant (and other non-judicial members of the Parole Board) who chaired oral hearings

involving prisoners sentenced to IPP who chaired oral hearings involving prisoners sentenced to IPP continued to receive a fee of £448 until 1 April 2014.

24. It is surprising that the relevant determinations of the Secretary of State, made pursuant to the power conferred by paragraph 3 of Schedule 19 to the 2003 Act, was not adduced before the employment tribunal in evidence. The setting of different levels of fees for different categories of Parole Board members chairing oral hearings was admitted to be a practice within the meaning of section 19 of the 2010 Act. However, the precise basis upon which the remuneration was said to be payable was not agreed. In particular, there was an issue as to whether the fee was a daily fee paid for sitting or whether it was a fee paid for a specific task such as chairing an oral hearing for a particular type of prisoner. Given that the determination of the Secretary of State contains the practice said to contravene the 2010 Act, it would have been preferable for the determinations themselves to have been adduced in evidence.

25. The Respondent was invited to provide a copy of the relevant determinations to the Employment Appeal Tribunal. The Respondent provided certain documents which were said to address fees together with an accompanying letter dated 21 January 2015. The documents included a submission to a minister dated 9 February 2009 containing paragraphs recommending an increase in the fee for retired judges to £583. The accompanying letter stated that there is no document recording approval of that recommendation but that approval would have been given orally or by an e-mail which is not now available. The submission containing the recommendation does not set out the details of the basis upon which the remuneration determined by the Secretary of State pursuant to paragraph 3 of Schedule 19 to the 2003 Act is payable to retired judges who are Parole Board members. It refers to an increase and gives the figure but without the underlying determination setting out the basis upon which remuneration

is payable, the reference to an increase does not itself assist in determining the precise basis upon which remuneration was payable. The documents provided say nothing about the remuneration payable to non-judicial members. Given that paragraph 3 of Schedule 19 to the 2003 Act contemplates the Secretary of State determining the fees that may be paid to members of the Parole Board (and that determination requires the approval of the Treasury), it remains surprising that there is no document or documents recording the determination or determinations of the Secretary of State as to the fees payable to members of the Parole Board. For completeness we note that the Appellant also submitted documentation in relation to the fees. We do not consider the material provided by either party assists in the resolution of this appeal.

26. In the event, we base our decision on the description of the practice as derived from the decision of the employment tribunal, that description being derived from the way the practice was, it seems, described by the Parole Board in guidance given to their members. The Parole Board is, of course, a separate legal entity from the Secretary of State and it is the Secretary of State, not the Parole Board, who determines the remuneration that may be paid to Parole Board members.

The Present Position

27. We were told that, with effect from 1 April 2014, the system of remuneration changed. From that date, the Parole Board Rules 2011 as amended did not restrict the chairing of oral hearings to judicial members. The Rules provided that the Chairman simply had to appoint one member of the Parole Board to act as a chair of a panel. From that date, therefore, judicial and non-judicial members were able to chair oral hearings involving those sentenced to life imprisonment as well as those sentenced to IPP. We were told that, with effect from 1 April

2014, the rate of remuneration for retired judges and non-judicial members chairing oral hearings is the same. This claim, and the decision of the tribunal, concern the period between November 2009 and 31 March 2014 when differential fees were paid to non-judicial members (including the Appellant from 23 January 2012) and retired judicial members.

The Decision of the Tribunal

28. The complaint was that the differential rates of remuneration paid to retired judicial members (of whom there were 39 during the material period, all of whom were white) constituted a practice within the meaning of section 19 of the 2010 Act which put or would put persons with the same racial characteristics as the Appellant (who is black) at a disadvantage. The tribunal set out the list of issues at paragraph 2 of its decision in the following terms:

> **"Indirect discrimination**
>
> **Under s19 Equality Act 2010**
>
> **(1) It is admitted by the Respondent that the setting of different levels of fees for different chairs is a 'practice'.**
>
> **(2) Whether the setting of different levels of fees for different chairs is discriminatory in relation to the Claimant's protected characteristic;**
>
> > **(a) Whether the practice above applies or would apply to persons with whom the Claimant does not share the disadvantage**
> >
> > **(b) Whether or not the practice puts, or would put, persons with whom the Claimant shares the protected characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic**
> >
> > **(c) Whether the practice puts the Claimant at a disadvantage**
> >
> > **(d) Whether or not the Respondent can show the practice referred to above, to be a proportionate means of achieving a legitimate aim**
>
> **(3) What is the pool for comparison?**
>
> **(4) Under s.23(1) the comparators relied upon by the Claimant for the purpose of s.19 are white retired judges.**
>
> **(5) Whether or not there is any material difference between the circumstances relating to each case.**
>
> **Remedy**
>
> **(6) What awards should be made to the Claimant as a result of any finding of indirect discrimination."**

29. In practice, there were in essence three critical issues for determination by the tribunal, namely (1) whether the practice put or would put persons with whom the Appellant shared the protected characteristic at a particular disadvantage (the issue referred to in paragraph 2(2)(b) of the tribunal's decision) (b) whether there were any material differences between the circumstances of the cases of the retired judges serving as members of the Parole Board and the non-judicial members such as the Appellant (the issue in paragraph 2(5)) and (c) whether the practice was objectively justified (the issue in paragraph 2(2)(d)).

30. On the first of those issues, Mr Barr Q.C. for the Respondent contended before the tribunal that section 19 of the 2010 Act required the Appellant, who was black, to establish that the practice put, or would put, a group of other persons sharing the same characteristic as the Appellant at a particular disadvantage. Here, he submitted, the Appellant had not established that there were other black persons (or even one other black person) who were accredited to chair oral hearings involving prisoners sentenced to IPP. Consequently, he submitted to the tribunal, the Appellant could not demonstrate that the situation involved indirect discrimination within the meaning of section 19 of the 2010 Act. Mr Toms, for the Appellant, contended that consideration of whether the practice "puts or would put" persons sharing the Appellant's protected characteristic at a particular disadvantage included consideration of other hypothetical black persons who had not yet been appointed to chair oral hearings. He contended that the practice would put black persons at a disadvantage as they were more likely to become eligible to chair oral hearings by way of becoming a non-judicial member of the Parole Board accredited to chair oral hearings than by way of being a retired judge and they were therefore more likely to receive the lower fee for chairing oral hearings. The tribunal rejected the argument of the Appellant that they could have regard to a hypothetical person in the following terms:

> **"[Mr Toms] argued this would accord with the purpose of the legislation which is to try to eliminate structural inequality and discrimination, particularly given the evidence that the differential pay rate is a barrier to recruiting more BME chairs. Mr Toms argument was specifically rejected in Eweida in the Court of Appeal. For that reason we reject Mr Toms submission on this point.**
>
> **Mr Barr submits that to use a hypothetical comparator would mean that disparate impact could always be satisfied through the inclusion of a hypothetical comparator sharing the Claimant's protected characteristic in the disadvantaged pool which could not have been the intention of Parliament. Mr Barr points out that Sedley LJ in *Ewida* pointed out that he did not rule out the inclusion in the comparative exercises of persons included on the basis of evidence who would potentially affected by the PCP nor did he exclude the use of hypothetical comparators in cases concerning other types of discrimination. However the Tribunal notes that in the present case there is no evidence before us that any black person was in fact deterred from becoming an IPP chair by the differential rate. There was no evidence to this effect from Mr Thake. He mentioned that those deterred were largely white and women. The Parole Board did not say that any black person had been deterred from putting him or herself forward. In those circumstances we reject Mr Toms argument."**

31. The second essential issue concerned whether there was a material difference between the circumstances of the retired judicial members and the non-judicial members of the Parole Board. The argument of the Appellant was that there was no difference between retired judges and non-judicial members of the Parole Board when chairing oral hearings involving prisoners sentenced to IPP.

32. The employment tribunal first considered whether that was the appropriate comparison. The tribunal considered that the whole of the tasks undertaken by the retired judges had to be taken into account, not merely their role when chairing oral hearing involving prisoners sentenced to IPP. At the material time, only serving or retired judges could chair oral hearings involving prisoners sentenced to life imprisonment; non-judicial members could not chair those hearings. In those circumstances, the employment tribunal considered that the appropriate comparison was between the entirety of the work undertaken by retired judicial members. The employment tribunal expressed this conclusion in the following terms:

> **"The Tribunal has considered whether there is a material difference. With effect from 1 April 2014 the Parole Board Rules will change so that IPP chairs will be entitled to chair lifer panels. However, that has not been the case prior to the imminent changes in the law. On the evidence before us there is still to be discussion as to the implications of that change and what panels IPP chairs will in fact chair. It is notable that when chairing IPP cases the role of an IPP chair and of a judge is the same. However, only judges could chair lifer cases at the material time. Whilst there is an undisputed overlap, the Tribunal is not satisfied that the**

> **judges and the IPP chairs were performing the same job. It was only one part of the job that was the same. The other part of the job was materially different."**

33. Against that background, the tribunal considered the position of the retired judges. They were all legally qualified and had legal expertise as judges and had, when judges, been authorised to try cases of murder, attempted murder or rape or had significant experience of chairing Mental Health Review tribunals. Non-judicial members were not legally qualified and did not have experience of judging criminal trials or sentencing in such cases. The tribunal noted that at the material time the Parole Board Rules required a judicial member of the Parole Board to chair an oral hearing involving a prisoner sentenced to life imprisonment. Retired judges were, therefore, chairing different hearings from the non-judicial members. Further, the tribunal accepted that, even in cases involving prisoners sentenced to IPP, the use of judicial members' skills was considered particularly valuable in relation to legally complex cases, where there was a procedural or legal issue to consider. The tribunal also accepted that judicial members had knowledge of Crown Court procedures and sentencing guidelines and use of judges in high profile cases ensured public confidence. The tribunal noted the difference in training between judicial and non-judicial members. The tribunal concluded that:

> **"In these circumstances, the Tribunal is satisfied that there is a material difference between the retired judges and the IPP chairs and in those circumstances [the Appellant's] claim of indirect race discrimination fails."**

34. The third issue concerned the question of whether the differential treatment was objectively justified if, contrary to the tribunal's findings, the practice put or would put persons with the same protected characteristic as the Appellant at a particular disadvantage. The tribunal noted that the Respondent would be able to justify the practice if it was a proportionate means of achieving a legitimate aim. The tribunal referred to the decision of the Supreme Court in *Chief Constable of Wes Yorkshire Police v Homer* [2012] ICR 704 and paragraph 22 of the decision of Baroness Hale observing that:

> **"To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so."**

35. The tribunal first identified the legitimate aim pursued in the following terms:

> **"The first issue for the Tribunal is to identify what was the legitimate aim. By 2008/9 the Parole Board faced a crisis as a result of the backlog or oral hearing cases both lifer and IPP. It was an urgent priority to address this backlog. Mr Barr argues that the legitimate aim was the aim of reducing the backlog of oral hearing cases. The Tribunal is satisfied that the aim is legitimate."**

36. The tribunal then considered the question of whether the fee increase for retired judges was a proportionate means of achieving that aim in the sense of it being both appropriate and necessary. They noted that the rate of remuneration that retired judges received before the increase (£448 a day) was significantly lower than the remuneration that they could earn working in the Crown Court or the Mental Health Review Tribunals. They considered that evidence established that the lower fee was a major problem in recruiting the necessary number of retired judges. They considered the argument that the Respondent had alternatives to recruiting more judges and could have recruited both more judges and non-judicial members to chair oral panels. Having reviewed the evidence and the arguments, the tribunal concluded that:

> **"43. On the evidence before the Tribunal there was no shortage of individuals applying to be IPP members, whereas there was a manifest shortage of judges and retired judges. The significant step was the increase in fees and the removal of the requirement for the appointment of judicial members to be subject to the Office of Commissioner for Public Appointment Regulations (page 98). In addition the ratio of reading to sitting time was changed and [the Chairman of the Parole Board] encouraged senior members of the judiciary to encourage members of the judiciary and retired judiciary to apply. It would not have been possible for IPP chairs to have dealt immediately with the backlog in cases. They were new appointments and certain cases were not suitable for an IPP chair. Where there was a need for a skill based on legal complexity, or the high profile of a case, in addition to lifer cases, it was necessary for the Parole Board to be chaired by a judge. Retired judges were necessary because of the sitting limitations on sitting judges, who could only sit for 15 days per year. Retired judges were not subject to that limitation. As a result of the initiative a large number of judges were recruited in 2010 and the backlog was addressed. Tribunal is satisfied that the legitimate aim of reducing the backlog of oral hearing cases was achieved by proportionate means. The increase to the fee for retired judges was both appropriate and necessary to achieve that aim. In those circumstances the Tribunal is satisfied that the practice was a proportionate means of achieving a legitimate aim."**

37. The tribunal therefore dismissed the claim for indirect race discrimination. Their decision records the parties as Mr A Thake and the Secretary of State for Justice. The

Employment Appeal Tribunal granted an application to change the details of the name of the Appellant to Mr Greenland.

THE ISSUES

38. Against that background, the following issues arise:

(1) did the tribunal err in concluding that the practice of paying increased fees to retired judges who were members of the Parole Board did not put persons with the same protected characteristic as the Appellant at a particular disadvantage?

(2) did the tribunal err in concluding that there was a material difference in the circumstances of the case of retired judges who were members of the Parole Board, as compared with the non-judicial members of the Parole Board?

(3) did the tribunal err in concluding that the practice of paying an increased fee for retired judicial members chairing oral hearings was objectively justified?

39. In order to succeed on this appeal, the Appellant must succeed on all three grounds of appeal.

THE FIRST ISSUE – PARTICULAR DISADVANTAGE

40. Mr Toms, on behalf of the Appellant, submitted that the requirements of section 19(2)(b) of the 2010 Act is satisfied when the practice complained of puts or would put persons with whom the Appellant's shares the protected characteristic (here race) at a particular disadvantage. He submitted that it is not necessary to identify any other actual person with the protected characteristic who is put, or would be put, at a disadvantage. Rather, he submits that section 19 of the 2010 Act permits the claimant to rely on what he described as hypothetical

comparators or members of the disadvantaged group, that is other persons with the protected characteristic who might chair oral hearings and become eligible for payment of the lower fee paid to non-judicial members. Mr Barr Q.C. on behalf of the Respondent, submitted that section 19 of the 2010 Act required the Appellant to be part of a group of persons who shared the protected characteristic (i.e. part of a group of black persons) and who are at a particular disadvantage and that section 19 of the 2010 Act does not permit of hypothetical comparators

The Proper Approach

41. The aim underlying the law relating to indirect discrimination is to identify a provision, criterion or practice (a "PCP") which appears to be neutral on its face but in reality works to the comparative disadvantage of people with a particular protected characteristic such as race or gender. If there is such a PCP (and assuming that there are no material differences in the circumstances of the cases of the persons being compared), then the PCP needs to be scrutinised to determine whether or not it is objectively justified: see generally paragraph 17 of *Chief Constable of West Yorkshire v Homer* [2012] ICR 704.

42. The specific provision dealing with indirect discrimination is section 19 of the 2010 Act. Section 19(1)(a) of the 2010 Act provides that a person discriminates against another person if he applies a provision, criterion or practice to that person which is discriminatory in relation to a protected characteristic of that person. Section 19(2) of the 2010 Act then identifies the circumstances in which the provision, criterion or practice is discriminatory.

43. First it is necessary to identify the provision, criterion or practice in issue. In the present case, the practice is described as the fixing of different levels of fees for retired judges who are members of the Parole Board and non-judicial members of the Parole Board.

44. Secondly, it is necessary to consider if the respondent applies or would apply the PCP to persons who do not share the protected characteristic of the claimant. In the present case, the Respondent does apply the practice to persons who do not share the protected characteristic of the Appellant. The Respondent applies the practice of paying a different, and higher, level of fees to the retired judges who are members of the Parole Board. Members of that group do not share the protected characteristic. They (all) have a different racial characteristic. They are (all) white whereas the Appellant is black.

45. Thirdly, it is necessary to consider whether the practice puts, or would put, the Appellant and other persons sharing the protected characteristic at a particular disadvantage when compared with persons who do not share that characteristic. It is not sufficient that the practice puts, or would put, only the Appellant at a particular disadvantage. That follows from the wording of section 19(2)(b) and (c) of the Act. In particular, section 19(2)(b) of the 2010 Act would serve no purpose if it were sufficient if the practice puts, or would put, only the Appellant at a particular disadvantage. That conclusion is also consistent with the ruling of the Court of Appeal in *Eweida v British Airways plc* [2010] ICR 890 at paragraphs 10 to 13 dealing with the interpretation of materially identical provisions in the regulation 3(1)(b) of the former Employment Equality (Religion or Belief) Regulations 2003 ("the Regulations").

46. Fourthly, in our judgment, the key question then is whether the practice puts, or would put, another person who shares the Appellant's protected characteristic at a particular disadvantage when compared with persons who do not share that characteristic. In our judgment, the proper approach to that question on the particular facts of this case is as follows. The practice was the fixing of remuneration for members of the Parole Board pursuant to an exercise of the statutory power conferred by paragraph 3 of Schedule 19 to the 2003 Act. The

practice involved fixing one level of remuneration for the retired judges who were judicial members and another, lower, level of remuneration for non-judicial members. The practice put the Appellant at a particular disadvantage as he only received the lower fee for chairing oral hearings The question is whether there was another person who shared the Appellant's protected characteristic (race) who was a non-judicial member of the Parole Bard at the material time. If so, in our judgment, the practice would put such a person who shared the protected characteristic at a particular disadvantage as the person would only be eligible to be paid the lower fee if they were appointed by the Chairman of the Parole Board to chair an oral hearing. For present purposes we assume, without deciding, that it would be sufficient if there were at least one other person who shared the Appellant's protected characteristic and that "persons" in section 19((2)(b) includes the singular as well as the plural.

47. We have considered the submissions of Mr Barr that it would be necessary for the Appellant to show that there was another black non-judicial member of the Parole Board who was already accredited by the Parole Board as suitable to chair oral hearings and there was no such person as the Appellant was the only black person accredited to chair oral hearing. In other words, the Appellant would need to show that there was a black person accredited to chair oral hearings, not merely another black non-judicial member of the Parole Board, in order to demonstrate that the practice put, or would put, another person sharing the Appellant's protected characteristics at a particular disadvantage. In our judgment, that approach would not be correct on the facts of the present case. This case deals with the statutory power of the Secretary of State to determine the remuneration of members of the Parole Board. The Secretary of State has done so and has fixed a fee for retired judges who are judicial members and a fee for non-judicial members. It is that practice that is challenged. That practice would put any non-judicial member of the Parole Board at a particular disadvantage. If they chaired an

oral hearing, they would only be eligible to receive the lower fee, not the higher fee paid to the judicial member. It is correct that the chairman of the Parole Board would only have appointed non-judicial members of the Parole Board to chair oral hearings in the exercise of his power under rule 5(3) of the Parole Board Rules 2011 if the chairman was satisfied that that non-judicial member satisfied the internal Parole Board requirements to chair such hearings. However, we do not consider that the assessment of the practice adopted by the Secretary of State for fixing the remuneration of different categories of members of the Parole Board should be dependent upon the internal arrangements that the Parole Board put in place for determining who is to chair particular oral hearings.

48. Furthermore, that approach is consistent with the decision of the Court of Appeal in *Eweida v British Airways plc* [2010] ICR 890. Sedley L.J. observed at paragraph 17 of the judgment that the purpose of the use of the word "would" in a materially similar context in the Regulations is:

> **"to include in the disadvantaged group not only employees to whom the condition has actually been applied but those to whom it is potentially applies. Thus, if you take facts like those in the seminal case of *Griggs v Duke Power Co.* 401 US 424, the group of manual workers adversely affected by the unnecessary academic requirement will have included not only those to whom it had been applied but those to whom it stood to be applied".**

49. In our judgment, that is the appropriate approach in the present case. The differential fee levels fixed for non-judicial members of the Parole Board stood to be applied to any member who chaired an oral hearing. The practice of paying the (lower) level of remuneration fixed by the Secretary of State would put non-judicial members, if they chaired an oral hearing, at a particular disadvantage when compared with the retired judges who were judicial members. The question for the purpose of section 19(2)(b) of the 2010 Act is, therefore, whether the non-judicial members included a person or persons who shared the Appellant's protected characteristic. That involved consideration of whether there was at least one other black non-

judicial member of the Parole Board in addition to the Appellant. If so, the practice of fixing a higher fee for retired judges who were judicial members and a lower fee for non-judicial members of the Parole Board put, or would put, the Appellant and any other non-judicial member who was black at a particular disadvantage when compared with the persons who did not share that protected characteristic.

50. Finally, there is the question of the position if there was no other non-judicial member who shared the Appellant's protected characteristic (that if, if there was no other black non-judicial member of the Parole Board at the material time). That, in our judgment would properly raise the question of whether section 19(2)(b) permitted a hypothetical black person to be included amongst the group for the purposes of the comparison. On the facts of the present case, there is no scope for including hypothetical persons, that is persons who are not members of the Parole Board, within the group for comparison. We do not consider that the phrase "puts or would put persons" includes, in the context of this case, non-existent or hypothetical persons who are not yet members of the Parole Board for the following reasons.

51. This case concerns alleged indirect discrimination in relation to the terms of the Appellant's appointment within the meaning of section 50(6)(a) of the 2010 Act. The practice complained of concerns the fixing of different levels of remuneration for two different categories of existing members of the Parole Board. The wording of section 19(2)(b) is concerned with whether that practice puts or would the Appellant and persons who share his protected characteristic at a particular disadvantage. The purpose underlying section 19 of the 2010 Act is to enable the identification of an apparently neutral practice in relation to the fixing of levels of remuneration which in reality works to the disadvantage of members of the Parole Board who have particular protected characteristics. That involves considering the impact of the

practice on the two groups concerned. On the one hand, one group comprises 36 persons, the retired judges, who are white. The other group comprises 113 members. The issue is whether that group includes the Appellant and one or more black persons. If so, it will be necessary to consider if there are material differences between the circumstances of the two groups to see if a comparison is valid and, if a comparison is valid, whether the practice is objectively justified. The wording and purpose of section 19 of the 2010 Act point to consideration of the potential impact of the practice on the Appellant and other non-judicial members of the Parole Board who share his protected characteristics (not hypothetical, potential future members of the Parole Board).

52. Furthermore, that approach is, as a minimum, consistent with the decision of the Court of Appeal in *Eweida v British Airways plc* [2010] ICR 890 at least in the context of a practice dealing with the terms and conditions of existing staff (or, as here, existing members of a public body). At paragraph 15, Sedley L.J. considered that the materially similar provisions of the Regulations required "that some "identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage". We recognise that, on one reading, Sedley L.J. contemplated the possibility that one interpretation of the meaning of "would put" could involve consideration of persons outside the workforce (see paragraph 18). However, in the context of that case, the Court of Appeal did not have to decide the issue.

The Present Case

53. The difficulty in the present case is that the arguments before the employment tribunal were not advanced on the basis discussed above. The Appellant focussed on the question of whether section 19(2)(b) permitted the inclusion of what were described as hypothetical persons in the group of persons whom the practice put, or would put, at a disadvantage. The Appellant

contended before the employment tribunal (and the Employment Appeal Tribunal) that the persons whom the practice would put at a disadvantage includes what he describes as hypothetical comparators, that is persons who share the protected characteristic and have not yet been appointed to chair oral hearings of the Parole Board. The Appellant drew no distinction between existing (black) members of the Parole Board and (black) persons not yet appointed as members of the Parole Board. The Appellant submitted that black and ethnic minority people were far more likely to be appointed to chair oral hearings involving prisoners sentenced to IPP by becoming a non-judicial member of the Parole Board and being accredited to chair hearings than by being appointed to the Parole Board as a retired judge. Therefore, the Appellant submitted that these hypothetical comparators would be put at a particular disadvantage as they would only qualify for the lower fee paid to non-judicial members rather than the higher fee payable to the retired judges serving as members of the Parole Board.

54. The tribunal correctly concluded that, in the present case, it was not appropriate to consider hypothetical persons for the purpose of section 19(2)(b) of the 2010 Act. The tribunal also concluded that there was no evidence that black persons had, in fact, been deterred from seeking to become chairs of oral hearings. That may be correct but does not address the relevant issue. The relevant issue is not whether persons were deterred from seeking to be appointed to chair oral hearings. The relevant issue is whether the practice of paying different fees to different categories of Parole Board members put, or would put, the Appellant and a person or persons sharing his protected characteristic, at a particular disadvantage. That involved consideration of whether there was at least one other black non-judicial member of the Parole Board in addition to the Appellant. The tribunal did not address that issue.

55. Furthermore, as a result of the way the case was advanced, the tribunal did not have evidence as to whether or not there was another non-judicial member of the Parole Board who shared the Appellant's protected characteristic. The evidence indicated that the proportion of members of the Parole Board who were black or from another ethnic minority had risen to 5.23% by 2010. The total number of members of the Parole Board as at January 2014 was 223 of whom 113 were non-judicial members. There is, however, no evidence as to the figure for the number of black (as opposed to other ethnic minority) non-judicial members of the Parole Board during the material period. If, in order to decide this appeal, it had been necessary to decide if there were one or more non-judicial black members of the Parole Board (in addition to the Appellant), then we would have to consider carefully if it were permissible to infer that there was such a person from the evidence before the employment tribunal or whether the matter would have had to be remitted to enable the tribunal to find the relevant facts. However, in order to succeed on this appeal, the Appellant would have to succeed on the other two grounds of appeal as well as this ground of appeal. As we are satisfied, for the reasons given below, that the Appellant fails to establish either of those two grounds of appeal, the appeal would be dismissed in any event. In those circumstances, it is not necessary to reach a final decision on whether or not it is permissible to infer that there was at least one other non-judicial member of the Parole Board at the material time who shared the Appellant's protected characteristic.

THE SECOND ISSUE – MATERIAL DIFFERENCE

56. Section 23 of the 2010 Act provides that, on a comparison of cases for the purpose of section 19, there must be no material differences between the circumstances relating to each case. If there are material differences (other than the protected characteristic) between the two groups, then it will not be appropriate to compare those two groups for the purposes of section

19 of the 2010 Act and it would not be permissible to attribute the difference in treatment to any indirect discrimination.

57. In the present case, the employment tribunal found that there were material differences between the retired judges who were members of the Parole Board and the non-judicial members. The retired judges chaired oral hearings involving prisoners sentenced to life imprisonment whereas non-judicial members were not permitted to chair those hearings under the Parole Board Rules in force at the material time. Both retired judicial members and non-judicial members could chair oral hearings involving prisoners sentenced to IPP. The tribunal found that the work (or "job") for which the retired judicial members and the non-judicial members were remunerated were not the same. There was an overlap in that part of the work (or "job") was the same but the other part was materially different. The retired judges were legally qualified and had different legal skills and expertise as judges and, in part, chaired different types of oral hearings. Even in relation to oral hearings involving prisoners sentenced to IPP, the tribunal found that the legal skills of the retired judges was particularly valuable in legally complex cases. There were also differences in training.

58. Mr Toms, for the Appellant contended that the decision of the tribunal was perverse as there was no material difference between a retired judge and a non-judicial member when they were chairing an oral hearing involving a prisoner sentenced to IPP. Mr Toms submitted that the retired judges were paid a fee for a task and that, in so far as the task was chairing an oral hearing involving a prisoner sentenced to IPP, there was no material difference between retired judges and non-judicial members. In relation to that task, differences of training, skills and qualifications were not material.

59. The fact is that, on the evidence before the tribunal, the retired judges were paid a daily fee for their work as a member of the Parole Board. The evidence does not support the assertion that they were paid a fee for a specific task. In those circumstances, given the remuneration was paid for the work done by the retired judges, the tribunal was entitled to consider the entirety of the work in respect of which they received remuneration. They were entitled to conclude that there were material differences in the cases of the retired judicial members as compared with the cases of the non-judicial members. The retired judges did undertake a broader range of work and had legal skills and experience relevant to their work which was not possessed by the non-judicial members. In those circumstances, the tribunal were entitled to find that there were material differences for the purposes of section 23 of the 2010 Act and to conclude, therefore, that it was not appropriate to compare those two groups for the purpose of section 19 of the 2010 Act. Consequently, the tribunal was entitled to find, for this reason alone, that there was no indirect discrimination for the purposes of section 19 of the 2010 Act.

THE THIRD ISSUE – OBJECTIVE JUSTIFICATION

60. The third issue concerns the question of whether the practice of fixing a higher fee for retired judges who were members of the Parole Board during the material period than the fee payable to non-judicial members was objectively justified. In our judgment, the tribunal correctly addressed this question by reference to the approach identified in *Chief Constable of West Yorkshire v Homer* [2012] ICR 704.The tribunal first identified the legitimate aim. That is described in paragraph 41 as the need to deal with the backlog of oral hearings in cases involving both prisoners sentenced to life imprisonment and to IPP. It described the need to deal with these cases as an urgent priority. There is no appeal against the finding that this was the aim and that it was legitimate.

61. The tribunal then considered whether the increase in fees was both appropriate and necessary. Its reasoning can be found at paragraphs 42 and, especially, paragraph 43 of its reasoning which is set out above. In essence, the tribunal found that the major problem was ensuring that sufficient judges were available to carry out the necessary tasks. It found that one significant deterrent to recruiting retired judges was the fact that the fee that retired judges received for work for the Parole Board was significantly lower than they could earn by working in the Crown Court or Mental Health Review Tribunals.

62. The tribunal specifically addressed the question of whether there was an alternative solution available, namely recruiting more judges and non-judicial members to chair hearings of prisoners sentenced to IPP. The tribunal considered that that would not achieve the legitimate aim of reducing the backlog of oral hearings. Recruiting more non-judicial members would not assist in reducing the backlog as they would not have been appointed to chair oral hearings immediately. The chairman of the Parole Board did not appoint them to chair oral hearings until they had acquired experience of dealing with other cases. Furthermore, judicial members, not non-judicial members, were needed to chair oral hearings involving prisoners sentenced to life imprisonment, as that is what the Parole Board Rules required members. Retired judges, rather than sitting judges, were needed because of the restrictions on the number of days that serving judges could sit on oral hearings for the Parole Board. In those circumstances, the tribunal considered that the increase in fees for retired judges, in order to recruit more judicial members, was both appropriate and necessary to achieve the aim of reducing the backlog of oral hearings. In our judgment, that was a decision that the tribunal was entitled to reach on the material before them.

CONCLUSION

63. First, the employment tribunal was entitled to conclude on the evidence before them that there were material differences in the circumstances of the cases of retired judges serving as members of the Parole Board and non-judicial members at the material time. Given those material differences, the practice of paying a different, and higher, fee to retired judges did not involve indirect discrimination within the meaning of section 19 of the 2010 Act. Secondly, and separately, the tribunal was entitled to conclude that the payment of increased fees to retired judges serving as judicial members of the Parole Board, as a means of recruiting more retired judges, was both appropriate and necessary to achieve the legitimate aim of reducing that backlog. For each of those reasons, this appeal is dismissed.