Appeal No. UKEAT/0213/19/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 12 February 2020
Judgement handed down on 06 October 2020

Before

HER HONOUR JUDGE KATHERINE TUCKER

(SITTING ALONE)

MRS ELIZABETH RYAN	APPELLANT
SOUTH WEST AMBULANCE SERVICES NHS TRUST	RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Louise Mankau (Counsel) Instructed by: Thompsons Solicitors Churchill House 17 Churchill Way Cardiff CF10 2HH
For the Respondent	Jonathan Gidney (Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS

SUMMARY

AGE DISCRIMINATION

This case involved an allegation of indirect age discrimination. On appeal it was contended that the Tribunal had fallen into error by concluding that the Claimant was an 'undeserving Claimant' within the meaning of paragraph 32 of the Supreme Court decision in **Essop v Home Office; Naeem v SoS for Justice** [2017] IRLR 558 and that it erred in its analysis of the Respondent's case on justification.

The appeal was allowed. Before the Tribunal it had not been recognised that the group and individual disadvantage asserted were different. This led to an error in the subsequent analysis. The group disadvantage was asserted to be a reduced likelihood of membership of a Talent Pool used by the Respondent for recruiting to senior roles for the age group 55-70. The Claimant was in that age group and was also not in the talent pool. The Tribunal erred in its approach to the question of individual disadvantage and had erred in concluding that the Claimant had not suffered an individual disadvantage. That in turn led to error in its approach to justification.

HER HONOUR JUDGE KATHERINE TUCKER

1. This is an appeal against the decision of an Employment Tribunal sitting in Exeter. The Employment Judge was EJ NJ Roper and the members were Mr T McAuliffe and Mr J Williams.

2. I refer to the parties in this appeal as the Claimant and Respondent as they were below.

3. The Claimant appeals against the Tribunal's dismissal of her claim of indirect age discrimination. She alleged that she was indirectly discriminated against when she was not able to apply for promotion on two occasions because she was not in the Respondent's 'Talent Pool'.

4. The hearing took place over 3 days between 16-18 January 2019. Both the Claimant and the Respondent were represented by counsel during that hearing. The Tribunal reserved its judgment and the Judgment and Reasons were sent to the parties on 29th January 2019.

The grounds of appeal

5. The Claimant advances 2 grounds of appeal:

   a. First, that the Tribunal erred in concluding that there was no causal link between the relevant PCP and the disadvantage suffered by the Claimant

   b. Secondly, that the Tribunal erred in concluding that the PCP was objectively justified.

The facts

6. The Claimant has worked for the Respondent since 1991 and remains in the Respondent's employment, currently as a Learning and Development Officer (a Band 7 role). She was born on 23 August 1950 and was aged 66/67 at the time of the matters complained of. Between approximately 2013 and 2016 the Claimant was employed as the Respondent's Education Business Manager at managerial grade Band 8a.

7. The Respondent is an NHS Foundation Trust which provides emergency and urgent care services in the South West region of Britain. It employs approximately 4,300 people.

The Talent Pool

8. The Respondent operates a pay and seniority scale commencing at Band 1, through to Band 7, after which it has more senior managerial positions commencing at Band 8a and above. In addition, the Respondent has developed a recruitment tool called the 'Talent Pool' ("TP") as part of its succession planning. In its Reasons the Tribunal stated that the use of the TP appeared "to be a diversion from the normally agreed recruitment and promotion procedures for NHS Trusts which are covered by Agenda for Change terms and conditions." The stated purpose of the TP was to identify and develop future leaders and managers within bands 1 to 7 inclusive, and, to retain existing leaders and managers at Band 8a and above, by establishing an identified pool of high performing and talented employees who would benefit from additional training opportunities. In addition, the Tribunal found that some, albeit not all, "vacancies could be filled with limited need to advertise for and to interview candidates because those in the TP would already have been identified as worthy of promotion into leadership roles". This enabled the Trust to fill roles in some circumstances more quickly than would otherwise be the case.

Access to the Respondent's Talent Pool

9. The Tribunal found that employees could gain access to the TP through, in practice, three mechanisms:-

(i) First through the Respondent's appraisal system. Each employee has a one to one meeting with their line manager ("a Career Conversation"). If, through that appraisal they were graded as 'exceeding expectations' in their then role, they would be placed in the TP;

(ii) Secondly, if an employee felt that the line manager had unfairly, or, wrongly, given a lesser grading at appraisal than "exceeding expectations" then, they could appeal their line manager's assessment of their performance. Their performance would then be assessed by an independent manager with the potential for the employee to subsequently be placed in the TP;

(iii) Thirdly, an employee could self-nominate for inclusion in the TP. Twice yearly, employees were notified of a window of opportunity of approximately two weeks during which they could self-nominate for inclusion in the TP. That application would be considered by a manager other than the employee's line manager and would be undertaken entirely independently of that line manager.

10. The use of the TP/ TP scheme became operational at some point in 2015/ early 2016.

11. Although the Claimant had not been in the TP in order to achieve her promotion to her Band 8 role, because she had not been required to be so at that time, the Tribunal found, as a fact,

that she was aware of its existence and the methods of entry into it. In fact, she had, in her managerial role, been involved in its development.

12. The Claimant did not gain access to the TP through her Career Conversation in March 2017 as she was rated as 'meeting expectations'. She did not appeal that rating. Further, when the window for self-nomination application process was opened between 10 and 24 February 2017, and, again, between 18 and 29 September 2017, the Claimant did not apply. It appears that there was no evidence before the Tribunal regarding the reasons for that. The Tribunal certainly made no factual determination as to the reasons why she did not appeal or self-nominate. In addition, there was no evidence before the Tribunal as to either, what would have happened had the Claimant appealed her appraisal rating, or, self-nominated, and, again, the Tribunal made no findings about those matters.

13. Before the Tribunal, the Claimant had advanced a case that her line manager had discouraged her from seeking to advance her career because she was about to retire. She made a claim of direct age discrimination regarding comments she said were made to her by her line manager. She withdrew that claim. The Tribunal recorded in its reasons that the Claimant had asserted that her manager had discouraged or prevented her from seeking to progress because of her likely future retirement and that there was considerable dispute about those matters. No findings were made about those factual matters.

Redundancy and redeployment

14. Around the time of the development of the TP scheme, the Respondent undertook a Corporate Services Review. In January and February 2017 the Claimant was informed that her role as Education Business Manager was at risk by reason of possible redundancy. During the restructuring process two opportunities for redeployment in the Learning and Development

Department arose for the Claimant: one to the role of Learning and Development Manager at Band 8a and the other to Learning and Development Officer at Band 7. The Claimant was interviewed for the more senior position of Learning and Development Manager, but was unsuccessful. She was, however, offered, and accepted, the more junior position of Learning and Development Officer with a two-year pay protection at the level of Band 8a.

The two opportunities for promotion

15. In or around September 2017 the Claimant's line manager's position became vacant ('the Petter role"). The Respondent wanted to fill that role as soon as possible. The Respondent's relevant Executive Director decided to do so immediately from the TP, thus taking advantage of the system under which she knew that talented managers were available. Another manager, Mr Neil Lentern was appointed to the role. The Claimant was not considered for the role because she was not in the TP. Mr Lentern's role, prior to his promotion, was that of the Learning and Development Manager. (This was the Band 8a role which the Claimant had applied for in January/ February 2017 but not obtained (see para.14 above).) When Mr Lentern was promoted, his role ("the Lentern role") became available. In November 2017 the Claimant submitted a formal expression of interest in this vacancy. She was told that the role had been advertised within the TP, and that she could only apply if it remained unfulfilled through recruitment via the TP, at which stage it would be advertised more widely. In the event, that opportunity did not arise: the position was awarded to an individual who was in the TP. It was accepted by the parties that the Claimant was not eligible to be considered for, or offered, the Lentern role because she was not in the TP.

The TP and group disadvantage

16. The Tribunal carefully set out further information regarding the TP:

> **"21. [T]he TP was divided into two subdivisions: Bands 1 to 7 inclusive for aspiring Leaders, and Band 8a and above for existing Leaders. The system was effectively developing from 2015/2016 … Because the system was developing, the Respondent kept the process under review, and in particular reviewed the position at least twice annually to consider the make-up of the employees within the TP. To this extent the Respondent undertook Equality Impact Assessments and began to monitor the statistics to assess whether there was any significant disparate impact against any group of employees."**
>
> **…**

The Tribunal found that membership of the pool could not be faulted in respect of membership percentages for any protected characteristic except age. It found, however, that the statistics in respect of age were different[1]: of the 4,300 employees employed by the Respondent, 12% of that number fell into the age group of 55 to 70. 12% of the total employees of the Respondent is 516 (or one in eight rounding down). However, there were 119 employees registered into the Talent Pool and of those only 6% (or seven employees) fell into the age group of 55 to 70, (i.e., one in 17). The Tribunal stated:

> **"26. … One in 73 employees aged 55 to 70 were therefore members of the Talent Pool. When this is compared to employees aged below 55 they are 94% of the 119 employees, or put another way 112 members of the Talent Pool are aged below 55. This is one in 34 of employees aged below 55 who are in the TP. So, in short, employees aged below 55 have a 1/34 chance of being in the Talent Pool, whereas employees aged over 55 only have a 1/73 chance of being in the Talent Pool." (Emphasis added).**

17. It was these statistics, set against the facts set out above, which gave rise to, and were at the heart of the Claimant's claim of indirect discrimination: the Claimant's indirect age discrimination claims related to the alleged disparate impact upon her, as a member of the age group 55-70, and as an individual, of not being a member of the Respondent's TP.

[1] The detailed figures were as follows in respect of different age groups: Age 16–20, 0%, 2 %; Age 21-25, 4%, 10%; Age 26–30, 15%, 13%, Age 31–35, 16%, 12%; Age 36–40, 20%, 15%; Age 41–45, 18%, 13%; Age 46-50, 14%, 13%; Age 51-55, 8%, 10%; Age 56-60 5%, 8%; Age 61-65, 1%, 3%; and Age 66-70, 0%, 1%.

18. It was accepted by the parties before the Tribunal, and on appeal, that the Claimant was denied the opportunity to apply for promotion on two occasions because she was not in the TP. This, asserted the Claimant, was the individual detriment she suffered and amounted to indirect age discrimination.

The Tribunal's decision

19. The Tribunal found that the relevant PCP put a particular age group (those aged 55-70) at a disadvantage, and that the Claimant was similarly affected by that disadvantage, However, it found that there was no causal link between the disadvantage suffered by her and the PCP. It held that, in this sense, the Claimant was an 'undeserving' Claimant: the disadvantage she suffered had nothing to do with the PCP. In addition, it concluded that the Respondent had established that the PCP was justified.

The relevant PCP

20. It is important to set out precisely the PCP which the Tribunal found had been applied. The Tribunal stated:

> **"39. … it is clear for the purposes of this case that there was a PCP that the Respondent relied on the Talent Pool to fill managerial vacancies promptly, and that this PCP was applied to the [relevant] positions which is the recruitment process of which the Claimant complains. For the purposes of this case therefore <u>there was a PCP that the Respondent only promoted managerial staff on the basis of their pre-existing membership of the Talent Pool."</u> (Emphasis added)**

21. It also found, however, that not all of the Respondent's employees were promoted by reference to the TP. For example, for those positions which were difficult to fill (an example was roles for paramedics) they would be advertised nationally or more widely. That exception, however, did not apply in respect of the roles the Claimant had wished to be considered for.

A *Group disadvantage*

22. The Tribunal found that the relevant PCP put people of the Claimant's age group, namely those aged 55 to 70 years old, to a particular disadvantage when compared with those who did not have that protected characteristic. It stated:

B

> **"40. … On the face of it the statistics do indeed show that there is statistical disadvantage or disparate impact applied to those aged 55 to 70. Put simply one in 34 of all employees aged 20 to 55 are in the TP, whereas only one in 73 of employees aged 55 to 70 are in the TP."**

C As can be seen, the group disadvantage was termed as a <u>reduced likelihood of being in the TP</u>.

23. In addition, the Tribunal robustly rejected (at paragraphs 41-43 of the Reasons) the

D Respondent's assertions that the statistics were misleading and did not really evidence a group disadvantage, because they created an unreliable impression. It appears that the Respondent had contended that this was the case for 3 reasons:-

E

(1) The figures assumed that every employee in every relevant age group wished to be in the TP and had taken all necessary steps to gain access to it;

(2) The different statistics for the different age groups reflected reasons for non-

F membership of the TP which were beyond the Respondent's control such as personal preference;

(3) The statistics reflected the normal generalised career path of the Respondent's

G employees[2].

H

[2] The submission made that the figures reflected the fact that the youngest employees on commencing employment with the Respondent will need to build up their experience and expertise before being able to qualify for the TP. This is why for the age group 16 to 20, which is 2% of the Respondent's employees, none are in the TP, and for the age group 21 to 25, which is 10% of the Respondent's employees, only 4% are in the TP. Similarly, as employees get to the age group of (for example) 55 to 60, they are more likely to be "winding down", and less interested in promotion, which is why in that age group (which is 8% of the Respondent's employees) only 5% are in the TP.

24. The Tribunal rejected those arguments and stated:

> **"43. We do not agree with these submissions which appear at this stage to be seeking an explanation for the obvious disparate impact of the statistics. As noted by Lady Hale in paragraph 26 of her judgment in Essop the reasons why one group may find it harder to comply with the PCP than others are many and various. The reason for the disadvantage need not be unlawful in itself, nor be under the control of the employer. In this case the statistics speak for themselves. If an employee is under age 55, he or she has a one in 34 chance of being in the TP, whereas if an employee is aged between 55 and 70, he or she has a one in 73 chance of being in the TP. The Claimant would have had the opportunity to apply for the vacancies … "but for" her exclusion from the TP. Accordingly, we find that the application of the PCP on the face of it put the Claimant individually at the disadvantage complained of in that she was not considered for the posts …" (Emphasis added).**

Individual disadvantage

25. The individual disadvantage asserted by the Claimant was that "she was not considered for the" two posts. The Tribunal concluded that, 'on the face of it', the Claimant did, individually, suffer that disadvantage in that she was not considered for those roles and that she would have had the opportunity to apply for the vacancies "but for" her exclusion from the TP. (Paragraph 43 of the Tribunal's Reasons).

26. The Tribunal however, went on to consider whether the Claimant was an 'undeserving Claimant' as described by Lady Hale in *Essop*, (as to which see further paragraph 36 of this Judgment below) and stated:

> **"44. However, as noted in paragraph 32 of Lady Hale's judgment in Essop, it still remains open for the Respondent to show that this particular Claimant was not put at a disadvantage by the requirement. This relates to the "undeserving" Claimant who has suffered a disadvantage for reasons which have nothing to do with the disparate impact, and is undeserving in the sense that that Claimant might otherwise "coat tail" upon the claims of the deserving Claimants. We mean no disrespect to this Claimant Mrs Ryan in referring to her as "undeserving", but do so by reference to analysing her position in this respect.**
>
> **45. We have found that the Claimant was clearly aware of the workings of the Respondent's TP system. She had been involved in the creation of the policies which had led to the inception of the TP system. She was a senior employee who knew of and was confident enough to use other procedures available to the Respondent's staff, as shown for instance by her raising two formal grievances against her line manager. The Claimant did not seek entry into the TP. There were two methods open to her: the first, if she considered that her Career Conversation appraisal results of "meeting expectations" were wrong and she should have been considered to be "exceeding expectations" (thus gaining entry to the TP), she could have appealed those decisions; secondly, she was notified of the opportunities to self-nominate to the TP, in a process which would have bypassed her line manager Mr Petter of whom she complained, but she failed to do so.**

> **46. For these reasons we find that there was no causal link between the PCP and the disadvantage suffered by the Claimant. The Claimant was not offered the opportunity to apply for the roles given to Mr Lentern and Mr Knowles, because she was not in the TP, but we find that this was because she had not realistically tried to gain entry to the TP. For this reason, we find it was not the application of the PCP which put the Claimant at that particular disadvantage, but her failure to apply to the TP. (Emphasis added)**
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> **47. For this reason we dismiss the Claimant's claims for indirect age discrimination."**

27. As to justification, the Tribunal found that the "Respondent's actions" were justified. It stated:

> **"48. However, even if we are mistaken in this conclusion, we would have dismissed the Claimant's claims in any event on the basis that the Respondent's actions were justified. We have considered the justification defence put forward by the Respondent, and our conclusions are these.**
>
> **49. The Respondent's actions would only be justified if they amount to a proportionate means of achieving a legitimate aim. The legitimate aim relied upon in connection with the creation and maintenance of the TP is appropriate succession planning to enable the Respondent to identify emerging talent in bands 1 to 7, and retaining existing talent in bands 8a and above, by providing partially preapproved candidates for short term appointments and secondments which are likely to be necessary in an emergency response organisation.**
>
> **50. Although it was not specifically conceded by the Claimant, we have heard no cogent argument on behalf of the Claimant to suggest that this is not a legitimate aim. Given that the Claimant assisted in the creation of the TP system it would seem disingenuous of her to criticise it. In any event we agree with the Respondent that it has established a legitimate aim in this respect.**
>
> **51. The next point to consider is the extent to which the PCP in question was a proportionate means of achieving this legitimate aim. We note the following points: (i) the TP covers the entire spectrum of ages and experience within its two subdivisions, and no particular age group is precluded from entry to the TP by reason of age; (ii) the entry requirement to the TP is entirely neutral, and definitely neutral with regard to age, in that it requires exceeding the expectations of the line manager in completion of the relevant role; (iii) in any event there is a second route to entry by way of self-nomination which bypasses the line manager resulting in independent consideration by Executive Directors, which is also age neutral; (iv) the TPs are reviewed twice annually to ensure fair representation; and (v) equality impact assessments and monitoring of representation by characteristics have been carried out, and will continue to be carried out. There is no disparate impact by reference to any of the protected characteristics with the exception of the age statistics, which will continue to be monitored and investigated, and may give a false figure (as suggested by the Respondent).**
>
> **52. For these reasons we conclude that the introduction and maintenance of the TP amounted to a proportionate means of achieving a legitimate aim, and we would have also dismissed the Claimant's indirect age discrimination claim for this reason."**

The Law

28. Indirect discrimination is defined in section 19(1) of the EqA as follows:

> (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 these circumstances 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.

29. Section 23(1) EqA provides: "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."

30. The statutory definition of indirect discrimination set out in the EqA 2010 was considered in **Essop v Home Office [**2017] IRLR 558**.** Unlike the concept of direct discrimination, its purpose is to identify and prevent rules, provisions and practices which are applied within the workplace, and in society more generally, which, despite being applied to all, present and create difficulties for people with particular protected characteristics. It is *"one form of trying to 'level the playing field'"*. (Per Lady Hale in **Essop v Home Office** [2017] IRLR 558 SC, paragraph 1.) Together with the other forms of prohibited conduct identified in the EqA 2010, it is part of the statutory provisions which seek to provide legal protection from, and prevention of,

discrimination in the workplace and, through that, some might contend, in wider society as a whole.

31. Direct discrimination prohibits less favourable treatment of an individual *because of* a protected characteristic. In claims of direct discrimination, the issue with which a Tribunal usually has to grapple is 'why' an individual is treated in a particular way on a particular occasion. This is because the Tribunal must find "*a causal link between the less favourable treatment and the protected characteristic.*" (See **Essop** at paragraph 25). Indirect discrimination is very different. It assumes equality of treatment. In other words, it operates on a premise that all are treated in the same way: the rules or provisions in question (the provision, criterion or practice 'PCP') applies to all. However, the concept of indirect discrimination recognises, and gives consequence to, the fact that that PCP may then cause a particular disadvantage to a particular group of people, and a particular individual (often for reasons which we do not know or cannot fully understand). In these types of cases, the causative link does not have to be between the protected characteristic and the disadvantage; rather, it has to be between the PCP and the group and individual disadvantage:-

> **"Indirect discrimination … requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot." (Essop, paragraph 25, emphasis added.)**

The last sentence in my view is important to consider. Hidden barriers can create obstacles to equality in the work place (and society). Not only are they sometimes difficult to spot, but they can also be difficult to remedy. That does not mean, however, that their existence should not be acknowledged and addressed.

32. The reasons why a particular group may not comply with a PCP can be *'many and various'*. They may derive origins from past direct discrimination, or they may be entirely innocuous; we may not yet understand them or even be able to identify them:

> **"They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15; [2012] ICR 704, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). <u>They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem."</u> (Per Lady Hale in Essop at paragraph 26, emphasis added).**

33. It is also important to recall that, in order to establish indirect discrimination it is not necessary to establish *why* a particular group is disadvantaged by the PCP.

34. In **Essop** the Supreme Court identified (paragraphs 24-29) the following features of, and principles relevant to, indirect discrimination:

(1) There is no express requirement in the EqA 2010 or in the previous definitions of indirect discrimination to explain why a particular PCP puts a group at a disadvantage.

(2) There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. Logically, if disadvantage is framed in terms of a greater likelihood of a particular outcome, some may achieve that outcome and some may not.

(3) Disparate impact, or particular disadvantage is often established on the basis of statistical evidence. However, that is different to a causative link: "statistical evidence

is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link." (Per Lady Hale at paragraph 28).

(4) It is always open to the Respondent to show that his PCP is justified - in other words, that there is a good reason for the PCP. It is important not to shy away from such a conclusion in an appropriate case:

> **"Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon Respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question … [b]ut, as Langstaff J pointed out in the EAT in *Essop*, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result." (Per Lady Hale in Essop at paragraph 29)**

35. Having set out those features of indirect discrimination the Supreme Court then considered the Respondent's contention that for an individual Claimant to show that he or she has been put at "that disadvantage", (i.e. the same disadvantage as the group to which he belongs has been put) the reason why the PCP creates the disadvantage must be shown. The Supreme Court rejected the logic of that submission and held:

> **"30. All the above salient features of the definition of indirect discrimination support the appellant's case that there is no need to prove the reason why the PCP in question puts or would put the affected group at a particular disadvantage.**
>
> **31. The Respondent relies upon two main arguments to counter this. The first is that the individual claimant has to show that he has been put at 'that disadvantage', that is the same disadvantage that the group to which he belongs is, or would be, put. How, it is said, can one know what that disadvantage is unless one knows the reason for it? But, what is required by the language is correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual. This will largely depend upon how one defines the particular disadvantage in question. If the disadvantage is that more BME or older candidates fail the test than do white or younger candidates, then failure is the disadvantage and a claimant who fails has suffered that disadvantage. If the disadvantage is that BME and older candidates are more likely to fail than white or younger candidates, then the likelihood of failure is the disadvantage and any BME or older candidate suffers that disadvantage." (Emphasis added).**

It is important to note within that passage the statement that what is required is "correspondence" between the group and the individual disadvantage.

36. Lady Hale then considered the Respondent's argument that if the reason for the disadvantage were not established then, "undeserving" Claimants, who have failed for reasons that have nothing to do with the disparate impact, may "coat tail" upon the claims of the deserving ones." Lady Hale stated as follows:

> **"32. … This is easier to answer if the disadvantage is defined in terms of actual failure than if it is defined in terms of likelihood of failure (because only some suffer the first whereas all suffer the second). But in any event, it must be open to the Respondent to show that the particular claimant was not put at a disadvantage by the requirement. There was no causal link between the PCP and the disadvantage suffered by the individual: he failed because he did not prepare, or did not show up at the right time or in the right place to take the test, or did not finish the task. A second answer is that a candidate who fails for reasons such as that is not in the same position as a candidate who diligently prepares for the test, turns up in the right place at the right time, and finishes the tasks he was set. In such a situation there would be a "material difference between the circumstances relating to each case", contrary to section 23(1) (para 4 above). A third answer is that the test may in any event be justified despite its disparate impact. Although justification is aimed at the impact of the PCP on the group as a whole rather than at the impact upon the individual, as Langstaff J pointed out, the less the disadvantage suffered by the group as a whole, the easier it is likely to be to justify the PCP. If, however, the disadvantage is defined in terms of likelihood of rather than actual failure, then it could be said that all do suffer it, whether or not they fail and whatever the reason for their failure. But there still has to be a causal link between the PCP and the individual disadvantage and it is fanciful to suppose that people who do not fail or who fail because of their own conduct have suffered any harm as a result of the PCP. It must be permissible for an employer to show that an employee has not suffered harm as a result of the PCP in question.**
>
> **33. … In principle, the arguments put forward by the Respondent do not justify importing words into the statute (and the Directives which lay behind it) which are simply not there and which, as the Court of Appeal recognised, could lead to the continuation of unlawful discrimination, which would be contrary to the public interest (para 34). In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual. This may be easier to prove if the reason for the group disadvantage is known but that is a matter of fact, not law." (Emphasis added)**

37. In **Homer v Chief Constable of West Yorkshire** [2012] IRLR 601 SC the Supreme Court considered a claim of indirect age discrimination. I was referred to paragraphs 20 and 24 concerning justification in that context:

> **"20. As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:**
>
> **'. . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that**

> end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.'
>
> He then went on at [165] to commend the three-stage test for determining proportionality derived from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80:
>
> 'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?'
>
> As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726 [31], [32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.
>
> …
>
> 24 Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer. That comparison was lacking, both in the ET and in the EAT. Mr Homer (and anyone else in his position, had there been someone) was not being sacked or downgraded for not having a law degree. He was merely being denied the additional benefits associated with being at the highest grade. The most important benefit in practice is likely to have been the impact upon his final salary and thus upon the retirement pension to which he became entitled. So it has to be asked whether it was reasonably necessary in order to achieve the legitimate aims of the scheme to deny those benefits to people in his position? The ET did not ask itself that question."

38. In **R (Tigere) v Secretary of State for Business, Innovation and Skills** [2016] 1 ALL ER 191, the Supreme Court again identified the need, when considering justification, for a Tribunal to both analyse the justification of the PCP and then carry out an analysis of the discriminatory effect of the relevant measure:

> "It is now well established in a series of cases at this level, beginning with *Huang v of State for the Home Dept, Kashmiri v Secretary of State for the Home Dept* [2007] UKHL 11, [2007] 4 All ER 15, [2007] 2 AC 167, and continuing with *R (on the application of Aguilar Quila) v Secretary of State for the Home Dept, R (on the application of Bibi) v Secretary of State for the Home Dept* [2011] UKSC 45, [2012] 1 All ER 1011, [2012] 1 AC 621, and *Bank Mellat v HM Treasury (No 2)* [2016] 1 All ER 191 at 204 [2013] UKSC 39, [2013] 4 All ER 533, [2014] AC 700, that the test for justification is fourfold: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?" (Tigere paragraph 33)."

39. The burden of establishing justification rests upon the Respondent. In **Hardy & Hansons Plc v Lax** [2005] IRLR 726 the following was said of the concept of justification of indirect

discrimination (albeit in respect of the then applicable provisions of the Sex Discrimination Act 1975):

> **"32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (*Barry v Midland Bank plc* [1999] ICR 859) and I accept that the word "necessary" used in *Bilka-Kaufaus* [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.**
>
> 33 **The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* [2001] ICR 1189 and in *Cadman* [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman* , the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.**
>
> 34 **The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions.**
>
> 35 **The employment tribunal, at para 9, referred to *Allonby* and stated:**
>
> **"It is understood that it was necessary to weigh the justification put forward by the [employers] against its discriminatory affect. Accordingly, it proceeded to consider the matters on which the [employers] relied in order to refuse the applicant's request that the RRM job be done on a job share or part-time basis."**
>
> 36 **I find nothing wrong with that general statement. Whether the correct test has been applied, and an analysis conducted with appropriate rigour, can in this case be considered only upon a detailed consideration of the reasoning of the employment tribunal …"**
>
> **(Emphasis added).**

40. The Tribunal was also referred to the Equality and Human Rights Commission: Code of Practice on Employment (2011), ("the EHRC Code"), and in particular paragraphs 16.20 and 16.21 in relation to "Advertising a Job":

> **"16.20 the practice of recruitment on the basis of recommendations made by existing staff, rather than through advertising, can lead to discrimination. For example, where the workforce is drawn largely form one racial group, this practice can lead to continued exclusion of other racial groups. It is therefore important to advertise the role widely so that the employer can select staff from a wider and more diverse pool.**
>
> **16.21 Before deciding only to advertise a vacancy internally, an employer should consider whether there is any good reason for doing so. If the workforce is made up of people with a particular protected characteristic, advertising internally will not help diversified the workforce. If there is internal advertising alone, this should be done openly so that everyone in the organisation is given the opportunity to apply."**

The parties' submissions

Ground 1

Claimant

41. The Claimant submitted that once the Tribunal had found three significant matters, it should then, subject to the question of justification, have made a finding of indirect discrimination. Those three matters (the constituent elements of s.19(2)(a)-(c) EqA 2010) were:

a. That the PCP was applied in this case (because the Respondent relied upon the TP to fill the two roles for which the Claimant was not considered) and;
b. That the group disadvantage was established (because employees in the age group 55-70 were statistically less likely to be in the TP);
c. That the Claimant suffered the disadvantage complained of (because, but for the PCP she would have had the opportunity to apply for the relevant posts); alternatively, because she was in the disadvantaged group and was statistically less likely to be in the TP and, in fact, was not in the TP.

It was submitted that each element of the statutory test was met and the requisite causal link between the PCP and the disadvantage was established.

42. The Claimant submitted that the Tribunal's conclusion that it was not the application of the PCP which put the Claimant at a particular disadvantage but her failure to appeal her appraisal mark or to self-nominate to the TP was the cause of her disadvantage, or, alternatively, broke the causative link between the PCP and the particular disadvantage, was an error. In respect of that submission the Claimant contended that:

(a) The facts of the Claimant's case and those of **Essop** were not analogous having regard to the PCP. The Claimant could only be said to be an underserving Claimant, in truth, on the facts of this case if, for example, she had had no interest in promotion. The examples given in **Essop** regarding an 'undeserving Claimant' were ill-suited to the facts of the present case. They would only have been truly analogous if the PCP or group disadvantage were framed differently, for example, if the PCP in this case were framed as an "absolute" requirement to gain an exceeding expectations mark, or a requirement to self-nominate. It was not – it was framed in terms of reduced likelihood of being in the TP. That is different, for example, to an absolute requirement to sit or pass an exam;

(b) The Tribunal's conclusion involved the Tribunal in impermissibly going behind the PCP by essentially requiring the Claimant to establish <u>why</u> she was disadvantaged. It placed an additional and impermissible burden upon the Claimant. Further, it involved the Tribunal in making unsafe assumptions, such as an assumption that a member of the affected group could only be individually disadvantaged by the PCP if they appealed the appraisal marking or self-nominated and had still not gained access. However, there was no evidence before the Tribunal to support those conclusions or assumptions: it was not known why the statistics created the group disadvantage, and it was not known what would have occurred or been likely to occur if the Claimant had appealed or self-nominated.

(c) If the group disadvantage was a lower likelihood of being in the TP, the Claimant too was at that disadvantage as she was in the relevant age group (55-70) and was not a member of the TP.

(d) In the absence of evidence as to the reasons behind the statistics showing the disparate impact on the relevant age group, the Tribunal's conclusion ran the risk of allowing potentially discriminatory reasons for that disparate impact to be perpetuated: for example, older employees might proportionately have been graded lower.

(e) There was no finding made that an appraisal appeal or self-nomination would have granted the Claimant entry into the TP. If the Respondent sought to establish that the Claimant was an "undeserving Claimant" it was for the Respondent to show a lack of causal link between the PCP and the disadvantage suffered. In the absence as to findings on these two matters, it had not done so and the Tribunal's conclusion could not stand.

The Respondent

43. The Respondent contended that the Tribunal was fully entitled to conclude that the Claimant was an "undeserving Claimant" within the meaning of **Essop** and that that was clearly what the Tribunal had intended to convey in its Reasons at paragraphs 43-46. The Tribunal acknowledged that "at first blush" it appeared that the Claimant had suffered an individual disadvantage; however, on closer analysis, it had legitimately concluded that that was not the case because, despite knowing about the TP, she neither appealed her grading, nor self-nominated for the TP.

44. The Claimant failed to establish an individual disadvantage. She was well aware of the different routes into the TP and the purpose of the TP, which was a legitimate recruitment tool. It was submitted that it was 'fanciful' to suggest that people who fail because of their own conduct have suffered harm as a result of the application of the PCP: the Claimant's position was fairly and properly analogous to the examples of 'undeserving' Claimants identified in **Essop.** Further, to suggest that it was necessary to show what would have happened if she had appealed or self-nominated was the equivalent of suggesting that in the exam candidate example in **Essop,** it would be necessary to show what score a candidate would have achieved if they had turned up to an exam when they did not do so. The Respondent contended that it was misconceived to suggest that the lack of evidence that the Claimant would have been accepted into the TP had she appealed her appraisal score or self-nominated to it because it was *"not necessary or appropriate to guess or hypothesize"* as to what would have happened had she done so – it was sufficient simply that she had not done so; at best all that could be said is that, had she done so, she would have been at or in the same disadvantage as the Group.

Ground 2

45. The Claimant submitted that by accepting the undeserving Claimant argument advanced by the Respondent the Tribunal left a number of significant issues unaddressed and/or made a number of assumptions as to what would have occurred if the Claimant had self-nominated or appealed. The Tribunal did not identify whether a requirement to self-nominate or to appeal imposed upon the age group 55-70 in order to gain entry to the TP was something which was likely to apply to the same level to other age groups. Further, there was not an analysis of the known evidence, such as the fact that no one in the age group 55-70 had achieved entry to the TP via self-nomination, nor why that was. Similarly, the Tribunal did not build into its limited

analysis the impact, if any of the Agenda for Change (referred to at paragraph 7 of the Reasons), nor the Statutory Code of Practice. The fair and critical analysis required in respect of justification was simply missing.

46. The Claimant submitted that the Tribunal did not properly consider whether the means chosen to achieve the Respondent's objective were no more than necessary to accomplish it. It was submitted that the first two numbered points in paragraph 51 of the Tribunal's reasons were not of probative relevance to the question of whether an apparently neutral PCP was no more than necessary. By definition, in a claim of indirect discrimination, the PCP will apply to all and in that sense, be apparently 'neutral'. Further, it was submitted that the third numbered point did not add to the analysis: it was the existence of the TP itself which had to be proved to be no more than necessary and the availability of alternative routes to enter it did not address the question of whether the existence of the TP was necessary or not. The same criticisms were levelled at points four and five: they identified steps taken to monitor the impact of the TP, but given that the TP was found to have an indirectly discriminatory effect those matters did not set out how the data was analysed. For example, it was not clear what, if any, conclusions were reached as a result, and there was no analysis of those conclusions. Equally, there was no analysis of whether less discriminatory means to achieve the Respondent's aim were considered, or could have been used. In addition, it was submitted that the evidence presented by the Respondent did not accord with the findings made in respect of paragraphs 51(iv) and (v). In particular, the evidence of bi-annual reviews was in truth merely evidence of *an intention* to hold such reviews: no evidence was adduced of any actual review having taken place. Similarly, there was no evidence of an equality impact assessment actually having taken place.

47. It was submitted that the analysis identified in points (iii) and (iv) of *Tigere* were wholly absent.

Respondent

48. The Respondent contended that the analysis in *Tigere* did not fully import to the employment law context but that, to the extent that it did, the Tribunal's analysis at paragraph 51 satisfied points (iii) and (iv). It was submitted that it was for the Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the measure at stake. The Tribunal did so as set out in paragraph 51. The Tribunal properly considered the nature of the Respondent's business and its needs and then carried out a balancing exercise in which it considered the fail safe mechanisms built into the TP and the review process.

49. It could not be said that there was no evidence justifying the conclusions set out at para. 51(iv) and (v). There was evidence of twice annual reviews within the grievance decision and oral evidence that a EAI was carried out.

<u>Discussion and conclusions</u>

<u>Ground 1: The Tribunal erred in concluding that there was no causal link between the PCP and the disadvantage suffered by the Claimant</u>

50. I am grateful to both counsel for their detailed and clear submissions and their frank and agreed statements as to what had occurred during the course of the hearing before the Tribunal.

51. I consider that one of the primary difficulties which arose in this case was that at the outset, the relevant group disadvantage and the relevant individual disadvantage were not

sufficiently clearly articulated or reflected upon. I do not consider that responsibility for that can fairly be laid simply at the feet of the Tribunal decision makers. I return to this issue below.

52. For present purposes however, I record that it was agreed by counsel on appeal that at the hearing before the Tribunal both the parties and the Tribunal worked on the premise that the group disadvantage was the lower likelihood of members of the affected age group being members of the TP. (See paragraphs 22 and 24 of this Judgment above). However, the individual disadvantage asserted by the Claimant was that she was denied the opportunity from being considered/ was not considered for two opportunities for promotion and, therefore, lost out on the potential increase in pay and status she would have attained if she had been appointed to them. (See paragraph 37 of the Tribunal's Reasons and paragraph 7.3 of the Claimant's Claim).

53. Paragraph 43 of the Tribunal's Reasons is important. The Tribunal found that "on the face of it" the PCP did put the Claimant, individually at the group disadvantage: she was not considered for the roles (para.43 of the Tribunal's decision). Within the same paragraph the Tribunal again identified the group disadvantage as being a statistical lower likelihood of being in the TP. It concluded, however, that the Claimant did not actually suffer an individual disadvantage because it was not the application of the PCP which put the Claimant at that disadvantage, rather it was her failure to apply to the TP. (See paragraphs 43 and 46 of the Reasons set out at paragraphs 24 and 26 of this Judgment above.)

54. During the course of argument I drew counsel's attention to paragraph 31 of the judgment in **Essop** (set out at paragraph 35 of this Judgment above) and gave time for them to consider that paragraph, particularly in the context of the way in which the claim was argued before the Tribunal. Both counsel agreed that the apparent approach set out by the Supreme Court is first to

identify the relevant group disadvantage and then to consider whether the Claimant suffered *<u>that</u>* disadvantage and that there was a need for correspondence between the two. It was agreed that the present case had not followed that format: the individual disadvantage was identified; the group one was not, initially during case management, and then, when it was, it was formulated differently to the individual disadvantage. It was not contended before the Tribunal, or on appeal, that that, in itself, should have led to the dismissal of the Claimant's claims.

55. I consider that the following important principles are to be derived from **Essop,** particularly paragraphs 31-33:

(i) In claims of indirect discrimination such as a the present, both group and individual disadvantage must be established. (This is not a case where rights under Art 9 ECHR are engaged and where additional considerations may apply);

(ii) Once group disadvantage has been established by a claimant, the individual claimant "has to show that he has been put at *"that disadvantage"*. "That disadvantage" is the same disadvantage that the group to which s/he belongs to is, or would be, put; there must be 'correspondence' between the two.

(iii) It is not, however, necessary for the claimant to show the reason for the group disadvantage; all that is required is that there is a corresponding group and individual disadvantage (as to which see (iv) below). This is a complete answer to the assertion made (in that case, and to some extent in this) that one cannot know whether a claimant is at that disadvantage unless one knows the reason for it.

(iv) The reason why a claimant does not have to show the reason for a group or individual disadvantage is to be found in the principles underlying the prohibition of indirect discrimination and the manner in which the statutory tort is constructed (see the above, particularly paragraph 30).

(v) However, what is required by the language of the statute is *"correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual."* This is important. To some extent, I regard this as the flip side of the coin on which 'no need to show the reason for the disadvantage' is stamped: the claimant does not have to show the reason for the disadvantage, but s/he must show that she has suffered a corresponding disadvantage to the group.

(vi) It must be open to a Respondent to show that a particular claimant was not put at a disadvantage by the relevant PCP, or, in other words, to show that there was no causal requirement between the PCP and the disadvantage suffered by the individual. In practice, and on the facts, it may be easier to prove this if the disadvantage is defined in terms of actual achievement or occurrence of a particular event than if it is expressed in terms of likelihood of achieving that event or that event occurring.

(vii) Similarly, if the reason for the disadvantage is known, it may be easier to prove the causal connection between the PCP and the

> disadvantage suffered, both for the group and for the individual. Proving that, however, is a matter of fact, not law. (Paragraph 33 of **Essop**).

56. In a claim of indirect discrimination, real care and attention must be paid to how the disadvantage (both group and individual) in a particular case is framed. It must be clearly articulated, both at the group and the individual level. Failure to do so is likely lead, in my view, to many problems in the ensuing litigation. Further, two points arise which are relevant to the consequences of how the group and corresponding individual disadvantage are framed:

(i) In general terms, if the disadvantage is expressed as a likelihood of a particular outcome in respect of a particular group, then any person in that group suffers that disadvantage. In other words, a disadvantage expressed as a likelihood of an outcome will generally affect more people. (See paragraph 31 of **Essop** and also the end of paragraph 32).

(ii) If the disadvantage is framed in terms of achievement of a particular event, or, of an event occurring, only those who actually achieve that event or in respect of whom the event occurs will suffer the same disadvantage.

57. As noted above. the concept of an 'undeserving Claimant' arose from submissions made in the *Essop* case that if no obligation lay upon a Claimant to evidence the reason why a PCP put a group at a particular disadvantage, individuals who had, in truth, suffered no disadvantage as a result of the reasons leading to the group disadvantage, may be able to assert a valid claim. Put another way, the 'undeserving Claimant' refers to those individuals who are within the relevant

group (sharing the relevant characteristic and therefore the group disadvantage) but who cannot, in truth, align themselves with that disadvantage as an individual because the reason why they are in the group has nothing to do with the disparate impact established. The Equality Act 2010 Statutory Guidance notes that the prohibition on age discrimination within the act is:

> **"… designed to ensure that the new law prohibits only harmful treatment that results in genuinely unfair discrimination because of age. It does not outlaw the many instances of different treatment that are justifiable or beneficial."**

58. It is clear from the judgment that the Supreme Court considered that it must remain possible for a Respondent to prove that there was not the relevant causal link between a PCP and an individual disadvantage. A Respondent may disprove, by reference to the relevant facts, the causal link between the PCP and the individual disadvantage in the Claimant's case. Logically, this would require a Respondent to establish why a particular event occurred in the Claimant's case. Alternatively, a Respondent may assert that the Claimant was not in a comparable situation for the purposes of s.23 of the EqA 2010: i.e., that there was or is a material difference between the Claimant and (potentially) both the group and others who did not share the relevant characteristic for the purposes of s.19. Finally, a Respondent could also seek to justify the disparate impact of a particular PCP.

59. I turn to consider how these principles apply in this case.

60. It is important to note that although the issues were identified by the Tribunal at paragraph 37 of the judgment, and had also been identified at a case management hearing, the group disadvantage was not clearly articulated: all that was stated, both in the reasons and case management summary was, "did the PCP put people of the age group 55-70 at a particular disadvantage when compared with persons who do not have this protected characteristic." This

was problematic, not least because in her claim, the Claimant identified the group disadvantage in the following terms:

> **"the C contends that there is a group disadvantage amongst older employees as they are under-represented within the TP. The C is seeking further disclosure to prove this point but is anecdotally aware that the [TP] contains a disproportionately high number of younger employees."**

In the same document the individual disadvantage was asserted to be that the C was "denied the opportunity to be considered for two promotion opportunities and therefore potentially lost out on the pay and status she would have attained had these applications been successful."

61. Consequently, the Tribunal considered a claim of indirect discrimination where the group disadvantage was expressed in different terms to the individual disadvantage asserted by the Claimant. This will not have assisted parties, or the Tribunal, in undertaking the correct analysis of the claim and issues. It would not, in my view, be fair to criticise the Tribunal who determined the claim for this; it is for the Claimant to set out his or her case and the Respondent to answer that case. Neither party, both of whom had the benefit of legal representation, identified this, at the case management stage, or at the final hearing. Whilst the overriding objective is that cases should be dealt with fairly and justly, the parties and their representatives are to assist the Tribunal in reaching that objective: accurately pleading a case and identifying issues is one way in which representatives, in particular, can do so.

62. Returning to the appeal, however, the Tribunal proceeded to determine the claim on the basis set out at paragraph 42 above. It did not find that the Claimant's case failed because her asserted individual disadvantage did not correlate with the group disadvantage (and nor does that appear to have been advanced). Rather, the Tribunal found that:

"The Claimant was not offered the opportunity to apply for the roles … because she was not in the TP, but we find that this was because she had not realistically tried to gain entry to the TP. For this reason, we find it was not the application of the PCP which put the Claimant at that particular disadvantage, but her failure to apply to the TP." (Para 36 of the ET Judgment.)"

63. I consider that this paragraph evidenced an error of law made by the Tribunal. I accept the submission made on behalf of the Claimant that applying the statutory language of s.19 in the light of the decision in **Essop**, a prima facie claim of indirect discrimination was made out. In this case, the relevant requirements of s.19 were established: it was agreed that a PCP existed and was applied by the Respondent: the Respondent promoted from staff in the TP. In addition, the group disadvantage was established and the Claimant established she belonged to the group: the claim was determined on the premise that group disadvantage was that there was a lower likelihood of members of the affected age group (55-70) being members of the TP. The Claimant was within that group. The Tribunal was satisfied that that group disadvantage was established on the evidence before it. It expressly rejected the case advanced by the Respondent that the statistical figures were misleading and did not, in truth, evidence a discriminatory effect. Finally, and importantly, the Claimant suffered the corresponding disadvantage as the group: she was not in the TP. As set out in **Essop***,* because the case proceeded on the basis that the group disadvantage was the reduced likelihood of those in the affected age group being in the TP, all those in the group suffer the individual disadvantage. (See paragraph 37(i) above). I agree with the submission made by the Claimant that, correctly applying **Essop***,* the Tribunal should have then found that a prima facie case of indirect discrimination had been established.

64. I also agree, however, that the analysis of what had actually happened in this case did not need to stop there. As set out in **Essop***,* it must remain open to a Respondent to show that the established group disadvantage did not disadvantage an individual. However, as the reason for

the group disadvantage was not known in this case, and because the group disadvantage was expressed as a 'lower likelihood' of being in the TP that, may be more difficult. (Para 36(v) and (vi) above). That was envisaged by the Supreme Court in **Essop** as a matter of principle. The facts of this case illustrate why and how that may arise.

65. In particular, in my judgment, one of the valid criticisms made of the Tribunal's conclusion set out at para. 53 above was that there was no evidence before the Tribunal as to what would have happened had the Claimant either appealed her appraisal mark or had she self-nominated to the TP. The Tribunal made no findings of fact on that issue. In fact, in the Respondent's answer to the Appeal the Respondent stated that: *"[n]obody knows what would have happened had the C appealed her "met expectations" appraisal and/or undertaken the self-nomination route to the TP ... Whilst the Tribunal did have evidence of others that had successfully gained access via the self-nomination route, it could not make a finding of fact that the Claimant would have succeeded had she tried."*

66. As it could not be said that the consequence of the Claimant self- nominating, or appealing her appraisal, would have been that she would have been placed in the TP, it equally could not have been said that it was her failure to do either of those things which prevented her from being in it.

67. Closely aligned to this point is the fact that there were, in practice, 3 routes through which an employee could be placed in the TP: directly from appraisal; appeal of rating following appraisal; or, self-nomination. The Claimant did not try two of those routes, (and that may reflect the statement that 'she did not realistically try') but she did try the other, because she worked in her role and participated in her 1:1 appraisal. She was given a 'meets expectations' rating and

then not placed in the TP. There was no evidence about why she was rated as 'meets expectations' only. In my judgment, in order to have successfully advanced the 'undeserving Claimant' argument, the Respondent would have to have adduced and proved that this was because of her performance, or indeed other reason, but certainly that it was not because of the group disadvantage or something related to it such as the application of stereotypical assumptions about age.

68. I am satisfied that the Tribunal erred in reaching the conclusion it did in paragraph 36 of its Reasons. In doing so, the Tribunal made a finding that the Claimant was not put at a disadvantage by the PCP, the PCP being, "that the Respondent only promoted managerial staff on the basis of their pre-existing membership of the TP". However, on any analysis, and indeed the Tribunal's, she was: but for the application of the PCP she could have been considered for the relevant roles because the obstacle to her being considered for the roles would not have existed. The Tribunal then went onto look at what the effective cause was for the Claimant not being in the TP and found that the effective or real cause was that she had not realistically tried to get into the pool. That was an error. That conclusion was reached when the evidence was that she had not advanced to it through one route, did not try two others, but where the Tribunal could not legitimately conclude that, causatively, that failure led to her not being in the TP. Perhaps, unusually, in order for the Respondent to have proved that she was an 'undeserving Claimant' it would have to have established, through evidence, that it was likely that she would have been placed in the pool if she had appealed or had self-nominated. Rather than applying the statutory language, the Tribunal sought to focus on the causative link between the Claimant's individual actions and the individual disadvantage without reflecting on the available evidence (or lack thereof) about the consequences of the Claimant's individual actions.

69. Having reached this conclusion, I stood back from the case and the facts to consider the credibility and consequence of that analysis. Equality law has real importance in society. It is one of the cornerstones through which we, as a democratic society, seek to ensure that all members of that society, whatever their gender, age, race, sexual orientation, beliefs, abilities or disabilities can participate fairly and fully. It would be regrettable if overtly complex decisions or outcomes in this field led to decreased credibility or confidence in this area of law.

70. In this case, standing back, I consider that it is important not to over-complicate the issue. The Respondent applied a policy (recruiting from the TP) which had the effect of limiting the pool from which applicants for more senior roles within the organisation could have been selected. There were legitimate reasons for the policy. The effect of the rule, however, had a particularly disadvantageous or prima facie discriminatory effect on one group of older employees. The Claimant was one of those employees. She was affected by the policy because she was not considered for two roles which she could otherwise have been considered for. It was up to the Respondent to prove that the discriminatory effect of the rule was not at play in her particular case. The Respondent did not place before the Tribunal the evidence required to prove that, because the Respondent did not adduce the evidence about why the rule had that effect in her case. At best, the Respondent established that there were ways in which the Claimant could have mitigated or reduced the impact of the discriminatory effect of the rule. That, however, is something which, depending on the outcome of the argument about justification should play out or be reflected in remedy.

Ground 2

71. The Claimant asserts that the Tribunal's decision regarding objective justification is perverse. That is a high hurdle to overcome. An appellate court must take care not to allow its close examination of the conclusion of the Tribunal to lead it to substitute its own assessment of

the decision. A ground of appeal based on perversity ought only succeed where an overwhelming case is made out that no reasonable tribunal, on a proper appreciation of the evidence and law, would have reached that conclusion. (**Yeboah v Crofton** [2002] IRLR 634). It should only interfere with the decision of a Tribunal where there is a clear self-misdirection or a finding of fact made which was unsupported by *any* evidence (**Piggot Brothers &Co Ltd v Jackson** [1991] IRLR 309.

72. When assessing whether a particular PCP is justified, a tribunal must carry out a critical evaluation through which the discriminatory effect of the relevant provision and the reason and need for it are balanced and weighed. To put the same point another way, the assessment of whether a particular provision can be justified entails a comparison of the impact of that provision upon the affected group as against the importance of the aim to the employer. Furthermore, that analysis and critical evaluation must be demonstrated in the Tribunal's reasoning. (See *Hardys and Handsons v Lax* at paras. 22; 33 and *Homer* paragraph 20 and 24).

73. To some extent, the outcome of the analysis may depend on whether there were non-discriminatory alternatives, or less discriminatory alternatives, available.

74. The points listed at para 51 of the Tribunal's Reasons list factors which support a conclusion that the TP was not overtly discriminatory on any ground, and, only appears to have adversely affected one particular group of employees (in respect of some, at least, of whom, there may be non-discriminatory reasons why they are not in the TP.) Furthermore, the Tribunal correctly identified checks and balances which have been built into the route through which access to the TP takes place and rightly identifies that the Respondent monitors and/or intends to monitor the impact of the scheme upon diversity. Furthermore, elsewhere in the judgment (and it

is important to read the judgment as a whole) the Tribunal identifies that recruitment from promotion was not carried out exclusively from the TP. Furthermore, the Tribunal made reference to the Statutory Code. However, what that paragraph and the Judgment as a whole, in my judgment, does not set out is a critical evaluation through which the discriminatory effect of the relevant provision and the reason and need for it are balanced and weighed. For example (and potential examples only) it did not include consideration of:

a. whether there was a need for both of the two relevant positions to be filled quickly or why that was so. This was relevant to the business needs and the decision that it was appropriate to recruit directly from the TP.
b. the actual discriminatory effect generally and upon the Claimant: that the decision to recruit only from the TP initially, was, at that stage an absolute bar to other candidates being considered when discriminatory reasons may have played into membership of the TP. It also prevented the Claimant from being considered for a role she had previously been interviewed for and at a pay scale she had previously been employed at.
c. whether any lesser measures could have achieved the same aim: could for example membership of the TP have been a desired rather than necessary condition of eligibility.

75. For these reasons, I am satisfied that the decision regarding objective justification cannot stand.

76. As to disposal, I have not heard submissions on this and will invite submissions as set out within the Order accompanying this Judgment.