Easter Term
[2012] UKSC 15
On appeal from: [2010] EWCA Civ 419

JUDGMENT

Homer (Appellant) *v* Chief Constable of West Yorkshire Police (Respondent)

before

Lord Hope, Deputy President
Lady Hale
Lord Brown
Lord Mance
Lord Kerr

JUDGMENT GIVEN ON

25 April 2012

Heard on 17, 18 and 19 January 2012

Appellant	*Respondent*
Robin Allen QC Declan O'Dempsey (Instructed by McCormicks Solicitors)	Clive Lewis QC David N Jones (Instructed by The Force Solicitor, West Yorkshire Police)

LADY HALE (WITH WHOM LORD BROWN AND LORD KERR AGREE)

1. The case of *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16, which was heard alongside this case, concerned direct discrimination on the ground of age. In that case there was no issue that the application of a mandatory retirement age constituted direct age discrimination. The issue was how it might be justified. This case concerns indirect discrimination on the ground of age. Mr Homer appeals against the holding of the Court of Appeal that there was no such discrimination in his case. The Chief Constable appeals against the holding that, if there was such discrimination, it could not be justified.

The proceedings

2. Mr Homer retired from the police force in October 1995 at the age of 51 with the rank of Detective Inspector. He immediately began work with the Police National Legal Database (PNLD) as a legal adviser. The PNLD provides legal advice and other resources to police forces and other organisations in the criminal justice system. When he was appointed, a law degree or equivalent was not essential if the post holder had exceptional experience/skills in criminal law, combined with a lesser qualification in law. This he was deemed to have by virtue of the experience gained and examinations passed in the police force. After his appointment, the criteria were changed so that a law degree became an essential qualification for first appointment, but this did not immediately affect him. The requirement was never applied to him, nor was he told that the possession of a law degree was an issue of concern to his employers, until the matters giving rise to these proceedings.

3. The PNLD experienced problems in attracting enough suitably qualified candidates and concluded that this was because the staff were comparatively underpaid and there was no formal career structure. They were advised to create a new career structure with opportunities for progression and more competitive salaries. At the same time they were advised that it was important to retain current employees and that they continued to be instrumental in the development and expansion of the database. In 2005, therefore, the PNLD introduced a new grading structure with three "thresholds" above the starting grade. In order to reach the third threshold it was necessary to have a law degree or "similar fully completed". In 2006, Mr Homer was regraded to the first and second thresholds, but not to the third, as he did not have a law degree, although he met the criteria in all other respects. The evidence of the business director of the PNLD was that she supported Mr Homer's application for the third threshold but felt constrained by

the rules to deny it to him. She supported his internal appeal against the decision but it was rejected in May 2006.

4. By then, he was aged 62. The normal retirement age in the PNLD was 65, although employment might be extended for a year at a time subject to satisfactory medical reports and fulfilling other criteria not expected of people below the age of 65. Mr Homer would reach the age of 65 in February 2009. It was the expectation of both sides that he would retire then. If he were to undertake a law degree by part time study it would take him at least four years. The earliest he could have graduated would have been the summer of 2010, after his normal retirement date. In any event, it was unlikely that he would have obtained a place on a course starting in September 2006 if he only applied in May 2006.

5. Mr Homer appealed against the rejection of his internal appeal in August 2006. The Employment Equality (Age) Regulations 2006 (SI 2006/1031) came into force on 1 October 2006. His further appeal was rejected in November 2006. In December he issued a formal grievance, asking to be treated as a transitional exception, but the respondent did not hold the required meetings, and the grievance was eventually rejected in August 2007. In April 2007 he issued these proceedings in the Employment Tribunal (ET) complaining of unlawful age discrimination.

6. In January 2008, the ET held that Mr Homer was indirectly discriminated against on grounds of age and that this was not objectively justified. However, the Employment Appeal Tribunal (EAT) held that he had not been indirectly discriminated against on grounds of age, although if he had been, it would not have been justified: [2009] ICR 223. The Court of Appeal dismissed both his appeal and the respondent's cross-appeal: [2010] EWCA Civ 419, [2010] ICR 987. The same issues arise on the appeal to this Court.

The law

7. The Employment Equality (Age) Regulations 2006 were the means by which the United Kingdom transposed into UK law the requirements of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. According to article 1, the purpose of the Directive is to

> "lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

8. Article 2 explains what this means. The portions dealing with indirect discrimination are as follows:

> "1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in article 1.
>
> 2. For the purposes of paragraph 1: . . .
>
> (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having . . . a particular age . . . at a particular disadvantage compared with other persons unless:
>
> > (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, ..."

9. This is transposed by regulation 3 of the Age Regulations as follows:

> "(1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if— . . .
>
> (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but—
>
> > (i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
> >
> > (ii) which puts B at that disadvantage,
>
> and A cannot show the . . . provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

> (2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.
>
> (3) In this regulation –
>
> > (a) 'age group' means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages; and . . ."

Unlike the case of direct discrimination, with which *Seldon* is concerned, it is not suggested that regulation 3 does not properly transpose the Directive into UK law. The question is simply how it applies in this case.

10. Regulation 7 defines the relevant unlawful acts of discrimination:

> (2) It is unlawful for an employer, in relation to a person whom he employs at an establishment in Great Britain, to discriminate against that person –
>
> > (a) in the terms of employment which he affords him;
> >
> > (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit;
> >
> > (c) by refusing to afford him, or deliberately not affording him, any such opportunity; or
> >
> > (d) by dismissing him, or subjecting him to any other detriment."

It is common ground that the failure to allow Mr Homer across the third threshold falls within the regulation.

The discrimination issue

11. The ET found that the appropriate age group was people aged 60 to 65, who would not be able to obtain a law degree before they retired [15]. That group was put at a particular disadvantage compared with people younger than that, because they were prevented from reaching the third threshold and the status and benefits associated with it [18]. The claimant was put at a disadvantage because he could not achieve the qualification (and therefore the status) before he retired. The ET noted that it was not argued that he was put at a disadvantage because fewer people in his age group had law degrees [18].

12. The EAT and Court of Appeal were however persuaded that what put Mr Homer at a disadvantage was not his age but his impending retirement. Had it not been for that, he would have been able to obtain a degree and reach the third threshold. As Mr Lewis argues on behalf of the respondent, the key words in regulation 3(1)(b) are "puts at". What is it that puts him at – or causes – the disadvantage complained of? It is the fact that he is due to leave work within a few years. Regulation 3(2) requires that the relevant circumstances in the complainant's case must be the same, or not materially different, from the circumstances in the case of the persons with whom he is compared. So, argues Mr Lewis, you have to build the relevant circumstance into the comparator group also, in this case the proximity of leaving work. So Mr Homer must be compared with anyone else who is nearing the end of his employment for whatever reason. Anyone who was contemplating leaving within a similar period – whether for family reasons or some other reason - would face the same difficulty. That is what puts him at a disadvantage and not the age group to which he belongs. Indeed, what Mr Homer is arguing for would put people of his age group at an advantage compared with younger people, because they would be able to get the benefits of the third threshold without having a law degree when others would not.

13. This argument involves taking the particular disadvantage which is suffered by a particular age group for a reason which is related to their age and equating it with a similar disadvantage which is suffered by others but for a completely different reason unrelated to their age. If it were translated into other contexts it would have alarming consequences for the law of discrimination generally. Take, for example, a requirement that employees in a particular job must have a beard. This puts women at a particular disadvantage because very few of them are able to grow a beard. But the argument leaves sex out of account and says that it is the inability to grow a beard which puts women at a particular disadvantage and so they must be compared with other people who for whatever reason, whether it be illness or immaturity, are unable to grow a beard.

14. Ironically, it is perhaps easier to make the argument under the current formulation of the concept of indirect discrimination, which is now also to be found in the Equality Act 2010. Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men

affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But, as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in *Equality: the New Legal Framework*, Hart 2011, pp 64 to 68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages.

15. In any event, it cannot be right to equate leaving work because of impending retirement with other reasons for doing so. They are materially different. A person who leaves work for family reasons or takes early retirement generally has some choice in the matter. Indeed, she may factor into her decision whether it would be advisable to obtain the law degree and with it the higher grading before doing so. A person who is coming up against the mandatory retirement age does not have the same choice. Any extension depends upon the decision of the employer which cannot be depended upon at the relevant time. At the relevant time for this case, regulation 30 of the Age Regulations provided that the decision to retire an employee at the age of 65 did not need to be justified. Hence, as Mr Allen puts it, this is a case of running up against the buffers of a mandatory retirement age rather than a matter of choice.

16. Nor is this a question of asking for more favourable treatment for people of their age. It obviously has to be possible to cure the discrimination in a non-discriminatory way. In *London Underground Ltd v Edwards (No 2)* [1999] ICR 494, for example, the new rosters for underground train drivers were held to be indirectly discriminatory because all the men could comply with them but not all the women could do so: it was a "striking fact" that not a single man was disadvantaged despite the overwhelming preponderance of men in the pool of train drivers affected. The reason, of course, was that the new rosters had a greater impact upon single parents and single parents are predominantly (though not exclusively) female. But the problem could be solved, not by making an exception for the women, but by making arrangements for single parents of whatever sex. This problem could have been solved by making arrangements for people appointed before the new criterion was introduced.

17. Ingenious though the argument put forward by Mr Lewis is, therefore, to my mind it is too ingenious. The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a

particular protected characteristic. A requirement which works to the comparative disadvantage of a person approaching compulsory retirement age is indirectly discriminatory on grounds of age. There is, as Lord Justice Maurice Kay acknowledged, "unreality in differentiating between age and retirement" [34]. Put simply, the reason for the disadvantage was that people in this age group did not have time to acquire a law degree. And the reason why they did not have time to acquire a law degree was that they were soon to reach the age of retirement. The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified. But if it cannot, then it can be modified so as to remove the disadvantage.

18. I would therefore allow Mr Homer's appeal on this point.

Justification

19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: *Bilka-Kaufhaus GmbH v Weber von Hartz*, Case 170/84, [1987] ICR 110.

20. As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

He went on, at [165], to commend the three-stage test for determining proportionality derived from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80:

> "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to

> the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

21. The ET found that the aim of requiring a law degree was to facilitate the recruitment and retention of staff of appropriate calibre within the PNLD. It is not disputed that this was a legitimate aim. When it comes to considering proportionality, however, it is necessary to distinguish the aim of recruitment from the aim of retention. It is also necessary to distinguish the aim of retaining newly or recently recruited staff, who stand to benefit from the opportunity of career progression, and the aim of retaining existing staff, who were recruited under a different system, and who may or may not be motivated to stay by such an incentive. It was clearly important to the developing organisation to retain the skills and expertise of its existing highly valued staff, including Mr Homer. This means, as the EAT pointed out, that it was necessary to distinguish between the justification of the criteria for recruitment and the justification of the criteria for the thresholds above that, and in particular the third threshold.

22. The ET (perhaps in reliance on the IDS handbook on age discrimination) regarded the terms "appropriate", "necessary" and "proportionate" as "equally interchangeable" [29, 31]. It is clear from the European and domestic jurisprudence cited above that this is not correct. Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. 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. Some measures may simply be inappropriate to the aim in question: thus, for example, the aim of rewarding experience is not achieved by age related pay scales which apply irrespective of experience (*Hennigs v Eisenbahn-Bundesamt; Land Berlin v Mai*, Joined Cases C-297/10 and C-298/10 [2011] European Court Reports); the aim of making it easier to recruit young people is not achieved by a measure which applies long after the employees have ceased to be young (*Kücükdeveci v Swedex GmbH & Co KG*, Case C-555/07, [2011] 2 CMLR 703). So it has to be asked whether requiring existing employees to have a law degree before they can achieve the highest grade is appropriate to the aims of recruiting and retaining new staff or retaining existing staff within the organisation. The EAT expressed some scepticism about this [45, 46].

23. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate. The EAT suggested that "what has to be justified is the discriminatory effect of the unacceptable criterion" [44]. Mr Lewis points out that this is incorrect: both the Directive and the Regulations require that the criterion itself be justified rather than that its discriminatory effect be justified (there may well be a difference here between justification under the anti-discrimination law derived from the European Union and the justification of discrimination in the enjoyment of convention rights under the European Convention of Human Rights).

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.

25. To some extent the answer depends upon whether there were non-discriminatory alternatives available. It is not clear whether the ET were suggesting that an exception should have been made for Mr Homer (who was on any view an exceptional case) or whether they were suggesting that the criterion should have been modified to include qualifications other than law degrees. As the EAT said, an ad hominem exception may be the right answer in personnel management terms but it is not the answer to a discrimination claim. Any exception has to be made for everyone who is adversely affected by the rule. "Grandfather clauses" preserving the existing status and seniority, with attendant benefits, of existing employees are not at all uncommon when salary structures are revised. So it is relevant to ask whether such a clause could have represented a more proportionate means of achieving the legitimate aims of the organisation. On the other hand, what is in issue here is not preserving existing benefits but affording entry to a newly created higher grade.

26. As the ET did not approach the question of justification in a suitably structured way, and ask itself all the right questions, the case should be remitted on the issue of justification. We cannot be clear that if they had asked the right questions they would have reached the same conclusion, although it is possible that they would have done so. However, as the EAT pointed out, there is nothing to stop the Chief Constable deciding to make a personal exception for Mr Homer, quite independently of his age discrimination claim (provided of course that it can

be done without discriminating against someone else on a prohibited ground). This litigation has been pursued in a friendly spirit and it is to be hoped that it might be resolved in similar vein.

27. It was important to establish the principles in a new area which many still find counter-intuitive. It is not long ago that it was taken for granted that age was a relevant criterion in deciding how long people should be allowed to go on working. Now that has to be justified. The same is true of apparently neutral criteria which have an adverse impact upon people of a particular age. But both the Age Regulations and the Equality Act recognise that difficult balances have to be struck between the competing interests of different age groups. We all have a lot of learning to do.

LORD HOPE

28. For the reasons that Lady Hale gives, with which I entirely agree, I would allow this appeal.

29. Mr Lewis QC for the Chief Constable made much of the point that it was Mr Homer's own decision to retire when he reached the normal retirement age of 65 and not stay on so that he could get the benefit of his law degree. But I do not think that it follows that his age had no bearing on the issue. The time available to complete the law degree and get the benefits that would flow from it was inevitably linked to the age of the person concerned. The effect of the measure was bound to vary from person to person, but I do not see this as a reason for saying that it did not discriminate against Mr Homer on account of his age. The number of years that he had left to him before he could reasonably expect to retire meant that his age had a direct bearing on whether he would be disadvantaged by the requirement. He was, in effect, being forced to work on beyond the normal retirement age so that he could obtain the benefit. This was, in itself, indirectly discriminatory.

30. It was submitted that to exclude Mr Homer from the requirement to obtain a law degree would be to give him a benefit that was not available to others. It is true that this would have meant that he would not have to go to the trouble of studying and preparing for the examinations. Nor would he have to wait until he had passed the examinations before he got the benefit. But I cannot accept that discrimination on the grounds of age can be regarded as justified simply because eliminating it would put others at a disadvantage that is not related to their age. Any reversal of a discriminatory rule or practice that does not treat everyone equally is likely to have an impact on others which, from their point of view, may seem to be to their

disadvantage. This is especially so in the case of age discrimination, where a measure that affects some will inevitably affect others differently. We all grow older as we progress through life. Age is a characteristic which changes with time. A disadvantage to others which is unrelated to their age will not be a ground in itself for holding that the age-related discrimination of the person who complains of it must be regarded as justified.

31. That removing the discrimination would have this effect on others may, however, have a bearing on the issue of justification when it is looked at more broadly. This is because it leads to the question whether there were other ways of dealing with the requirement of enhanced qualification. The answers to that question may show that the discrimination could have been avoided without giving rise to any effects which were objectionable. But the question whether there was a more proportionate way of doing this was not explored by the Employment Tribunal. I agree with Lady Hale that the case must be remitted to it for a further consideration of that issue.

LORD MANCE

32. My initial reaction was that the case advanced by the appellant Mr Homer was counter-intuitive (a word which Lady Hale uses in para 27). But, having read her judgments in this case as well as in *Seldon v Clarkson Wright and Jakes*, I am fully persuaded that my initial reaction was wrong, and that the present case involved indirect discrimination on grounds of age, basically for the reasons she gives in paras 1 to 18.

33. The key to the resolution of Mr Homer's claim therefore lies in the issue of justification, which must be remitted for further consideration by the Employment Tribunal as Lady Hale says in para 26.

34. In relation to that issue, I have difficulty about any suggestion that the Chief Constable should have made a personal exception for Mr Homer quite outside his age discrimination claim (Lady Hale, para 26) or make "a modification of the provision, criterion or practice [requiring a law degree] for the appellant's age group" (Maurice Kay LJ's phrase in the Court of Appeal, para 38).

35. The problem about such suggestions was identified by Elias J in the Employment Appeal Tribunal, para 49, when he held that the Tribunal was not "correct to say - if indeed it was intending to say – that the discrimination should have been avoided by making a personal exception of the claimant". He explained:

> "If the imposition of the criterion of a law degree resulted in unjustified indirect discrimination, because the discriminatory effect was disproportionate to the aim, then all adversely affected by the rule must be treated equally. That may well have had the consequence that only the claimant might qualify, but it is not the same as creating an 'ad hominem' exception for him."

36. In other words, if (as the Tribunal appears to have concluded) there was no objective need for an employee as experienced, skilled and knowledgeable as Mr Homer to have had a law degree in order to qualify at the third threshold, then there may have been employees, with more than five years to go to retirement and so with sufficient years ahead in which to complete a law degree, whose experience, skill and knowledge would also have made such a requirement unnecessary. An exception for Mr Homer personally, or a general exception for employees within four or five years of retirement age, could have discriminated unjustifiably against such younger employees on grounds of age.

37. No doubt, this is an aspect which the Tribunal will wish to consider, among others, in relation to the issue of justification.