



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Homer

**Respondent:** The Chief Constable of West Yorkshire Police

**Heard at:** Leeds      **On:** 13 and 14 November 2012  
**Reserved:** 30 November 2012

**Before:** Employment Judge Keevash

**Members:** Ms J Eastwood  
Mr M Taj

**Representation**

**Claimant:** Mr D O'Dempsey, Counsel  
**Respondent:** Mr D Jones, Counsel

## RESERVED JUDGMENT

The complaint of unlawful age discrimination succeeds.

## REASONS

### BACKGROUND

1. By his Claim Form the Claimant complained that the Respondent indirectly discriminated against him under the provisions of the Employment Equality (Age) Regulations 2006 ("the 2006 Regulations"). By its Response the Respondent accepted that it had applied a provision, criterion or practice ("PCP"). It contended that the PCP had not placed people of the Claimant's age group at a particular disadvantage. Further it contended that the PCP was a proportionate means of pursuing a legitimate aim.
2. The Claimant succeeded in the Employment Tribunal. The Employment Appeal Tribunal granted the Respondent's appeal. The Court of Appeal dismissed the Claimant's appeal from the Employment Appeal Tribunal. The Supreme Court granted the Claimant's appeal. It decided that arguably there was indirect age discrimination of the Claimant. It remitted the matter to the Tribunal on the issue of justification. Subsequently the Regional

Employment Judge ordered that the case be considered by a fresh Tribunal and that the parties had permission to submit evidence in respect of the issue of justification.

### ISSUE

3. The Tribunal identified the following issue for determination: was the PCP a proportionate means of achieving a legitimate aim?

### HEARING

4. The Claimant gave evidence on his own behalf. John Hughes, Head of Corporate Human Resources gave evidence on behalf of the Respondent. The Tribunal also considered a bundle of documents.

### FACTS

5. During the course of the Hearing the representatives confirmed that the findings of fact made by the first Tribunal, subject to any further evidence adduced on the issue of justification, provided the factual matrix upon which that issue had to be determined. There was no need to start afresh the fact-finding process. Accordingly a brief summary of the relevant facts is set out so as to provide sufficient context for the Discussion section of these Reasons.
6. The Claimant was born on 20 February 1944. He served the Respondent for thirty years as a Police Constable retiring on 1 October 1995 with the rank of Detective Inspector. He was then employed as a Legal Adviser in the Police National Legal Database (PNLD) which was based in and was part of the West Yorkshire Constabulary for which the Respondent was responsible. At that time there was no requirement that the employee had a law degree. Rather the requirement was that the employee had a law degree (or equivalent) or exceptional experience or skills in criminal law, combined with a lesser qualification in law.
7. The PNLD is a computerised legal database and knowledge management system that is accessed by Police Forces in England and Wales and other relevant bodies such as the Crown Prosecution Service and the Independent Police Complaints Service.
8. The Respondent's experience in recruiting for the role of Legal Adviser was that, although advertisements had attracted much interest, there were few applicants. Surveys indicated that this was due to the salary level and not due to lack of interest in the role.
9. In December 2003 Ms Croft, PNLD Business Director, discussed the Claimant's employment history with him. The Claimant was told that if he wished to obtain a law degree the PNLD would pay. The Claimant decided not to accept this offer but did not indicate to the Respondent that he did not wish to take up the offer and the Respondent did not insist on a response to this offer or engage the Claimant in discussion as to the perceived advantages of a law degree for the Claimant. The Respondent at no time prior to refusing to re-grade the Claimant indicated that the failure to have a

law degree would have any impact on his career progression within the PNLD.

10. The normal retirement age within the Respondent was 65. The Respondent's policy also provided that the Respondent was prepared to extend service beyond the age of 65 to the age of 70. That extension was only to be applied annually and on each occasion would be the subject of a medical report which would have to indicate that the employee was fit to undertake the full duties of his substantive role. No such requirement was imposed on any member of staff who had not yet reached the normal retirement age of 65. The Claimant was aware of the opportunity to request an extension of service. The offer to fund a law degree, i.e. to pay the costs of the course and required books, remained open.
11. At the material time the Claimant would have reached the age of 65 on 22 February 2009. As he would not have completed a law degree until after he was 65 he took the view that it was not worthwhile to undertake the burden of working for it. Moreover at the time of the discussion with Ms Croft, the Claimant did not appreciate that obtaining such a degree would have any practical significance.
12. In 2004 the Respondent ran a recruitment exercise using a profile which stated that a degree in law was essential expertise in the role required. One of the successful candidates was three quarters of the way through a degree at the time of appointment but did not have a law degree. At about the same time a Legal Adviser left the PNLD six weeks after appointment to take up the same role in a Magistrates Court which paid an additional £7,000 a year.
13. In or about 2005 the Respondent commissioned an external survey to assist the PNLD to establish a competitive salary and benefits package in order to attract and retain more applicants.
14. On 24 March 2005 Michael Page Legal presented to the Respondent a report entitled "**Salary Review for the Post of Legal Advisor**" ("the Michael Page Report"). The report stated:-

"...Michael Page Legal has been approached by representatives of the PNLD and asked to carry out an independent salary survey across both the private and public sectors in order to assess the correct market value to be placed upon the role of Legal Advisor.

The reason for carrying out a salary survey is so that PNLD ensures that a competitive salary and benefits package is offered to its employees and therefore ensures that the organisation is successful in attracting and retaining the ideal candidates for the role of Legal Advisor. It will also ensure that the current employees of the PNLD (with their varying skill levels and experience) are retained and continue to be instrumental in the development and expansion of the database.

In order to fill the position of Legal Advisor the PNLD has traditionally drawn from two groups. The first being ex-police officers or civilian employees who have the advantage of familiarity with the Police

Force as an organisation, and a hands on knowledge of the areas of law and the defence wordings they will be applying to the database.

The second group are legal professionals – legal graduates with a background in criminal law. These individuals could be barristers, solicitors or legal executives with grounding in criminal law, or a legal graduate with around 5 years' experience working as a paralegal in a criminal law environment.

This survey will look at the salaries of legal professionals whose skills are of interest to the PNLD. It will look at the variations in salary across the public and private sectors and the salary progression expected by employees as they progress in their career. It will look at the types of benefits available to employees in both the private and public sectors and will form a recommendation on the ideal salary banding for the role of Legal Advisor.

The conclusions reached in this document will be based upon the understanding of the functions of the role of Legal Advisor, as set down in the role profile dated 01 April 2004. It forms recommendations which are mindful of the current market value of the candidates whose skills will be attractive to the PNLD, and would assist the PNLD to remain competitive in the current candidate driven market.

...

### **3. The Role of Legal Advisor**

The overall purpose of the role is to "provide an accurate and up-to-date interpretation of the law and in particular criminal law and police procedures to assist forces/customers and other agencies in maintaining a database known as PNLD distributed across all forces in England and Wales and external customers...

It should be noted that the role of Legal Advisor carries a weight of responsibility with it. The Legal Advisors must ensure that at all times the written and verbal advice they provide is up to date and correct for the circumstances for which they are providing it. They are required to provide initial and on-going training and assistance to other members of staff. They must be capable of giving presentations to the users of the database in order to train on aspects of its contents. Legal Advisors are also required to be involved in the marketing of the database to new customers to continue to develop the PNLD as a business.

These skills, in addition to the legal knowledge they require to perform the basic functions of the role, create a job description that is technically demanding with a high level of responsibility.

The candidate required will possess the following traits:-

- Be an ex-police officer or force (civilian) employee.
- OR Be a qualified Barrister, Solicitor or Legal Executive.
- OR Hold a law degree with a minimum of 5 years' experience of working within the field of criminal law.
- Have a thorough knowledge of legislative process and/or relating to the police.
- Will be able to express themselves articulately, both in writing and via presentations.
- Will be able to give sound advice over the telephone to PNLD clients/customers.
- Need to be flexible and able to apply their own judgment to a broad range of solutions, due to the often uncharted areas which are covered by the team.
- Have excellent interpersonal skills and be persuasive, self-motivated approach.

The role of Legal Advisor requires the post-order to demonstrate a wide variety of skills and carries a significant level of responsibility. The Legal Advisor must possess a solid working knowledge of criminal law and must be able to use their initiative. They must possess sound communication, presentation and marketing skills...

## **5. The Challenge**

The challenge involved in the recruitment of the position of Legal Advisor for the PNLD centres on the sourcing of suitable interested candidates. It is essential to find the right mixture of skills coupled with the willingness to learn and to continue to adapt their skills in a changing environment.

The legal market is candidate driven, and both private practices and public sector organisations have become increasingly successful in retaining lawyers by paying market rate salaries, maintaining a high quality workload and offering early career progression.

Across various legal disciplines we experience a high demand for candidates with a background in public law from public sector organisations across the UK. In many cases these candidates are also sought by private practices looking to enhance the service they are providing to their

public sector clients.

It should be noted that in spite of this trend we are experiencing a shortage of candidates specialising in criminal law who have an interest in moving into the public sector.

In addition to the general candidate shortage in this area, the number of suitable candidates available for this role will be limited further by the broad range of skills required and the current limits applied to salary and career progression. This shortage has already been demonstrated in the poor response to what I understand to have been a costly advertising campaign which was run on a national scale.

In the light of the varied skills required for the role of legal advisor it is essential that the PNLD ensures that it is offering a competitive salary which reflects the market value of the individuals being sought. The package on offer needs to be examined to ensure the benefits that it includes are attractive and that as an organisation the PNLD can demonstrate a clear route of progression to its employees. This is essential not only when attracting new staff but also when looking to retain the current group of Legal Advisors who have to date amassed a significant amount of experience and knowledge and who are vital to the continued growth and development of the business.

...

## 7. Conclusion

...As a public sector organisation the PNLD's strength and the current package on offer lies with the generous holiday package and flexible working options that are available to its employees. A starting salary of approximately £27,000 per annum is competitive for an entry-level post in the field of criminal law.

Based on the current market averages, the area where the PNLD may wish to make improvements to its package for the legal advisor is in career progression. The departmental structure within the PNLD is very bottom-heavy. Although there is little room for progression in role, it would be advisable to implement a progression strategy, whereby legal advisors can increase their salaries in line with market rates as their skills and experience develop. This will increase the likelihood of staff retention and will ensure the skills developed within the organisation continue to benefit the progression of the business and the candidates being brought in beneath them.

From the information gathered in conducting this survey, I would advise that the starting salary for a Legal Advisor within the PNLD should be no less than £27,000. This should be a structured progression put in place in order for applicants and current employees to be able to visualise their career progression, and salary increases should be set in increments up to a level of £35,000.

This advice is based upon the salary expectations of legal professionals specialising in criminal law across England and Wales. It covers both the public and private sectors and takes into account the diverse range of skills required for the role of Legal Advisor and the shortage of such candidates in the market."

15. On or about 12 September 2005 Ms Croft presented to the Respondent's Command Team a paper in which she proposed a career grading and progression structure for PNLD "to attract new staff to the organisation". The proposed career grading structure was subsequently agreed.
16. The Respondent introduced a career structure which comprised three thresholds. Legal Advisers were able to apply for re-grading within PNLD ascending from the first to the third threshold with associated increases in pay and pension.
17. In or about April or May 2006 the Claimant successfully applied for re-grading under the first and second threshold.
18. In order to attain the third threshold a Legal Adviser had to complete an application form to evidence the following:-

"Eligibility Criteria

- A degree in law or similar fully completed together with five years' experience in criminal law.
- Taken a significant lead in the national projects such as "one common CJS Code for the whole of the criminal justice sector".
- Give advice to the Home Office or similar organisation on legislation by belonging to a board.
- Developed PNLD by actively contributing towards developing a better solution for our customers, not by developing content but by progressing new areas, an example of which could be diversity.
- Able to significantly contribute towards the annual seminar by PNLD and also present a relevant topic at that seminar.

- That they are positive towards and have implemented a continuous learning and development profile for themselves, demonstrated through PDR. E.g. relevant courses, seminars, qualifications for the role.
- Satisfactory attendance through the Force Attendance Criteria.
- That the competencies of the role have no concern raised through their PDR.
- Be an active and ongoing Legal Practitioner through the Institute of Paralegals."

Only internal candidates were eligible to apply for the third threshold.

19. The Claimant applied for the third threshold. His application was rejected because he did not have a law degree.
20. By letter dated 24 May 2006 the Respondent's Deputy Chief Constable informed the Claimant that his appeal (supported by Ms Croft) was rejected.
21. By a letter dated 9 August 2006 the Claimant appealed against that appeal seeking reconsideration. He asked the Respondent to make an exception in respect of the formal qualification.
22. On 1 October 2006 the 2006 Regulations came into force.
23. By letter dated 2 November 2006 the Assistant Chief Constable rejected the Claimant's application.

#### THE LAW

24. Regulation 3(1) of the 2006 Regulations provides:-

"For the purposes of these Regulations a person ("A") discriminates against another person ("B") if –

- (a) ...
- (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 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."



Regulation 7(2) provides:-

"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) ...
- (d) by... subjecting him to any other detriment."

### **SUBMISSIONS**

25. Mr O'Dempsey and Mr Jones presented skeleton arguments. They also made oral submissions. Where appropriate reference to these submissions is made in the Discussion part of these Reasons. Mr O'Dempsey and Mr Jones referred to *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* [1987] ICR 110 ECJ; *R (Elias) v. Defence Secretary* [2006] EWCA Civ 1293 CA; *Hardy and Hansons Plc v. Lax* [2005] EWCA Civ 846 CA; The ACAS Guidance Age and the Workplace (2006).

### **DISCUSSION**

26. The Respondent accepted that it applied a PCP to the Claimant, namely a requirement that in order to proceed to the third threshold under its career grading structure an employee must have a law degree or similar fully completed. An employee over the age of sixty could not obtain a law degree before normal retirement age and, therefore, could not access the benefits of the third threshold before that time.
27. The Tribunal understood that, in deciding whether a PCP was a proportionate means of achieving a legitimate aim, it was necessary to follow the guidance of the Supreme Court where at Paragraph 19 of its Judgment Lady Hale stated:-

"The approach to justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if an 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... the Directive, but can encompass a real need on the part of the employer's business."

The test to be applied is an objective one. The Tribunal had to take account of the reasonable needs of the business but that was not sufficient. It has to be satisfied that the PCP was reasonably necessary.

28. The Tribunal understood that what can be a "legitimate aim" for the purpose of seeking to justify what would otherwise be indirect discrimination was a matter of fact. In *R (Elias) Mummery LJ* stated:-

"...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."

29. The Tribunal understood that the test of proportionality had to be read in the light of the EU Equality Directives and must therefore comply with the CJEU jurisprudence interpreting those Directives. It was necessary to determine whether the PCP itself rather than its discriminatory effect was justified. Part of the assessment of whether the PCP could be justified entailed a comparison of the impact of the PCP upon the effective group as against the importance of the aim to the Respondent. An objective balance had to be struck between the discriminatory effect of the PCP and the reasonable needs of the undertaking. In order to be proportionate a PCP had to be both an appropriate means of achieving a legitimate aim and reasonably necessary. That meant that the more serious the adverse impact on the protected group, the more cogent must be the justification for it. It was necessary to weigh the reasonable needs of the undertaking against the discriminatory effect of the PCP and to make an assessment of whether the former outweighed the latter. In the instant case Elias LJ (at Paragraph 48) stated:-

"It is an error to think that concrete evidence is always necessary to establish justification, and the ACAS Guidance should not be read in that way. Justification may be established in an appropriate case by reasons and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions."

30. Before the first Tribunal Ms Croft gave evidence that the PNLD had experienced difficulty in recruiting and retaining staff of a satisfactory standard. The PNLD wanted to improve the quality of the service it provided and wanted to provide in the future by ensuring that it had a consistently high level of competent advisers. The Michael Page Report clearly addressed the issue of recruitment and staff retention. The Respondent then introduced the new grading structure. It recommended that the Respondent should improve the current package by introducing career progression. It did not specify the criteria for progression to the top threshold in any structure. Accordingly the Tribunal found and decided that the Respondent's aim of recruiting and retaining staff of appropriate calibre within the PNLD was legitimate.
31. The Tribunal carefully considered the evidence of Mr Hughes. He stated that the application of a different remuneration scheme to new starters from that offered to existing employees doing the same job would have been illogical and fraught with problems. He had over fifteen years' experience in Human Resources. He based his opinion in part on his reading of legal cases and an understanding of how to maintain employee relations. His frequent dealings with trade unions he recognised the need for consistency particularly in the area of remuneration.
32. The Tribunal (in particular the lay Members, drawing on their industrial and work experience) found and decided that Mr Hughes had overstated the problems which would have been caused by applying a different

remuneration scheme to new starters from that offered to existing employees. It was unimpressed by his evidence which advanced generalisations in an unconvincing manner. At the material time there were eight Legal Advisers in the PNLD. The Tribunal did not have details of the age profile but by its very nature a scheme which applied only to new starters was time limited. Parallels could be drawn with other situations. Employers deployed red circling and pay protection arrangement schemes in order to accommodate workers, for instance when they were unable to perform their normal duties due to sickness or injury. Somewhat surprisingly Mr Hughes did not know about the genuine material factor defence in equal pay cases and the widespread practice of red circling or protected pay arrangements in such cases. The Tribunal was also of course aware of the development of different payment schemes in recent years particularly in relation to pension schemes. Many companies had closed their final salary pension schemes and new starters were employed with less favourable pension benefits. Further, particularly since the economic downturn in the UK, it was not uncommon for companies to negotiate lower prices in order to win new contracts. That brought to bear downward pressure on wage costs and often new starters were employed at lower rates of pay and less generous benefits than those enjoyed by existing employees. It followed that the introduction of a different remuneration scheme for new starters could be managed by the Respondent without any (or at least too much) difficulty. The Tribunal found that it would have been practicable for the Respondent to introduce the grading structure and to provide for existing staff to progress to the third threshold without the requirement that they hold a law degree.

33. The Tribunal decided that a distinction could be drawn between the aims of recruitment and retention. Although the Tribunal accepted that an adviser with a law degree was likely to be of a better calibre than an adviser without one, it did not follow that it was appropriate or reasonably necessary for an existing adviser to have a law degree in order to progress to the third threshold. The Respondent did not adduce any evidence that "clients" of the PNLD had requested that the service should be enhanced by improving the Advisers' level of qualification. Although there was evidence in the Michael Page Report that PNLD wanted to expand its client base, the Respondent did not adduce any evidence that prospective clients wanted advice to be given only by an Adviser with a law degree. In any event at the material time all Legal Advisers (with the exception of the Claimant) had law degrees and those on threshold one and two were eligible to progress to the third threshold. There was no evidence that Legal Advisers on threshold one and two were more likely to be lured away by competitors if an exception had been made for existing staff. The introduction of the grading structure was accompanied by an introduction of higher rates of pay for all existing staff. As a result, broadly speaking the levels of pay for Advisers on thresholds one and two were more in line with those similarly qualified staff outside PNLD. There was no evidence to support the contention that a different scheme for new recruits would have been unreasonable or unfair.
34. The Tribunal found and decided that, although the introduction of a new grading structure was appropriate and necessary to achieve the Respondent's aim, the Respondent had not shown that the requirement that existing Legal Advisers had to hold a law degree in order to be eligible for

progression to the third threshold was appropriate or reasonably necessary to achieve that aim. In reaching that conclusion it considered the numbers of Advisers adversely affected (the Claimant alone) and the amount of damage or disappointment that might result to him. In weighing the needs against the discriminatory effect, the Tribunal took care not to take into account the possibility that the Respondent could or should have made an exception for the Claimant. It found and decided that the Respondent had not shown that the PCP was a proportionate means of achieving a legitimate aim.

**CONCLUSION**

35. The Tribunal decided that the complaint succeeded. During the course of the Hearing the representatives indicated that the issue of remedy had largely been agreed. Accordingly by no later than 28 days from the date this Judgment is sent to the parties, they are requested to notify the Tribunal whether it is necessary for the matter to be listed for a Remedy Hearing.

*S. Keevash* 4 February 2013  
\_\_\_\_\_  
Employment Judge Keevash

RESERVED JUDGMENT SENT TO THE PARTIES ON

4 / 2 / 13

*JMM*

\_\_\_\_\_  
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS