



HR in the East Midlands

April 2017

Commercialism is high on the agenda for most councils, and our events page this month provides information on how you can access regional or in-house programmes to support officers in moving to a more commercial approach. Darren's article sets out a helpful explanation from the Supreme Court on indirect discrimination, following consideration of two cases.

Dying to Work - Regional Joint Council

On 4th April 2017 there was a meeting of the Regional Joint Council (RJC). The RJC is made up of 15 representatives of the joint trades unions and 15 councillors from local authorities across the region, reflecting the region's political balance (who also form the Regional Employers' Board).

The focus of April's meeting was the TUC's Dying to Work Campaign, and a presentation was given by Rob Johnson (GMB). This is a national campaign that had its roots in our region with the aim of providing employment protection for terminally ill workers. The campaign calls for terminal illness to be made a "protected characteristic" akin to protection afforded to pregnant workers, meaning that all employees battling terminal illness would enter a protected period within which they could not be dismissed as a result of their condition. Further information can be found at www.dyingtowork.co.uk

Some councils within the region have already signed up to the Charter, or a local version of the Charter, and others are in the process of considering doing so. The RJC agreed to promote this initiative, given that it provides a way of giving recognition for the good practice that many councils already take.

JE Processes

We recently circulated a request for information on the processes councils use for **job evaluation** in the context of trying to improve efficiency. Thank you for your responses. The majority of respondents still have a panel for job evaluation, and there was a shared interest amongst many of respondents in trying to find ways to make job evaluation more efficient, eg using job families. If you would like EMC to facilitate some joint working on this, then please get in touch.

Projects with Local Authorities

This month, we have provided individual authorities with support on a range of projects and issues, including-

- In-house resilience-building workshop
- Chief Executive Appraisal Facilitation
- HR Policy Development

If you would like to know how EMC could support an area of work for you, then please contact Sam Maher at sam.maher@emcouncils.gov.uk or Lisa Butterfill at lisa.butterfill@emcouncils.gov.uk.



Events in the East Midlands

At East Midlands Councils we are focused on providing a range of learning and development for council officers to meet different development requirements and preferences whilst ensuring relevance.

Supporting our Housing Officers

EMC is currently designing a programme of CPD for Housing Officers that will be a new area of work for EMC and support available. This is an exciting addition to our extremely popular suite of CPD programmes for Planning and Environment Health.

Commercialism - “Making it our Business”

Commercialisation is a growing trend within the public sector, and something that we are keen to support authorities with. This year we are working jointly with our counterparts from the North East Regional Employers Organisation to offer an opportunity for managers to take part in a practical programme that will support the development of commercial skills, as well as providing a supportive environment to explore commercial opportunities.

“Making it our Business” is a 4-day programme with two half day action learning sets designed to support the development or exploration of a commercial opportunity. **We are offering this as a regional programme starting in September 2017, as well as providing the programme on an in-house basis.**

Programme Content

Trading and Marketing Public Services

This introduces managers to the role of trading and entrepreneurship in a public service environment and some fundamental principles of marketing. On completing this module participants should have an understanding of the pre-requisites and priorities for an entrepreneurial approach to trading public services in order to generate income.

Negotiation Skills

This module will help managers to understand what negotiation is, and is not, in the business world. It will give them practical skills to enable them to prepare for a negotiation scenario, weighing up variables and anticipating challenges along the way.

Practical Project Management

This module will provide participants with the project management approach and governance arrangements that will help any project in becoming successful.

How to Write a Commercial Business Case

The “Writing a Business Case” module utilises proven local government MSP and Prince 2 based business case templates, as well as the organisation’s own (where available), practical best practice guidelines, and checklists for developing an effective business case.

Customer Relations

The Customer relations module provides guidance on how companies promote customer satisfaction and, moreover, loyalty. This involves understanding who the customer is, how to manage communications with customers, particularly customer questions and complaints, and how to resolve disputes amicably.

Presenting Your Business

Each participant will be expected to do a short presentation to their peers and receive feedback on it. It will help participants to understand how to deal with potentially challenging situations or people and will offer an opportunity to demonstrate their ability to deliver a presentation on any aspect of their business.

Action Learning

In addition delegates will take part in two half day Action Learning sets. These half day sessions will provide delegates with dedicated time to work on and explore their commercialism project and provide a supportive environment to achieve progress on projects and explore the learning on the way.

For more details on the programme visit <http://bit.ly/EMCCommercial>

Contact Details

For further information about any of our work please contact the Local Government Services Team. Either call 01664 502 620 or email:-

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‘In Deep with Darren’

Darren Newman’s in-depth analysis of a topical HR issue and its implications for local authorities

How Indirect Discrimination Works – following two Supreme Court Cases: Essop and Naeem

On 5th April the Supreme Court issued a judgment explaining how indirect discrimination works. Considering the concept was first introduced into UK law with the Sex Discrimination Act of 1975, it may seem surprising that it needed to do that. But in two cases the Court of Appeal had seriously muddied the waters with the result that nobody was quite sure where the law stood. The Supreme Court has, hopefully, restored some common sense to a subject that had become overly complex.

The Supreme Court heard the two cases together. In **Essop v The Home Office** the issue was a requirement for all employees to pass a ‘Core Skills Assessment’ in order to qualify for promotion to the position of Higher Executive Officer. As a good public sector employer, the Home Office commissioned an impact assessment to see if there were any equality issues raised by the requirement – and it turned out that there were. The pass rate for Black and Minority Ethnic (BME) employees was just 40.3% of the pass rate for white candidates. There was, however, no information to suggest why that was.

There was less mystery in the case of **Naeem v The Ministry of Justice**. This case concerned the pay of prison chaplains. Muslim chaplains, on average, were paid less than their Christian counterparts – a direct result of a pay system based on length of service. Muslim chaplains had only been recruited directly since 2002 with the result that they tended to be lower down the pay scale than Christian chaplains whose average length of service was longer.

Both situations may strike you as pretty obvious examples of indirect discrimination. There is a provision criterion or practice (PCP) which puts a group (BME staff, Muslim chaplains) at a particular disadvantage. The question should then be whether the test used by the Home Office or the Prison Service Pay Scale could be justified as a proportionate means of achieving a legitimate aim.

But in each case the Court of Appeal held that it was not obvious at all. In *Essop*, the Court pointed out that in an indirect discrimination claim, both the individual bringing the claim and the disadvantaged group as a whole had to suffer from the ‘same disadvantage’. But in the absence of any evidence as to the reason for the difference in pass rates, that could not be determined. Without knowing why the group as a whole had a lower pass rate, how could it be shown that the individual bringing the claim had failed the test for the same reason? In *Naeem* the Court held that there would be no indirect discrimination when there was a clearly non-discriminatory explanation for the difference in pay rates. Here the difference was length of service and there was no difference in the pay between Muslim and Christian Chaplains once that was taken into account.

The Supreme Court has now made it clear that the Court of Appeal took the wrong approach in both cases. There was nothing in the Equality Act that required those claiming indirect discrimination to show the ‘reason why’ they suffered a disadvantage; it was enough to show that the disadvantage was a real one. Everyone who failed the test suffered the same disadvantage in that they were denied opportunities for promotion. When it came to the pay system in the prison service, the ‘explanation’ for the disadvantage did not matter, indirect discrimination could not be avoided simply by factoring out the very issue (length of service) that lay behind the disadvantage suffered by Muslim chaplains.

Implications for Local Authorities

The upshot of all of this is that the Supreme Court has restored indirect discrimination as a statistical exercise and stripped away considerations of whether the disadvantage shown by the statistics might be caused by something other than a protected characteristic.



If a practice can be seen to adversely affect a particular group, we do not need to get bogged down in asking why that disadvantage has arisen. Instead the focus should be on whether the practice in question is a proportionate and reasonable one.

We often fall into the trap in indirect discrimination cases of talking about the 'justification defence' as though justification is a consideration only when indirect discrimination has been established. But that is not quite right. It is not that justification is a defence to a claim of indirect discrimination, but rather that the absence of justification is an essential element of what indirect discrimination is.

In the leading judgment of the Supreme Court, Baroness Hale stresses that getting to the stage where you have to show the justification for a provision criterion or practice is nothing to be ashamed of. It does not mean that a practice was found to be discriminatory but you managed to get off on a technicality. If you can show that any provision criterion or practice you operate is a proportionate means of achieving a legitimate aim then, by definition, it is not discriminatory.

The key thing about justification is that while the employer cannot always foresee the statistical impact that a PCP might have, it should at least be able to explain why the PCP is being applied and why it is needed. The Home Office was no-doubt surprised to discover that the pass rate for BME employees was so low. But presumably it has very good evidence that the test was an effective way of predicting which candidates for promotion would be suitable and which would not. Otherwise – why have the test at all? In the Naeem case, the Supreme Court actually restored the finding of the Employment Tribunal that there was no discrimination, because the pay scale was in the process of being reformed and it was proportionate for the employer to seek to do that in stages rather than all at once.

The convoluted reasoning of the Court of Appeal had got in the way of the real issue. Once it is clear that a practice has a disproportionate impact on a particular group then the question to ask is whether that practice is really necessary or whether things can be done differently so that the disadvantage is removed. If the practice can't be changed without compromising an

important business need, then that should be enough to answer any indirect discrimination claim. It is not often that a decision of the Supreme Court actually simplifies the law – but that is what has happened here.

Let's hope it lasts!

More information can be found on Twitter:
[@daznewman](#)

National Developments

Independent Investigators for Disciplinary Matters Relating to Chief Executives

This week we issued a JNC for Chief Executives of Local Authorities Circular that provided information on how to access independent investigators to assist with disciplinary matters relating to Chief Executives.

IR35: Request for Information on Implementation in Authorities

Following the LGA's letter to DCLG highlighting the problems with the IR35 reforms, as mentioned in last month's HR Bulletin, DCLG have offered to meet with the national bodies to discuss the issues with implementation and what could be done to help authorities. This will be a further opportunity to press for clearer guidance and improvements to the online tool.

To assist with the discussions, please email Sam Maher sam.maher@emcouncils.gov.uk with any examples you have from your local authority of particular issues you have encountered, or any improvements you would like to see to the guidance and online tool.



Pensions Update: 50-50 Survey & April Bulletin

There has been a low take-up of the **50-50 option** within the Local Government Pension Scheme (LGPS) and so the Scheme's Advisory Board is trying to understand the reasons for this and have therefore produced an online survey, which runs until the end of July.

Councils have been asked to encourage employees to complete the survey which can be accessed at [online survey](#). It is anticipated that it will take around 30 seconds to complete the survey, as there are a maximum of three questions to be answered.

The LGA pension team's April 2017 **update bulletin** has now been published and is available on lgpsregs.webdigi.co.uk and www.lgpsregs.org.

