



# EMPLOYMENT TRIBUNALS

**Claimant**

**Mr G A Dean**

**Respondent**

**The Home Office**

**v**

**Heard at Watford**

**On: 11-15 June 2012**

**Before: Employment Judge Hobson  
Mr P Lowndes  
Mr D Bean**

## **Appearances**

**For the Claimant: Ms N Braganza - Counsel  
For the Respondent: Mr J-P Waite - Counsel**

## **JUDGMENT**

The unanimous judgment of the employment tribunal is that:

1. The claimant's claims of direct discrimination on the grounds of race and age fail and are dismissed.
2. The claimant's claims of indirect discrimination on the grounds of both race and age are upheld.
3. There will be a Remedy Hearing on Tuesday 21 August 2012 at The Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford, Hertfordshire WD17 1HP.

## **REASONS**

### **1. The Issues**

1.1 There is an agreed list of issues dated 2 September 2011 at pages 123-127 of the bundle, the issues relating to direct discrimination on the grounds of race and age and indirect discrimination also on the grounds of race and age.

1.2 The agreed list of issues is as follows:

Race discrimination (direct)

- 1.3 Did the respondent treat the claimant less favourably than it treated or would have treated other persons?
- 1.4 If so, was it on racial grounds?
- 1.5 The claimant relies upon the following specific incidents of direct discrimination:
  - 1.5.1 Allegation 1 – The respondent discriminated against the claimant by failing to agree to use an alternative procedure which allows promotion without the claimant passing the Core Skills Assessment (CSA). The date of the alleged discrimination is 1 April 2010. The claimant contends there were a number of similar decisions in the past which are presently unspecified (the claimant has agreed to provide details about the nature of each decision and when it occurred within six weeks of filing this agreed list of issues). The claimant argues that these decisions and the continuing failure to waive the CSA form one continuing act and are therefore in time. The respondent disputes the claimant's argument in circumstances where the commencement of such acts is unspecified and in the event they are specified as set out above will seek to argue there is no continuing act and any such complaints are therefore out of time.
  - 1.5.2 Allegation 2 - deleted
- 1.6 There are no other allegations of direct race discrimination.
- 1.7 The claimant describes himself as a mixed race, being white/Asian.
- 1.8 The claimant relies in all cases on a hypothetical comparator (as identified at paragraph 65 of the claimant's Amended Grounds).

Age discrimination (direct)

- 1.9 Did the respondent treat the claimant less favourably than it treated or would have treated other persons?
- 1.10 If so, was such treatment on grounds of the claimant's age?
- 1.11 The claimant relies on Allegations 1.51 above.
- 1.12 It is unclear how the claimant puts his case. He says that he is in the age group 30-40. It is unclear whether he was comparing himself to

older or younger people and he will provide proper particulars as directed in the order for *further and better particulars*.

1.13 The claimant is comparing himself to younger employees. The claimant was aged 40 at the date of his claim to the tribunal. He identifies his relevant age group as those aged 35 or over. The claimant relies on a hypothetical comparator (as identified at paragraph 65 of the claimant's Amended Grounds).

1.14 The respondent denies direct discrimination. In the alternative, it states that any discrimination was a proportionate means of achieving a legitimate aim. The details of this defence are the same as set out in the section on indirect discrimination below.

Race discrimination (indirect)

1.15 The claimant contends:

1.15.1 That the provision, criterion or practice is the requirement to pass the Core Skills Assessment (CSA) in order to be promoted. The claimant contends that the requirement to sit the CSA, its structure and/or content, puts or would put people in the claimant's racial group at a disadvantage.

1.15.2 He alleges that there is evidence to show that proportionately fewer members of his racial group succeed in the CSA and that, therefore, the use of this test puts these people at a disadvantage.

1.15.3 He states he has been placed at the same disadvantage and has not been promoted as a result.

1.15.4 He says that the use of this CSA is not a proportionate means of achieving a legitimate aim.

Indirect age discrimination

1.16 The claimant puts his case in the same way as for indirect race discrimination. The claimant is comparing himself to younger employees. The claimant was aged 40 at the date of his claim to the tribunal, he identifies his relevant age group as those aged 35 or over. The comparator age group is those aged 34 or less.

Proportionate means of achieving a legitimate aim

1.17 The respondent alleges in the alternative that any indirect discrimination whether on racial grounds or grounds of age is a proportionate means of achieving a legitimate aim.

- 1.18 The aim is said to be the need to secure the best candidates for the posts whilst avoiding bias in the process. The CSA is particularly used when promoting to Grade H.
  - 1.19 The means is said to be the Core Skills Assessments. This assesses core competencies and is said to be a way of testing competencies against a general core competency framework.
  - 1.20 It is said that this is proportionate.
  - 1.21 The claimant relies on his Amended Grounds of claim dated 17 June 2011 for further particularisation of his claim and the issues.
  - 1.22 The respondent relies on their further grounds of resistance dated 8 July 2011 for further particularisation of their defence and the issues.
2. Findings of fact
- 2.1 The tribunal has referred to the claimant's ET1 claim form issued on 12 April 2010. The claims are of discrimination on the grounds of race and age related to his failure to gain promotion. The respondent's ET3 and grounds of resistance are dated 14 May 2010. The claims are denied.
  - 2.2 At the Case Management Discussion of 15 September 2010 Employment Judge Hodgson confirmed that it was specifically agreed that the tribunal is not concerned with allegations of discrimination prior to January 2010. The claimant may rely on previous matters by way of background.
  - 2.3 An application by the claimant to amend his claim was granted at a further Case Management Discussion on 1 February 2011 by Employment Judge Mahoney. Amended grounds of claim are dated 17 June 2011. Amended grounds of resistance are dated 8 July 2011. Further and better particulars given by the claimant are dated 26 October 2011.
  - 2.4 During the hearing the tribunal heard evidence from the claimant in accordance with his witness statement and from Mr P Farr, the claimant's trade union representative and Mr D Allen, a full time officer with the claimant's trade union Prospect. The union has supported the claimant throughout this matter.
  - 2.5 The tribunal also heard expert evidence and considered a report by Ms M Tyzack, a consultant, instructed by the claimant.
  - 2.6 Mr A Peters, who investigated grievances raised by the claimant, gave evidence as the sole witness for the respondent.

- 2.7 The tribunal was referred to bundles of documents containing approximately 750 pages plus a further bundle containing documents covering the CSA Test Material, comprising nearly 700 pages. In particular the tribunal was referred to the Pearn Kandola Report obtained by the respondent in February 2010, the investigation report by Mr Peters of August 2010 and the report by Tyzack Associates of May 2011. The tribunal also noted the claimant's race relations questionnaire of April 2010 and the respondent's replies of June 2010 with copious supporting documents. There was also a chronology and a list of persons from the claimant.
- 2.8 The claimant, who was born 7 June 1969, is now aged 42 and is of mixed race. His father was Indian and his mother Scottish. His father was a college lecturer in welding/fabrication and his mother's last job was as a school assistant in a science department. He confirmed that he was very much supported by his parents in his education.
- 2.9 The claimant's employment with the respondent commenced on 3 September 2001. He is currently a Professional Technology Officer (PTO). In this role he supplies technical support and advice to the Association of Chief Police Officers, police forces and policy advisers regarding police weaponry, ammunition and less lethal technology as part of the Centre for Applied Science and Technology (CAST). The claimant is still employed by the respondent.
- 2.10 The claimant has undergone annual appraisals through a system conducted by his manager. Since his first partial year in his present job, 2002, when he was marked on his assessment as "B", he has received "A" grades as "exceptionally effective". His appraisals show that he has exceeded his objectives, undertaken additional responsibilities and has been earmarked for promotion with strong support from his line manager, particularly Graham Smith, up to 2011.
- 2.11 In 2005 he was described as "ready to move up". Since 2008 he has received an annual performance bonus paid to the top 35 % of staff.
- 2.12 The claimant studied part-time between 2000-2004 and was awarded a first class honours degree in manufacturing systems engineering

The respondent's promotion system

- 2.13 The promotion procedure in the Home Office for the claimant's grade is that vacant posts are first made available to those awaiting redeployment, then they are advertised internally. If a candidate identifies a post for which they consider themselves suitable, and wishes to apply, the candidate will submit an application for the post based on the specific competencies required for the job. There is then a sifting process where all the applicants are either "sifted in" or "sifted out" by the manager of the recruiting campaign. All those "sifted in" for

the post are then invited to sit a "Core Skills Assessment" (CSA) and the candidate must pass this to then be considered for a Specific Skills Assessment (SSA) for the specific role for which they had applied.

- 2.14 Once a candidate has passed the CSA, they have a "ticket" to apply directly at the SSA level for promotion to the higher grade. The "ticket" lasts for a year. The CSA is a generic test that applies to all those seeking promotion to the next grade of Higher Executive Officer (HEO) or Higher Scientific Officer (HSO)/ Higher Professional Technology Officer (HPTO) for the specialist roles. Candidates who fail the CSA are barred from re-applying for at least six months.
- 2.15 The CSA was (and still is) an essential part of the respondent's recruitment selection process for those applying for posts on promotion to HEO or Grade 7 and equivalents (internal applications) or posts at HEO/SEO level and Grade 7/Grade 6 level and equivalents for external applicants. The CSA is an objective and independent test for the generic core competencies required for the grade as set out in the Home Office Core Competency Framework and assesses all candidates to the same standard using the same exercises. The assessment does not take account of the individual's performance in their current post or grade and does not test the specific skills required for the particular post they have applied for. The specific skills for a post are tested later at the competency based interview if the candidate meets the CSA standard.
- 2.16 Only those in specialist areas (where there is a Whitehall wide professional group such as librarians, lawyers or social scientists who have alternative professional competency frameworks) are not required to take the CSA as they have established alternative selection processes of at least a comparable standard to the CSA, which often tests a wider range of competencies and skills.
- 2.17 The purpose of the CSA is to ensure that all Home Office, UKBA and CRB civil servants at these key grades meet a minimum level of competency so that the Government and the general public can be assured about and have confidence in an efficient and competent Civil Service.
- 2.18 The CSA tests the five competencies contained in the Home Office Core Competency Framework - programme and project management, financial management, people management, analysis and use of evidence, and communication. The Core Competency Framework reflects the four skills required under the Cabinet Office Initiative Professional Skills for Government (PSG) which applies to all government departments. The Home Office Framework includes the additional skill of communication.

The claimant's applications for promotion

- 2.19 The claimant first applied for promotion through the CSA system in 2007. This was for a role as Offender Management Technologies Team Leader and Project Manager. His manager, Graham Smith, supported his application. He was "sifted in" on the basis of his application. He then sat the CSA for the first time on 20 November 2007 but was told that he had failed and therefore his application could not be progressed.
- 2.20 The claimant applied a further couple of times in 2008 and 2009 and sat the CSA again on 15 July 2008 and in July 2009 but was again told that he had failed.
- 2.21 Having been failed at the CSA three times, the claimant wrote to his manager, Graham Smith, on 19 June 2009 (pages 301-303) setting out that he believed that he had demonstrated in his work that he was competent to work at the higher level and that his manager has consistently recognised this. He raised the fact that the CSA is not mandatory across the whole of the Home Office department and agencies and that the CSA has limitations especially from a diversity perspective. The claimant requested that the requirement to pass the CSA be waived in the light of the existing view of his manager, that he had the necessary skills and competencies.
- 2.22 The Employment Tribunal notes (244-250) that in August 2008 the Home Office Trade Union was writing to the Permanent Secretary concerning policies and procedures, around race and disability, which had been shown to indirectly discriminate against members. This included concerns about the CSA.
- 2.23 The respondent undertook a review of the CSA diversity data for the first twelve months on 9 December 2008 (page 259). The headline analysis summary is at page 260. The summary advises caution in interpreting the survey findings because of the low sample sizes and also because a significant number of candidates have not provided diversity information.
- 2.24 The report shows that the most successful age group at the G7 CSA, were those aged between 25 - 34 years.
- 2.25 Ninety five percent of HEO(D) candidates fell within the 25 - 34 year old age band.
- 2.26 The overall success rate of White candidates (47%) was higher than Black and Ethnic Minority Groups (BME) candidates (24%). The detailed statistics are at pages 265 and 266.



2.27 Referring to a letter dated 19 June 2009 sent by the claimant to his manager, Graham Smith, (page 301-303) the claimant expresses his concerns regarding the CSA. He says:

"On each occasion the outcome of the CSA has been that I do not have the core competencies at the required level to allow me to proceed to an SSA. However, I do not believe that this is an accurate outcome since all of the other evidence clearly shows that I do possess the required competencies. Both the flaws in the CSA process and the strength of my own performance are detailed below.

1. The CSA process has limitations - there is a significant adverse effect on certain categories of staff. For example Black Minority Ethnic (BME) staff fare less well as do older members of staff. Not only do these statistics demonstrate this but the department itself has accepted that there is an adverse impact when it has carried out Equality Impact Assessments (EIAs) on the process. There is clearly a risk that this adverse impact is the sole reason that I am failing the CSA and it is my belief that this is the case. Since the Home Office is presently unable to prevent relevant factors such as race and age from influencing this process it must take steps to address this by other means and there is a very real risk that a failure to do this would be deemed to be unlawful if challenged."

2.28 The letter continues with further comment on the aspects of significant adverse effect and then at page 303 the claimant suggests his solution:

"I believe that a fair solution which meets both my and the department's needs is for the solution so recently used in SRG to be adopted - that I should be given the chance to demonstrate that I can carry out a particular role (via SSA). If I can pass the SSA part of the process then I should be promoted into that job, fully accepting that if I applied for any other post I would still have to demonstrate (again via the SSA) that I have the competencies required on a post by post basis. This clearly meets my needs. It also meets the department's needs - if I am the top candidate in an SSA process then I am clearly the best person for the job and that is clearly in the interests of the department."

2.29 The response to the claimant's letter to Graham Smith is at page 309, being a letter from Claire England of HR to Graham Smith dated 22 July 2009. In the third paragraph Ms England states:

"The amount of data available for analysis is very limited and although it is extracted from Adelphi records, not everyone has completed their full diversity record and many have opted to use the category "I prefer not to say". In these circumstances HR does not have the true diversity picture and it is not possible to draw definitive conclusion with incomplete statistical data".

2.30 At page 311-12 of the bundle is a paper (undated) prepared by the claimant's manager, Graham Smith. In the third section headed "A Solution" Mr Smith states:

"He is currently barred from taking the test until October. I believe that there is a pressing business need to fill this post by using a specialist skills assessment process now and to allow the current post holder to apply. There is precedent for



this to happen and there is a process whereby a person can be promoted into a post and pass the CSA at a later date. Whilst in this position it seems the post holder would be barred from applying or transferring to other 'H' Level posts within the Home Office until he passes the CSA. A clear development plan would need to be put in place based on feedback from previous failed CSA attempts.

2.31 Under the heading "Next steps", Mr Smith points out that for this process to be taken forward the support of the Director or Deputy Director at HOSDB is required and that the Director of HR, William Hague, would need to give his permission for SSA Boards to be held and for allowing the current post holder to apply for the job.

2.32 On 9 October 2009 the claimant submitted a Formal Resolution Form by way of a grievance (pages 336-337). In the Statement of Issues (Part A) the claimant wrote:

"Whilst I understand that the process is subject to continuous review, primarily to address these problems, (recognising the most suitable candidate) it is my understanding from the Equality Impact Assessments that none of the changes which have been made to the CSA process have been targeted at, or had a significant impact on, the diversity outcomes. I believe that as a result I have been discriminated against and wrongfully prevented from gaining promotion. My PDR's and line manager assessments over the past eight years clearly demonstrate that I have the core and specialist competencies necessary to perform at the higher grade."

2.33 In Part B under "Informal Approach", the claimant continues:

"However, the only substantive result of this to date is a meeting being arranged to discuss the matter further in November. In the meantime the department has continued to discriminate by conducting a further recruitment campaign using the same CSA process for a post for which I am suitable yet could not apply for. The post was advertised from 3 July 2009 as ACPO Armed Policing Liaison Officer/Firearms and Protective Equipment (FPE) Project Manager - IEP."

2.34 In Part D, under "Proposed Resolution" the claimant wrote:

"It is my understanding that an employer should not continue to use a process which it knows to be discriminatory. I believe that the central problem is the Home Office has a discriminatory process in place which is unlawfully blocking my promotion.

Similarly, whilst I welcome the HR advice that the department is free to seek alternatives to the CSA process if a business case can be provided - this is not satisfactory. If the department is using a discriminatory process it should not be necessary to provide a business case to justify why this process should cease. Indeed, as detailed below ASPI were not asked to provide a business case to address a similar problem where the CSA process was acting as a blockage (to the appointment of Vets)."

2.35 The claimant then concluded:

"HOSDP should now run a further campaign and allow me (and other candidates who can demonstrate the requisite core and specialist skills) to move to the SSA stage without reference to CSA. This will remove any suspicion that the department is discriminating by choice and will ensure that the best candidate for the post is appointed."

- 2.36 On 23 October 2009 a meeting was held to discuss the claimant's grievance. The claimant attended together with Mr Farr and his manager Graham Smith. Notes of the meeting are at pages 342-3 of the bundle. A copy of this note was sent to Claire England of HR. The objectives were stated as being to resolve the claimant's grievance by the end of November 2009. Ms England e-mailed a response to Graham Smith on 6 November 2009 (page 346) saying:

"I have now had an opportunity to read the note of the meeting you had with Graham Dean. I see that you undertook to arrange a meeting with HR. You should not have given this undertaking as a representative from HR will not meet Graham to discuss his personal concerns"

- 2.37 On 12 November 2009 a meeting was held to discuss the possibility of promotion outside the CSA process for the claimant. Present were Alan Pratt, the claimant's former Head of Unit, Director of Science Engineering Technology, the claimant's manager Graham Smith and Stephen Barber, Sector Manager Investigation Enforcement and Protection. The note of this meeting is at pages 351-352.

- 2.38 On summarizing the issues as he saw them, Mr Pratt put on record:

"The fact remains that the CSA is the accepted Home Office standard for establishing the core skills required by all entrants to H level posts. Candidates such as GD (the claimant) may have very strong specific skills, but this is not a substitute for the core skills. A SSA is an addition to the CSA and not a substitute for it."

- 2.39 The note concludes that the decision of Mr Pratt was "not to apply for an exemption" for the claimant. The report refers to contradictory advice from HR as to whether an exemption route even exists and should determine the fact of the matter. It adds that this has no bearing on the above decision. Finally the report states that:

"AP (Mr Pratt) re-iterated his sympathy for GD's situation and emphasized that continued support would be available to help pass the CSA. He also apologised for the length of time taken to reach a decision. However it is critical to preserve the CSA as an objective standard across the Home Office."

#### CSA – January 2010 and Further Grievance

- 2.40 The claimant's last application for promotion was in December 2009. The post was for a technical services manager in HOSDB's national technical unit (pages 360-62).
- 2.41 The claimant sat the CSA on 11 January 2010 but was informed by letter dated 13 January 2010 that he had been unsuccessful (363). The letter attached a results and feedback report (364-374).
- 2.42 The claimant made representations that he believed that there was a technical fault on the e-tray inbox exercise (part of the CSA) by e-mail on 13 January 2010 (page 375). The claimant's representation was based on the CSA familiarization material not explicitly stating that leaving e-mails to answer later might prevent subsequent e-mails arriving in the inbox, during the CSA test. The claimant received a responding e-mail from Jill Douglas, head of CSA, dated 10 February 2010 thanking him for his comments and suggesting that perhaps there was a need to make the guidance clearer (page 437).
- 2.43 The claimant raised a further grievance against the refusal to waive the CSA requirement on 21 January 2010 (pages 377-380). This was because the claimant had not received a full explanation from HR in respect of his previous grievance and no investigation into his complaint had been undertaken. The claimant again expressed his belief that he had been illegally discriminated against by the respondent through use of the CSA process as a method of assessing suitability for posts at the "H" Level. He pointed out that BME and older candidates are less likely to succeed. Again the claimant outlined an informal approach. He set out his concerns and dissatisfaction regarding the decision of Mr Pratt not to grant him an exemption from the CSA. He then proposed a resolution.

**Proposed Resolution**

Therefore AP (Mr Pratt) should be asked to do the following:

1. Determine from the department what research has been conducted to explain the statistical data.
2. If having done this AP determines that he wishes to continue to use the CSA process then he should be asked to provide an alternative explanation for the statistics other than my belief that discrimination on groups of race and age and demonstrate why this explanation is, on the balance of probabilities, more likely to be the underlying reason than discrimination.
3. If AP cannot demonstrate that discrimination is less likely than any other explanation then he should agree to cease use of the CSA process forthwith.
4. In the meantime, given the delay that is likely to occur whilst this is done, AP should allow me to be assessed for posts under SSA since, on the balance of probabilities, I am capable of carrying out the specialist "H" grade role."

2.44 At page 381-2 there is a letter sent by the claimant to his manager Graham Smith dated 25 January 2010. The claimant states:

"You have now informed me that HR refused to engage with me to discuss the discrimination which I have been subject to. They advised you that this discrimination should be taken forward as a general point under the auspices of the Whitley Process."

2.45 The claimant repeats his belief that he has suffered illegal discrimination as a result of the decision to implement the CSA process, adding that the data certainly supports this view. He adds:

"The CSA data at HEO Level (attached) is damning. At the interim CSA process, white candidates are more than three times more likely to pass the CSA than BME candidates. At the pre-interim stage this disparity falls to a mere (sic) more than twice as likely to pass.

The department's response to this data is as follows:

Analysis of diversity data from the CSAs does show that BME staff and older candidates tend to do less well, but the data needs to be set firmly into context. The amount of data available for analysis is very limited and although it is extracted from Adelphi records, not everyone has completed their full diversity record and many have opted to use the category "I prefer not to say". In these circumstances HR does not have the true diversity picture and it is not possible to draw definitive conclusions with incomplete statistical data.

I am open-minded on this point and recognise that it is difficult to draw definite conclusions. But that does not mean we should not try to determine the root cause - these figures are alarming and have remained alarming over every CSA exercise the department has run. To conclude, without further analysis that "it is not possible to draw definitive conclusions..." is simply not good enough. The department, at the very least, needs to provide a reasonable explanation of this data. This they have refused to do. The most likely explanation from the figures is that discrimination is occurring. This needs to be addressed.

Finally, we do have 100% figures for data on age discrimination - there is no "prefer not to say" option. There would appear to be a disparity in success rates based on age. This is far more clear-cut yet the department has also failed to address this.

The evidence would appear to suggest that there is a problem that needs to be investigated. However, the opposite appears to be occurring - the department is doing everything in its power to avoid addressing a complaint of alleged discrimination through its inaction. This is extremely worrying."

2.46 On 8 February 2010 Jill Douglas, head of the CSA Team rejected a complaint made by the claimant that his failure of his most recent CSA was the result of technical reasons (see pages 432-433).

2.47 The claimant received an e-mail from Graham Smith dated 19 March 2010 saying that he had been advised by HR that the claimant's grievance of June 2009 was out of time and that in any event it related

to departmental policy and so should not have been pursued using the grievance procedure (page 460).

2.48 The claimant had a meeting with Graham Smith regarding his January 2010 grievance on 29 March 2010 (pages 464-465). Mr Smith's response to the grievance was that he would write to HR asking for an explanation of the statistical data, but that he was not able to write to Alan Pratt asking whether he had taken the possibility of discrimination into account in deciding not to waive the CSA in the claimant's case (page 463).

2.49 The claimant then presented his complaint to the employment tribunal on 12 April 2010, but he also requested that his union officer write to the director of HR explaining that this had been done to safeguard the position in respect of time limits, but that the claimant and his union hoped that matters could still be resolved internally (page 481).

2.50 The claimant appealed against the decision relating to not being able to raise matters further with Mr Pratt regarding discrimination (pages 483-484). The claimant attended a hearing with Steve Barber, Sector Manager, to discuss his grievance appeal on 7 May 2010. The claimant was again represented by his union representative, Paul Farr. It was agreed that there would be an investigation into his complaint. A note of the meeting was taken (pages 499-500). It was agreed that an independent investigator be appointed to look at the claimant's case since this had not been done previously in accordance with the procedure. Again the claimant was disappointed that he had to push for the investigation as Mr Farr and he believed that such an investigation should have been initiated by the respondent previously.

2.51 It was then that Mr Alan Peters was appointed to undertake the investigation into the claimant's grievances and complaints. Mr Peters was assigned by Steve Barber as an independent investigator. Mr Peters' investigation report was sent to the claimant on 16 August 2010. To the disappointment of the claimant, Mr Peters found there was "no case to answer." The report is at pages 501-510.

2.52 Meanwhile, in February 2010 the respondent had received a lengthy report from Pearn Kandola (pages 384-431) being a review of HEO and Grade 7 Core Skills Assessments, diversity outcomes. Regarding this, in paragraphs 31 and 32 of his statement, Mr Peters states:

31. I should explain that because of the allegations of the CSA's discriminatory effect made by HOTUS the respondent commissioned a professional and independent review of the CSA processes. Pearn Kandola, a firm of occupational psychologists, was commissioned to undertake the review in or around December 2009.

32. Pearn Kandola presented their report [384-431] to the Home Office in February 2010. The review found that there were patterns of differential

impact with white candidates having a higher selection rate than BME candidates, and younger candidates having a higher selection rate than older candidates. The review assessed, however, that the CSA process was 'highly consistent and that candidates receive equitable treatment'. It should also be noted that data relating to age was not available for 38% of the candidate's and data relating to race was not available for 37% of the candidates."

The report was shared with the claimant's trade union.

2.53 Referring to the executive summary of the Peam Kandola Report, (page 386), it is stated:

"Firstly, we found the following patterns of differential impact;

- Ethnicity - White candidates have higher selection rates than BME candidates across all of the CSA's (HEO Original, HEO interim and Grade 7)
- Age Band - Younger candidates have higher selection rates than older candidates across all of the CSAs"

2.54 The executive summary continues:

"In assessing the fairness of the CSA, we concluded that they are highly consistent and that candidates receive equitable treatment. Although there was no evidence of unfair practices within the CSA it was noted that a full assessment of fairness could not be conducted without CSA specific validation data. A validation study of any future vacancy filling processes was therefore strongly recommended"

2.55 The tribunal noted that on the issues before it, the Peam Kandola assessments of "fairness" do not equate to whether the application of the CSA was or was not directly or indirectly discriminatory on grounds of race or age. At pages 387-389 the Peam Kandola report deals with the concepts of fairness and also differential impact. At page 387 they state:

"It is often assumed that these terms (fairness and differential impact) are interchangeable although this is incorrect."

2.56 At page 388, regarding the definition of differential impact, the report states:

"The Uniform Guidelines define differential impact as "A selection rate (for any protected group) which is less than four-fifths (or 80%) of the rate for the group with the highest rate. This is commonly known as the "Four-Fifths Rule".

2.57 The report continues, after setting out a table, by stating:

"Importantly, the Four-Fifths Rule is a general guide and is not conclusive evidence of differential impact... Simply put, differential impact is a statistically significant difference in selection rates between two groups of candidates..."



Differential impact can occur irrespective of selection rates where a clear instance of discriminatory practice is identified (eg rejecting a candidate who would otherwise be selected, on the basis of their group membership)".

2.58 Then under "definition of fairness" the report states:

"There are several definitions of fairness within the literature and there is no single meaning. However, a fair selection process is considered to have the following features:

- All candidates receive equitable treatment.
- There is predictive validity.
- There is a lack of predictive bias...

Importantly a selection process can be fair whilst, at the same time, demonstrating differential impact

2.59 At page 393, the Peam Kandola Report states

"There was significant differential impact of the basis of:

Ethnicity – white candidates had higher selection rates than BME candidates (47.23% and 19.04% respectively)

Age band – younger candidates had higher selection rates than older candidates (candidates who were 34 or younger had a selection rate of 53.58% compared to 20.22% for candidates who were 35 or older).

How this was established is set out in the report.

2.60 Regarding fairness, the Peam Kandola Report concluded (page 416))

"We are extremely confident that the CSA processes meet with the first requirement of treating all candidates equally. Based on the wider assessment literature we can also be confident that the CSA processes meet the second requirement, as they are likely to have at least a moderate level of predictive validity. Finally, it was not possible to draw firm conclusions with regard to the third requirement – an absence of predictive bias – due to the lack of a CSA validation study... Our view, therefore, is that there is no evidence, at this time, of a lack of fairness in the CSA process. However there is an urgent need to gather validation data which will further clarify the issue of fairness within CSAs."

2.61 The report continues to study factors that could contribute to differential impact which occurs in patterns of ethnicity and age bands. It concludes with recommendations, including recommendations as to how differential impact could be reduced by making changes to the CSA and/or consideration of alternative selection processes which are not based on an assessment centre process.



2.62 At page 455-6 of the bundle is a letter dated 23 March 2010 from William Hague, Director of HR Services of the respondent to James Cox of the trade union relating to the Pearn Kandola Review. Mr Hague states:

"In summary, Pearn Kandola confirms the existence of differential (adverse) impact on ethnicity and age groups but conclude that this maybe due to a number of factors, which the report discusses. I am pleased to have Pearn Kandola's reassurance that the CSA process is fair and consistent for our staff. On this basis there are no grounds to discontinue the use of CSAs as a part of our recruitment and selection process. We will of course be considering the findings very carefully and implementing many of the recommendations in the context of the work on the end-to-end recruitment and selection processes and the review of skills assessment."

The respondent's evidence

- 2.63 Mr Alan Peters, as stated above, was the sole witness on behalf of the respondent. Mr Peters is employed by the respondent as Head of the Home Office Human Resources Policy Team. Employee recruitment and selection falls within his team's remit. In essence his team is responsible for formulating the policy on the Core Skills Assessment (CSA) whilst its operational delivery rests with the CSA team (CSAT). Mr Peters has been engaged in this role since November 2009.
- 2.64 Prior to taking this post Mr Peters worked as Head of Recruitment and Training in the Research Development and Statistics Directorate (now part of Home Office Science). His role included running assessment centres for the recruitment and promotion of social researchers and statisticians.
- 2.65 From September 2008 to January 2009 Mr Peters was seconded to Human Resources to undertake a review of the CSA. His remit was to consider the effectiveness of the CSA in delivering the quality and volume of staff needed at the key gateway levels of HEO and Grade 7. He compared the Home Office's approach to assessment with a wide range of other Government Departments and with best practice guidance from expert bodies. Mr Peters also consulted with a significant number of internal stakeholders from across the department. As a result of this review, changes were made to both the HEO and Grade 7 assessment processes but the department remained committed to having the CSA as an essential element of the recruitment and selection policy.
- 2.66 The first CSAs were rolled out at Grade 7 and HEO (higher executive officer) level. Mr Peters said that his understanding is that diversity data for the first year of the CSA was collected and can be found at pages 259-267 for G7 posts and at 268-276 for HEO posts. As explained on page 259, 261-262, 268-270 the incomplete nature of the raw data used resulted in very small sample sizes at both grades.

Consequently it was very difficult for the respondent to draw any reliable conclusions from the data and caution was advised in interpreting the results. The problem of small sample sizes remained a feature of the data collected over the years. Although Mr Peters states that he understands diversity data has become more readily available through Adelphi records there has remained a significant tranche of candidates who have selected 'prefer not to say' when completing the diversity records.

2.67 In his evidence Mr Peters confirmed that since February 2010 the CSA has been altered and indeed there is a firm prospect that by late 2012 the CSA will be replaced. Not all the Pearn Kandola recommendations have been implemented. However, due to the Government recruitment freeze which was imposed during 2010, a minimal number of candidates have in fact been put forward for the CSA since late 2010 and during 2011.

2.68 On 20 May 2010 Mr Peters was commissioned by Steve Barber, Head of Investigation Enforcement and Protection (HOSDB) to investigate the claimant's grievances. His report was submitted on 6 August 2010. (pages 501-510).

2.69 In evidence the claimant and his trade union witnesses expressed surprise that Mr Peters was given the task of investigating the claimant's grievances in view of his very close involvement with the CSA. Mr Peters denied the possibility of any conflict of interest and added that having worked with Mr Farr for a number of years, he would have expected any objection to have been raised at the outset. The tribunal was also referred to the note of a meeting attended by the claimant and Mr Farr on 17 September 2010 (518) when it was recorded that in May 2010 the claimant had confirmed that he was content with the appointment of Mr Peters to act as the independent trained investigator.

2.70 At page 501 of his report, Mr Peters spells out the reason for the investigation. Mr Peters states:

"I was commissioned to complete this investigation with regard to two allegations by Graham Dean against the Home Office, specifically that:

- Graham feels that he has been discriminated against by the Home Office requirement that staff must pass the CSA before gaining promotion to "H" grade (including equivalents).
- Alan Pratt (Graham Dean's former Head of Unit) should have taken the above discrimination into account when considering promoting Graham Dean outside of the CSA process when he reviewed Graham Dean's case in November 2009.

In making his appeal Graham Dean has further asserted that an independent trained investigator should have been appointed in response to his grievance."

2.71 Mr Peters' report refers to the Pearn Kandola report and to the Home Office Recruitment and Selection Policy and to exceptions under that policy. Mr Peters conducted two interviews with the claimant in June/July and he communicated with both Allen Pratt and Graham Smith with regard to their involvement.

2.72 Mr Peters, having stated that after considering the Pearn Kandola Report, which clarified that there was evidence of differential impact, he added:

"There is no evidence that the (CSA) process is discriminatory, nor is there anything to suggest that the process should be withdrawn".

2.73 At the conclusion of his report (page 510) Mr Peters sets out his comments on the decision by Allen Pratt to use the CSA, and also sets out his conclusions with regard to the claimant's two allegations. There was no case to answer.

#### The Tyzack report

2.74 The final witness on behalf of the claimant was Ms Marilyn Tyzack who was called as an expert. She is described as a diversity specialist. She considered the Pearn Kandola report and Mr Peters' investigation report, with further documents. Her report is at pages 63-110 and is dated 26 May 2011.

2.75 At page 70, paragraph 6, the report states:

"The Respondents are arguing that it is for the claimant to establish why the content of the CSA places those from his ethnic group and/or age group at a particular disadvantage. Whilst the claimant's primary case is that the burden is not on the claimant to establish this fact, I have been asked to consider whether there is anything in the CSA that could be the cause of the disparate impact on the grounds of race and age.

2.76 In paragraph 9 of the report, Ms Tyzack states:

"In summary I have been asked to give an opinion on:

- whether we can identify any cause for the disparate impact of the CSA;
- whether there are any factors in the CSA which are likely to increase the risk of discrimination;
- the findings and conclusions of the Pearn Kandola report;
- whether there is anything we can add to the report's findings and recommendations;
- Any further research that we believe to have been appropriate;
- Any other actions that the Home Office should have considered;
- Whether it is appropriate to conclude that someone who describes himself as being of mixed race would be included in the finding of disparate impact on the grounds of BME.

10. I have therefore approached these requests by identifying and reviewing a number of key issues. These are:
- The reliability and validity of assessment processes;
  - The appropriateness of the Home Office test;
  - The accuracy of Graham Dean's assessments;
  - A review of the findings from the Home Office assessment process on race and age;
  - Reviewing relevant research to identify possible reasons for any race/age bias.

Criteria for exemptions from the CSA

2.77 At page 78, Ms Tyzack's report continues:

22. The Home Office, in completing the RR65 questionnaire for the Tribunal is clear that "it is Home Office policy that candidates who apply for posts on promotion to "H" must pass the Core Skills Assessment (CSA).
23. This is contradicted by points 2 and 3 above (relating to SSA assessments), although there is nothing in the guidance to indicate when it would be appropriate to carry out these options (the SSA only). The answer to question 6.10 of the RR65 questionnaire by the employer goes on to state "There is not a general procedure by which a manager can decide to promote an individual (via Specific Skills Assessment alone or otherwise) who would usually be required to successfully complete the CSA process." It is noted, however, that CRB, Identity and Passport Staff, Lawyers and Librarians are exempt from the two-staged process and it would be interesting to see the criteria for this decision.
24. Again, although we are dealing with relatively small numbers it is interesting to note that in 2009/2010 some 4% of ethnic minority staff were promoted without having to sit the CSA out of a total of 14% successful applicants. The figure for their White counterparts was 27% out of a total of 71% successful candidates. In fact, 35% of all staff were promoted without having to sit the CSA during this period. For 2010/2011 the overall figure for the exemption is almost the same."

2.78 At page 77 (paragraph 20) the report refers to the 2007 Review and states:

"It recommended an enhanced procedure for all levels from EO to Grade 6 and the continued use of robust selection and promotion procedures for what are described as "Gateway Management Roles" at HEO and Grade 7"

2.79 The Tyzack Report Conclusion is at page 98, paragraph 99 of which states:

"Of key importance is the Pearn Kandola Report which clearly identified differential impact on the grounds of race and age, the results of which are described as statistically significant. The BME selection rate was 40.3% of the White selection rate and there was a 0.1% chance that this could happen by

chance. For older candidates the rate was 37.4% with again 0.1% risk that this could happen by chance."

2.80 In paragraph 101 the report states:

"With the removal of the role play element in 2008, the CSA relies on two timed computer based exercises. This does not allow for any difference in learning style and more importantly, means that the two remaining tests have a high cognitive loading. As already noted, there is now widespread worldwide research available that shows adverse impact between ethnic groups when tests such as these are used in isolation in this way".

2.81 In evidence Miss Tyzack referred to page 274 the Home Office Overview of CSA candidates by Ethnicity. She pointed to the overall success rate for White candidates of 37% and for mixed race candidates of 20%, describing this as an obvious discrepancy.

2.82 The Tyzack report concludes:

"113. To sum up, in my view there is overwhelming evidence to support the key recommendations in the Pearn Kandola report (that has been available now for over a year) that either key changes should have been made to the CSA, or the Home Office should have considered using an alternative selection method. It is difficult to understand how any organisation that strives to be seen as a "best practice" employer could continue using a process that its own data suggests is flawed and that on a personal level appears to have had such a profound impact on a skilled and highly regarded member of staff. I certainly recognise the challenges of identifying a fair method of selection but consider it surprising that the Home Office has not considered suspending the CSA, pending further investigations.

114. I believe that in continuing to use this process not only are they at risk of perpetuating an unfair system of selection, but they are at risk of alienating and excluding key talent from the groups that are already known to be disadvantaged in UK workplaces.

2.83 Ms Tyzack referred to page 315(h), and to Table 5 from the CSA Headline Analysis Summary. Table 5 is an over-view of Candidates by Ethnicity: Pre-Interim Candidates where the success rate for White candidates was 38% as against the success rate for mixed race candidates of 17%.

2.84 Regarding 2009 when the role-play part of the CSA test was dropped by the respondent. Ms Tyzack referred to Table 6 at page 3159(i) and pointed out that for Interim candidates the success rate for White candidates was 54% with the success rate for mixed race candidates at 29%. The overall success rate for all BME candidates was 16%.

#### 4. The Law

3.1 Section 1(1)(a) of the Race Relations Act 1976 states:

"Direct race discrimination

A person discriminates against another if on racial grounds he treats that person less favourably than he treats or would treat other persons."

3.2 Direct discrimination is generally assessed in terms of comparative treatment. The tribunal noted that the claimant relies on a hypothetical comparator and does not point to an actual person as his comparator.

3.3 Section 1(1)(A) Race Relations Act 1976, which applies to indirect discrimination on the grounds of race or ethnic or national origins, states:

"A person also discriminates against another if he applies to that other person a provision, criterion or practice which he applies or would apply equally to a person not of the same race or ethnic or national origin as that other, but –

- (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;
- (b) which puts or would put that other at that disadvantage; and
- (c) which he cannot show to be a proportionate means of achieving a legitimate aim."

3.4 The Employment Equality (Age) Regulations 2006 state, in section 3:

"Discrimination On Grounds Of Age

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

- (a) On grounds of B's age, A treats B less favourably than he treats or would treat other persons; or
- (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 treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

Sections 3(2) and 3(3) deal with comparators and "A age groups".



- 3.5 The introduction by amending legislation regarding indirect discrimination for there to be a provision, criterion or practice, rather than the former test of "requirement or condition" made the test easier for claimants and has reduced, if not eliminated, the need for statistical or other evidence to show "a particular disadvantage".
- 3.6 Indirect race discrimination can be intentional or unintentional; see Enderby v Frenchay Health Authority [1993] IRLR 591, [1994] ICR 112 ECJ. There is no dispute in this case that the PCP is the requirement to pass the CSA, prior to being considered for promotion and assessment under the SSA.
- 3.7 The tribunal was referred to several authorities in the skeleton argument of counsel for the claimant. The tribunal noted the judgments of the Court of Appeal in Eweida v British Airways plc [2010] IRLR 322, [2010] ICR 890. Sedley LJ in discussing indirect discrimination and the legislation regarding indirect discrimination referred to the former laws which required the isolation of "pools" within which the proportion of disadvantage could be gauged, a task which defeated three decade's judicial attempts to find a workable formula. Sedley LJ said:

"I see no reason, therefore to depart from the natural meaning of Regulation 3. That meaning... is that some identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares."

- 3.8 The tribunal also referred to the judgment of the Supreme Court in Chief Constable of West Yorkshire Police and another v Homer [2012] ICR 704, and in particular to the judgment of Baroness Hale. The claim related to a complaint of indirect age discrimination. After reviewing the law and the provisions of Regulation 3 and Regulation 7(2) of the Age Regulations, Baroness Hale says in paragraph 11 of her judgment:

"The Employment Tribunal found that the appropriate age group was people aged 60-65, who would not be able to obtain a law degree before they retired. 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. The claimant was put at a disadvantage because he could not achieve the qualification (and therefore the status) before he retired. The employment tribunal noted that it was not argued that he was put at a disadvantage because fewer people in his age group had law degrees."

- 3.9 In paragraph 14, Baroness Hale continued:

"Ironically it is perhaps easier to make the argument under the current formulation of the concepts of indirect discrimination, which is now also to be found in the Equality Act 2010. Previous formations 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.... 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."

3.10 In paragraph 16 Baroness Hale continues:

"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."

3.11 Baroness Hale concludes in paragraph 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."

4. **Submissions**

The tribunal carefully noted and considered the written and oral submissions of counsel for both parties.

5. **Judgment**

Direct race and direct age discrimination

5.1 The unanimous judgment of the employment tribunal is that on the above findings of fact, there is no evidence that the refusal by the respondent to allow the claimant to be considered for promotion without having passed the CSA test was on the grounds of the claimant's race or age. The tribunal finds that this decision by the respondent would have been the same, whatever the age or race of a candidate. The claimant's claims of direct discrimination on the ground of his race and age fail and are dismissed.

5.2 The claimant has referred to other specialist groups such as Lawyers, Librarians or Social Scientists and Vets who were exempted from the CSA in various circumstances but the unanimous judgment of the employment tribunal is that these exemptions were only in relations to members of a group and there was no individual member of the claimant's department or elsewhere who had ever been exempted from the CSA as a single specialist case.

- 5.3 Neither in his grievance nor in his evidence before the tribunal did the claimant specifically claim that an exemption from the CSA had been refused on the grounds of his being of mixed race or on the grounds of his age.

Indirect discrimination on the grounds of race and age

- 5.4 As was agreed between the parties, the relevant provision, criterion or practice was the requirement of the respondent for candidates for promotion to certain grades all to pass the CSA test.
- 5.5 The unanimous judgment of the employment tribunal is that this provision did put members of the claimant's racial group and age group at a particular disadvantage. The tribunal accepts that there is evidence to show that proportionally fewer members of the claimant's racial group and age group succeed in the CSA and that therefore the use of this test puts these people at a disadvantage. The employment tribunal accepts the evidence from their findings set out in the Peam Kandola Report that, as to ethnicity and racial groups, the BME selection rate was 39.86% of the White selection rate and that when tested for statistical significance, there was a significant difference in selection rates between white and BME candidates and that this amounted to "significant differential impact".
- 5.6 Similarly regarding age, Peam Kandola found that the 35 and older group selection rate was 37.74% of the 34 and younger group and this also demonstrated a significant differential impact.
- 5.7 The tribunal further finds that the claimant was placed at the same disadvantage and has not been promoted as a result. The position is well put in paragraphs 113 and 114 of the report by Ms Tyzack at paragraph 2.82 of the Findings of Fact.
- 5.8 The tribunal further finds that the use of the CSA was not a proportionate means of achieving a legitimate aim. The continued use of the CSA test in the face of the evidence that it placed members of the claimant's race and age group at a particular disadvantage was not justified. There was no correlation between the competencies tested by the CSA and the competencies of particular jobs and objectives in the workplace.
- 5.9 The respondent was misguided when, in receipt of grievances and complaints by both the claimant and on his behalf by his trade union, demonstrating on the basis of the respondent's own data that the CSA test resulted in differential impact on the grounds of ethnicity and age, to focus their attention on the 'fairness' of the CSA test rather than on the more serious and relevant issue of discrimination and differential impact.

5.10 The unanimous judgment of the employment tribunal is that the claimant's claims of indirect discrimination on the grounds of his race and age are upheld.

6. Remedy


6.1 On the joint application of counsel for the parties, remedy is adjourned to enable them to seek agreement both as to recommendations, the possible promotion of the claimant and as to compensation. Failing agreement there will be a remedy hearing (1 day allowed) at 10.00am on Tuesday 21 August 2012 at The Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford, Hertfordshire, WD17 1HP.



Employment Judge Hobson

4 July 2012

Sent to the parties on:



For the Secretary to the Tribunals