Neutral Citation Number: [2024] EAT 9

Case No: EA-2022-000886-NLD

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 February 2024

**Before :**

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between :**

**MR J LOGO** **Appellant**

**- and -**

**PAYONE GMBH AND OTHERS** **Respondent**

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**MR J LOGO** the **Appellant in person**
**MS DEE MASTERS** (instructed by Orrick, Herrington & Sutcliffe (UK) LLP) for the **Respondent**

Hearing date: 9 November 2023

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# JUDGMENT

## SUMMARY

## RACE DISCRIMINATION

The Employment Tribunal failed properly to analyse the issue of "justification" in concluding that there were no reasonable prospects of success in claims of indirect discrimination.

**HIS HONOUR JUDGE JAMES TAYLER:**

## Introduction

1. I shall refer to the parties as the claimant and the respondent. The term respondent shall be used to refer to the first respondent.

2. This is an appeal against a judgment of the Employment Tribunal after a hearing on 21, 22 June and 18, 19 July 2022. The judgment and reasons were sent to the parties on 5 August 2022. So far as is relevant to this appeal, the Employment Tribunal struck out claims of indirect race discrimination because it concluded that there was no reasonable prospect that the respondent would fail to establish justification.

## Factual Background

3. The factual background is largely taken from the pleadings as there is relatively limited consideration of the facts in the judgment. I will set out the key facts as best I can but they should not be taken as findings of fact that will bind the Employment Tribunal at any future hearing.

4. The respondent is a European payment provider that facilitates online payment and mobile points of sale. In the ET3 response it is stated that the respondent's customers are primarily located in the "DACH" region, comprising Germany, Austria, and Switzerland.

5. In the ET1 claim form the claimant stated that he commenced employment with the respondent on 16 November 2016 in the role of New Accounts Manager UK for Medium and Large Accounts. The respondent had a small presence in the UK. The claimant states he worked in the Fashion and Lifestyle Team.

6. In his claim form the claimant states that:

> 6. When the Claimant commenced his role, he noted that a large amount of internal business of the First Respondent was conducted in German, however, it was mostly accompanied by English translations, particularly where it related to his duties. For example, team trainings and updates would be circulated in both English and German, and regular compulsory training sessions would mostly be conducted in English. …
>
> 8. Furthermore, the First Respondent overhauled its website in January 2020 so that it was available only in German, rather than in German and English. This disadvantaged the Claimant, because his clients are all based

> in the UK, and are English-speaking, and a key resource was no longer available to them in English. …
>
> 13. In or around May 2020, the Claimant applied for promotion to the role of manager of his team of seven accounts managers. The role was actually only advertised in German, but the Claimant managed to translate the advertisement, and submit an application.
>
> Some delay followed, but the Claimant received an invitation to a "discussion" of the role in October 2020. He missed the initial invitation to the discussion, because it was sent in German, but eventually the informally presented "discussion" took place, and the Eighth Respondent had a call with the Claimant in which he asked formal interview questions, without warning. The Claimant was later told he would not receive this role because he did not speak enough German.

**The decision of the Employment Tribunal**

7. The Employment Tribunal directed itself by reference to the familiar authorities that strike out is generally inappropriate when "the central facts are in dispute", especial care should be taken before striking out a discrimination claim, notwithstanding which, there is "no prohibition on strike-out in discrimination cases". To the extent that the Employment Tribunal directed itself as to the law of indirect discrimination and in particular "justification" the limited directions were in the sections dealing with the three complaints.

**Website**

8. The Employment Tribunal held in respect of the respondent's website:

> 55. The alleged PCP is that the Respondent's "website was only available in German". **It is agreed that in the period January 2020 to mid-2021, the website was only in German. To that extent the PCP was applied**.
>
> 56. The list of issues recites the group disadvantage question in the following way: "did the PCP put people who could not read German at a particular disadvantage i.e. impacting their ability to service their clients?" Given the Claimant is bringing an indirect race discrimination claim, in which he identifies his protected characteristic as being "Black British", it appears to me the question should be whether those sharing the Claimant's protected characteristic were put at a particular disadvantage, which is to say whether those who are Black British, or perhaps simply British, were so disadvantaged. This refinement does not, however, have a significant bearing on the apparent merits of the Claimant's claim.
>
> 57. There is no, or no material, dispute as to the factual background. **The Respondent is a German company based in Germany and**

**Austria**. The **vast majority of its business is conducted in Germany and/or with German-speaking customers**, in Austria and Switzerland. In 2012, the Respondent decided to enter the UK market to seek customers for its card payment business. By 2016, the Respondent had two UK based account managers, Mr Pugh and Mr Carew- Gibbs. An Associate Director in the Respondent's Fashion and Lifestyle vertical, Ms Fischer, was also seconded from Germany to the UK at this time. Following the departure of Mr Pugh, the Claimant was recruited in November 2016. There was uncertainty about the UK operation following the outcome of the Brexit referendum. In 2017, Ms Fischer returned to Germany. In 2018 Mr Carew-Gibbs retired and was not replaced. From this point going forward, the Claimant was the only UK based employee. **From January 2020, the Respondent rebranded its website. In the period up until mid-2021, it was only available in German.** Amongst its European workforce of nearly 1500, almost all were German speakers. **At this time the Respondent's presence in the UK market was very small and it was not looking to expand. Subsequent to his resignation, the Claimant has not been replaced.**

58. Returning to the PCP of the website being in German, at the material time there was no other British employee of the Respondent to whom the PCP of the website being in German could be applied. It would, however, have been capable of such application in the event of further recruitment.

59. I have some doubt about whether those sharing the Claimant's protected characteristic would necessarily be put at a particular disadvantage. The Claimant's argument is that they would be less likely to speak German. The relevant comparison exercise for an indirect discrimination claim would not be Black British or British people generally, rather it would be the relevant subset likely to apply for employment with the Respondent as a UK account manager. Given the Respondent is primarily a German company servicing the needs of German-speaking customers, those likely to apply for such employment might tend to comprise those who could already speak German or were willing to learn. This point is not entirely clear-cut, however, and the Claimant's position on it is an arguable one.

60. **Assuming group disadvantage, the Claimant was himself at the relevant disadvantage because he did not speak German and he was seeking to do business with non-German-speaking customers**.

61. **The Respondent's aim, as clarified in the list of issues is: "ensuring that material was presented in the language which was consistent with its business priorities at the time**."

62. **There is no reasonable prospect of Tribunal that the Respondent's aim was not legitimate**. The Respondent is a private business and is entitled to decide its own priorities, in terms of where and how it wishes to develop this. To the extent the Respondent decided its priority was pursue and seek to expand its business in German-speaking countries, with German-speaking customers, the Employment Tribunal

> will not intervene. Having the website available in German would, plainly, tend to achieve the Respondent's aim.
>
> 63. The question then is whether the PCP amounted to proportionate means. Whilst it could be said that having the website available in English as well would not defeat the achievement of the Respondent's aim, neither would it do anything to advance it. Per *Hardy and Hansons v Lax* [2005] EWCA Civ 846, the Respondent does not have to show that no other way of doing things was possible. **It is necessary to weigh the discriminatory effect on the Claimant against the reasonable needs of the business. A conclusion on this point can, realistically, only have one outcome, namely that as the Respondent was an almost exclusively German and German-speaking operation (at first three and then only two of nearly 1,500 employees were non-German speaking) and had no wish to develop its UK or English-language business at this time, it would have been disproportionate for it to have to create an English website, simply to accommodate one UK-based, English speaking employee. A finding in the Claimant's favour on this point would, in effect, amount to the Tribunal ruling the Respondent had to take steps and invest resources to develop its UK/English business, when it had decided not to.** I cannot see this happening.
>
> 64. The Claimant's indirect race discrimination claim with respect to the website is struck out because it has no reasonable prospect of success. [emphasis added]

**The job**

9. The Employment Tribunal went on to consider the claim about a job that was advertised that the claimant wished to apply for:

> 65. One of the Claimant's claims concerns the advertisement of a maternity cover role as Associate Director Fashion & Lifestyle in German, together with a job requirement that the post-holder speak German.
>
> 66. For like reasons as set out above, in connection with website claim, this is a PCP that could have been applied to other British employees had there been any and arguably, would have put them at a particular disadvantage because they did not speak German. The Claimant was at this disadvantage.
>
> 67. The Respondent's aim is: "ensuring that the postholder could communicate as effectively as possible with clients and colleagues." This is, unarguably, a legitimate aim. Given the vast majority of colleagues and customers were German speakers, the PCP would tend to achieve that aim.
>
> 68. **The Claimant says the aim could be achieved by less discriminatory means. He says that many of the Respondent's employees and customers speak English as a second language. This would mean if he were appointed to the position that he could address his German-speaking subordinates, or many of them, in English. To**

> **the extent there was a need to liaise with customers who did not speak English, this would be undertaken by his line reports. This appears to me to be an unrealistic proposition.** Given an overwhelmingly German and German-speaking workforce and customer base, the Respondent would be entitled to expect a senior employee dealing with the same to be able speak German. The fact that individuals can speak another language does not mean that is more efficient, effective and persuasive for them to do so. **The need of the Respondent's business for German-speaking in this role is wholly unsurprising. There is no likelihood of an Employment Tribunal ruling the Respondent must, in order to act proportionately, conduct its business English because a non–German speaking British person might be interested in this role.**
>
> 69. The Claimant's indirect race discrimination claim with respect to the job advert is struck out because it has no reasonable prospect of success. [emphasis added]

**Meetings**

10. The Employment Tribunal finally considered a complaint about use of the German language in meetings:

> 70. There is no material dispute as to the factual background. The meetings the Claimant refers to were conducted almost exclusively in German and written materials provided in that language. Some parts might be addressed in English at the time and, on occasion, summaries of material parts were provided to the Claimant in English subsequently.
>
> 71. Again, I accept this is a PCP that could have been applied to other British employees had there been any and arguably, would have put them at a particular disadvantage because they did not speak German. The Claimant was at this disadvantage.
>
> 72. **The Respondent's aim is: "ensuring that material was presented in the language which was most suited to participants".** Given all of the participants at such meetings, save for the Claimant, were German and / or German-speaking, this aim would best be satisfied by conducting meetings in German.
>
> 73. The Claimant's argument here is much the same as for the job advert. **He says the Respondent's aim could be achieved by less discriminatory means, namely conducting such meetings in English, because he says the other participants could speak and read English in addition to German. My view is that such an argument has no likelihood of being accepted. It is entirely reasonable that an almost exclusively German concern should wish to conduct its meetings in the German language and believe this was most likely to advance its business. I can understand why the Claimant felt disadvantaged by the language barrier. One solution might have been for him to learn German. Another might have been for him to have sought to be excused from attending meetings that would be conducted entirely or**

> **mostly in German. I can, however, see no prospect of a Tribunal that finding it would be proportionate for the Respondent to have to say everything in English at these meetings and produce all of the written materials in English, for the benefit of one British employee.**
>
> 74. The Claimant's indirect race discrimination claim with respect to the German being spoken in meetings is struck out because it has no reasonable prospect of success. [emphasis added]

**The Law**

11. Section 39 of the **Equality Act 2010** ("**EQA**") renders detrimental discriminatory treatment unlawful:

> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.

12. Indirect discrimination is defined by section 19 **EQA**:

> 19 Indirect discrimination
>
> (1) A person (A) discriminates against another (B) if A **applies** to B a **provision, criterion or practice** which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A **applies**, or would apply, it **to persons with whom B does not share the characteristic**,
>
> (b) it **puts, or would put**, **persons with whom B shares the characteristic** at a **particular disadvantage** when compared with persons with whom B does not share it,
>
> (c) it **puts**, or would put, **B at that disadvantage**, and
>
> (d) **A cannot show** it to be a **proportionate means of achieving** a **legitimate aim**.

13. There are a number of elements in a claim of indirect discrimination. In broad terms, so far as is relevant to this appeal, they are:

1.1. general application of a PCP - ss 19(1) and 19(2)(a) **EQA**

1.2. particular disadvantage to the group that shares the claimant's protected characteristic – s 19(2)(b) **EQA**

1.3. disadvantage to the claimant - s 19(2)(c) **EQA**

1.4. detriment to the claimant - s 39(2)(d) **EQA**

1.5. legitimate aim - s 19(2)(d) **EQA**

1.6. proportionate means- s 19(2)(d) **EQA**

14. The Employment Tribunal was prepared to assume the first four elements. The strike out was on the basis that there was no reasonable prospect that the respondent would fail to establish that each PCP was justified as being a proportionate means of achieving a legitimate aim. Without wishing to over labour the point, "justification" requires the respondent to show that there is a legitimate aim and that the PCP is a proportionate means of achieving that aim.

15. In **Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority** [2012] UKSC 15, [2012] I.C.R. 704 Baroness Hale noted that in the context of a business the term legitimate aim could encompass a "real need":

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

16. An aim cannot be legitimate if it is itself discriminatory: **Allonby v Accrington College and Rossendale College** [2001] EWCACiv 529, [2001] ICR 1189

17. The classic exposition of the approach to be adopted to justification in that the ECJ in **Bilka-Kaufhaus GmbH v Weber Von Hartz** (Case 170/84), [1987] ICR 110:

> 36. It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds. If the national court finds that the measures chosen by Bilka **correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end**, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of article 119.
>
> 37. The answer to question 2 (a) must therefore be that under article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the **means chosen for achieving that objective** correspond to a **real need** on the part of the undertaking, are **appropriate** with a view to achieving the objective in question **and are necessary** to that end. [emphasis added]

18. The means chosen to achieve a legitimate aim must be **both** appropriate and necessary. It has long been established, certainly as a matter of UK law, that the term necessary should be read as "reasonably necessary".

19. In **Hardys & Hanson plc v Lax** [2005] EWCA Civ 846, [2005] ICR 1565 Pill LJ, referring to the equivalent provisions of the **Sex Discrimination Act 1975**, held:

> 32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (*Barry v Midland Bank plc* [1999] ICR 859) and **I accept that the word "necessary"** used in *Bilka-Kaufaus* [1987] ICR 110 **is to be qualified by the word "reasonably"**. **That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend.** The presence of the word **"reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect.** The principle of **proportionality requires the tribunal to take into account the reasonable needs of the business.** But it has to **make its own judgment**, upon a **fair and detailed analysis of the working practices and business considerations involved**, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

> 33. **The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise** from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. **This is an appraisal requiring considerable skill and insight.** As this court has recognised in *Allonby* [2001] ICR 1189 and in *Cadman* [2005] ICR 1546, **a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal**. In considering whether the employment tribunal has adequately performed its duty, **appellate courts must keep in mind**, as did this court in Allonby and in Cadman, **the respect due to the conclusions of the fact-finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation**. **Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.**
>
> 34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a **power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached.** The **risk of superficiality is revealed in the cases cited** and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions. [emphasis added]

20. Pill LJ approved the statement of Balcombe LJ in **Hampson v Department of Education and Science** [1989] ICR 179, 191:

> "In my judgment 'justifiable' requires **an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition**." [emphasis added]

21. In **Hardys & Hanson** Thomas LJ stated:

> 54. For the reasons Pill LJ gives at para 32, **it is for the tribunal to determine whether the employer has shown that the proposal is justifiable** irrespective of the sex of the person to whom it is applied. As it is the tribunal which must decide on justification **without according any margin of appreciation to the employer**, **the tribunal must therefore set out a critical and thorough evaluation** following the tests set out in *Bilka-Kaufaus GmbH v Weber von Hartz* (Case 170/84) [1987] ICR 110 when making its determination of the merits of the justification advanced. I agree with Pill LJ that this task requires considerable skill and insight.
>
> 55. **Where the economics of the business of the enterprise or its working practices form part of the justification, then I would expect the reasons to set out at least a basic economic analysis of the business**

> **and its needs**; the emphasis in Bilka-Kaufaus was on "objectively justified economic grounds". Although the extent of the analysis of the economics of the business and its working practices must depend on the nature of justification advanced and of the enterprise being considered, **the analysis must be thorough and critical and show a proper understanding of the business of the enterprise**. [emphasis added]

22. Gage LJ held:

> 59. In my judgment, to hold that an employment tribunal must adopt a test of a margin of appreciation would be to add a gloss to the test of "reasonably necessary" (see *Health and Safety Executive v Cadman* [2005] ICR 1546) and not justified by reference to *Barry v Midland Bank plc* [1999] ICR 859 and *Allonby v Accrington and Rossendale College* [2001] ICR 1189. As Sedley LJ pointed out in *Allonby* (citing what Balcombe LJ had said in *Hampson v Department of Education and Science* [1989] ICR 179), "justifiable" requires **an objective balance between the discriminatory effect of the condition on the employee and the reasonable needs of the employer.** I agree with Pill LJ that it **requires the employment tribunal to assess the reasonable needs of the business taking into account the principle of proportionality.** In my view the reasonably necessary test is much the same as a test of proportionality and rather different to a margin of appreciation. [emphasis added]

23. **Hardys & Hanson** was approved by Baroness Hale in the Supreme Court in **Homer**.

24. It is apparent from these authorities that the assessment of justification will require:

24.1. an objective balance between the discriminatory effect of the PCP and the reasonable needs of the party that applies it

24.2. the Employment Tribunal making its own judgment (rather that granting a margin of appreciation to the employer)

24.3. a critical and thorough evaluation

24.4. fair and detailed analysis of the working practices and business considerations involved

24.5. avoiding the risk of superficiality

24.6. demonstration that the exercise has been carried out

25. The extent to which evidence is required to conduct the balancing exercise has been considered in a number of authorities analysed, albeit in the rather different circumstances of justification of age discrimination resulting from retirement ages, by Eady J in **Pitcher v University**

**of Oxford** [2022] I.C.R. 338:

> 106. **The burden of justifying an otherwise discriminatory act falls on the employer.** …
>
> 107. In *Cockram*, the employee argued that the employment tribunal should not have accepted the employer's "assertion" that the aim of the provision in issue was to incentivise retention up to the age of 55 and to disincentivise it thereafter. The Court of Appeal disagreed, holding that:
>
> > "where the proposition is that a rule excluding retiring employees under the age of 55 from the right to take unvested options under a long-term incentive plan tends to encourage them to stay with the company until the specified age, the proposition is surely so obvious that it barely requires evidence at all": para 30.
>
> 108. More particularly, Bean LJ (with whom Leggatt LJ agreed) rejected the proposition that the employer was required to adduce evidence that the customary retirement age clause in the LTIP had in fact led to a high retention rate and that, if it failed to do so, the employment tribunal ought to have inferred that there was no evidence that the provision encouraged retention, observing that:
>
> > "It would be impossible to do so very soon after such a provision was introduced; and even at a later date the causative effect of a provision in the LTIP about customary retirement age would be difficult to isolate: employees in their early 50s make choices about whether to remain in the same employment, move jobs or take voluntary retirement for a whole variety of reasons": para 31.
>
> 109. There is a dispute between the parties in the present appeals as to what the Court of Appeal was saying in *Cockram*.…
>
> 110. It seems to us that the points made by Bean LJ at paras 30 and 31 of *Cockram* are capable of being understood as relating generally to the evidential burden placed on the employer when seeking to establish objective justification. In some cases, some matters will be "so obvious"—Cockram -obvious—that they will barely require evidence. Moreover, whilst the requirement to objectively justify the discriminatory measure arises from the start of its application, evidence of impact on legitimate aims may sometimes be hard to come by soon after the implementation of a particular measure, or, more generally, it may be the case that causative effect is genuinely difficult to isolate; an employment tribunal should not require from an employer evidence which it cannot reasonably be expected to produce.
>
> 111. We do not consider, however, that these observations detract from the requirements placed upon the tribunal, as laid down in Hardy & *Hansons* [2005] ICR 1565 : **if the tribunal's assessment is to demonstrate the requisite critical and thorough evaluation** (per Pill LJ

> at para 33; Thomas LJ at para 54), **it will necessarily look for evidence rather than mere assertion (albeit that evidence may take the form of reasoned projection rather than demonstrable result) and will require a degree of cogency in the employer's case.** In this regard, we note the guidance provided by the Court of Justice in Fuchs [2012] ICR 93 on this issue (raised by the second question referred to it) …
>
> 112. **The principle of proportionality requires an objective balance to be struck between the discriminatory impact of the measure in issue and the needs of the employer; the more serious the disparate adverse impact, the more cogent must be the justification** (see the observations of the Court of Justice in CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (Case C-83/14) [2015] All ER (EC) 1083, at para 123 ). **In assessing the discriminatory effect of a measure, the tribunal will need to consider that question both qualitatively (the amount of damage done and/or how long lasting or final that damage is) and quantitatively (the number of people who will or are likely to suffer the discriminatory effect)**: see University of Manchester v Jones [1993] ICR 474, per Ralph Gibson LJ at p 497. [emphasis added]

26. While it may be an obvious point, it merits emphasising, proportionality is all about balance. Equally careful consideration must be given to both sides of the scales. A reasonably detailed, careful, objective assessment, qualitative and quantitative, must be made of the needs of the employer and the discriminatory impact on employees. Generally, such an assessment is ill suited to determination summarily in an application to strike out.

27. In **Malik v Birmingham City Council** UKEAT/0027/19 Choudhury J summarised the approach to strike out in discrimination claims:

> 29. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:
>
> > "Striking out
> >
> > 37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> >
> > > (a) that it is scandalous or vexatious or has no reasonable prospect of success..."
>
> 30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see *Anyanwu & Another v South Bank University and South Bank Student Union* [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of

> *Mechkarov v Citibank* N.A [2016] ICR 1121, which is referred to in one of the cases before me, *HMRC v Mabaso* UKEAT/0143/17.
>
> 31. In *Mechkarov*, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:
>
> > (1) only in the clearest case should a discrimination claim be struck out;
> >
> > (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> >
> > (3) the Claimant's case must ordinarily be taken at its highest;
> >
> > (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
> >
> > (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.
>
> 32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In *Community Law Clinics Solicitors Ltd & Ors v Methuen* UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."
>
> 33. A similar point was made in the case of *ABN Amro Management Services Ltd & Anor v Hogben* UKEAT/0266/09, where it was stated that, "If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in *Meek v City of Birmingham District Council* [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out.

28. Applications to strike out are most suited to situations in which it is clear from the pleaded case that there is a knockout blow, which generally only requires consideration of a very limited number of documents. As HHJ Serota QC put it in **QDOS Consulting Ltd v Swanson** UKEAT/0495/11:

> I would observe, bearing in mind the high cost to employers of conducting a hearing in the Employment Tribunal not only in terms of its legal costs but the expense of its employees attending lengthy proceedings (for example, I note that the Claimant's claim against Sandwell Borough Council took some 17 days), there is a temptation to take advantage of a procedural shortcut to avoid these expenses. As Bingham LJ put it in the

> passage that I have cited, "a technical knockout in the first round is much more advantageous than a win on points after 15". **However, applications to strike out on the basis that there is no reasonable prospect of success should only be made in the most obvious and plain cases in which there is no factual dispute and which the Applicant can clearly cross the high threshold of showing that there are no reasonable prospects of success.** Applications that involve prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses should not be brought under r 18(7)(b) but must be determined at a full hearing. Applications under r 18(7)(b) that involve issues of discrimination must be approached with particular caution. In cases where there are real factual disputes the parties should prepare for a full hearing rather than dissipate their energy and resources, and those, I would add, of Employment Tribunals, on deceptively attractive shortcuts. Such applications should rarely, if ever, involve oral evidence and should be measured in hours rather than days.

29. This strike out application took four days and involved consideration of a bundle of documents of 2,300 pages, witness statements on behalf of the respondent (albeit that at the last moment the claimant was informed that the witnesses would not attend to give evidence) and submissions. The claimant was a litigant in person.

**The Grounds of Appeal**

30. With the assistance of representation under the ELAAS scheme the grounds of appeal were succinctly redrafted (with the ground numbers I will use to analyse the appeal inserted):

> Grounds of Appeal
>
> *Ground 1*
>
> 3. The tribunal erred in its decision to strike out each of the complaints of indirect discrimination, i.e. the Website Complaint, the Job Advert Complaint and the Meetings Complaint. None of these complaints was not suitable for determination at the preliminary stage. **The application to strike out each of these was fact-sensitive and required the tribunal to review and assess considerable evidence, including document bundles of 2300 pages and witness statements. As such, and as discrimination complaints, the tribunal ought not to have struck them out at the interim stage.** The tribunal ought to have directed that the three indirect discrimination complaints proceed to a merits hearing where the evidence could be considered by a full tribunal panel with the benefit of full disclosure and oral evidence.
>
> *Ground 2*
>
> 4. The tribunal erred in its approach to proportionality when considering the Website Complaint. **The tribunal failed to have regard to i. the fact**

> **that the website had been in English prior to January 2020 and was put into English after the Appellant presented his complaints** to the tribunal; and ii. the fact that the **Respondent had over 60 UK based customers, whose accounts the Appellant worked on**.
>
> *Ground 3*
>
> 5. The tribunal erred in its approach to proportionality when considering the Meetings Complaint. **The tribunal impermissibly relied on possible steps the Appellant could have taken to mitigate the impact of the PCP** (for example, learning German, see paragraph 73 of the Written Reasons). This wrongly placed the onus on the Claimant. The question under s. 19 (2) (d) Equality Act 2010 is whether or not the Respondent has established that the PCP is a proportionate means of achieving the stated legitimate aim. The tribunal erred in failing to address this properly or at all.
>
> *Ground 4*
>
> 6. In relation to the Meetings Complaint, the tribunal erred in that it failed to consider whether the legitimate aim was indeed legitimate. Had it turned its mind to this question, it would have found that it was not a legitimate aim within s. 19 (2) (d) Equality Act 2010, alternatively that it was not so clearly a legitimate aim that it should have struck out the Meetings Complaint. **The aim relied upon, ensuring that material was presented in the language which was most suited to participants, was itself discriminatory and/or a re-working of the PCP**. Alternatively, the stated aim did not fulfil the requirements of s. 19 92) (d) because speaking German in the meetings could not be a means of achieving the aim of using the language most suited to the Appellant.

**Response**

31. The respondent asserts that the Employment Tribunal was right to strike out the indirect discrimination complaints as the facts relied on by the Employment Tribunal were essentially undisputed and, to the extent any relevant facts were in issue, the determination of the other claims that went on to a full hearing demonstrates that the Employment Tribunal would have been bound to reach the same conclusion so the appeal is academic.

**Analysis**

32. The Employment Tribunal considered that it was obvious that the respondent could not be expected to conduct its business in English for the benefit of one employee in the UK when the business was overwhelmingly based in German speaking countries with German speaking employees. The Employment Tribunal considered the point was so obvious that it could be determined summarily

with only limited consideration of the facts. The judgment does not include a detailed analysis of the discriminatory effect of the application of the PCPs. The claimant remained employed by the respondent to conduct their business in the UK. The respondent previously had a website that had enough information in English that the claimant could rely on it for his UK clients. After his complaint part of the website was translated into English again. The respondent had used English to a sufficient extent that the claimant had passed the recruitment exercise and had, at times, been able to deal with meetings in Germany. The changes to the website in particular, taking his case at its highest, would make it next to impossible for the claimant to continue working for the respondent in circumstances in which, while diminished and no longer a business focus, it continued to trade in the UK. It is arguable that the discriminatory effect on the claimant was extreme. Without a detailed analysis of the discriminatory effect of the PCP it was not possible for the Employment Tribunal to properly assess the objective balance between the discriminatory effect of the PCPs and the reasonable needs of the respondent. The analysis was of one side of the scales rather than the other. Both sides have to be fully considered.

33. The Employment Tribunal granted a substantial margin of appreciation to the employer. It was stymied in reaching its own judgment by the limitations of the strike out process. The absence of witness evidence from the respondent that could be properly challenged by the claimant meant that the analysis of the Employment Tribunal was insufficiently critical and thorough. It did not involve a detailed analysis of the working practices and business considerations involved. There is insufficient in the judgment to demonstrate that the required exercise was carried out. The judgment was superficial.

34. The judgment does not explain the costs to the respondent of maintaining the previous level of support so that at least part of the website was in English. The Employment Tribunal did not consider how difficult it would be for the respondent to ensure that some parts of meetings and recruitment exercises were conducted in English so that the claimant could participate. It may be that on such a detailed analysis an Employment Tribunal will conclude that each PCP is a proportionate

means of achieving a legitimate aim, but that is much better determined as a matter of substance on the basis of evidence that the claimant has a proper opportunity to challenge than through a summary strike out application.

35. It may be that the facts relied upon by the Employment Tribunal were largely undisputed but there were other important facts that required consideration for the analysis to be sufficiently rigorous.

36. I am not persuaded that the appeal is academic. The outcome of other complaints that proceeded to a full hearing is not determinative of whether justification would necessarily be made out in the indirect discrimination claims. Relying on facts found in respect of different claims that required a different legal analysis is not a proper manner in which to undertake a careful analysis weighing up the needs of the respondent against the discriminatory impact of the PCPs.

37. In the particular circumstances of this case, the analysis of the justification defence was insufficient as a result of the summary process adopted.

38. Ground 1 succeeds which is sufficient to allow the appeal. I consider there is substance in Ground 2 but am less persuaded by Grounds 3 and 4, but that is academic as the success of Ground 1 means that the matter must be remitted to the Employment Tribunal so I limit my formal determination to allowing the appeal on Ground 1. I am persuaded that this matter is not suitable for strike out. I do not consider it is appropriate for me to go on to consider whether a deposit order should be made. It is not an application to which there could only be one answer. The determination would be the province of the Employment Tribunal should the respondent consider it is a proportionate step to renew an application for deposit orders. I dismiss the contingent cross-appeal.

39. I do not consider that the matter should be considered again by the same Employment Tribunal that determined the strike out application as I consider the error was fundamental and the claimant might be concerned that there could be a second bite of the cherry. Save for that, the management of the claim on remission will be a matter for the discretion of the Regional Employment Judge. I understand that the parts of the claim that went to a full hearing, and were dismissed, are now subject of an appeal, so it may be necessary to manage this matter in a way that allows for the determination

of that appeal so as to ensure efficiency.