Neutral Citation Number: [2022] EAT 198

Case No: EA-2020-000272-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 November 2022

Before :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between :

MR SOKRATIS LASDAS	**Appellant**
- and -	
(1) VANQUIS BANK PLC	
(2) RETHINK GROUP LTD	**Respondents**

- -
- -

Mr S Lasdas, the **Appellant** in person
Ms Iris Ferber (instructed by **Squire Patton Boggs (UK) LLP**) for the **First Respondent**
Mr Joseph Bryan (instructed by **Clarke Willmott Solicitors**) for the **Second Respondent**

Hearing and judgment date: 15 November 2022

- -

JUDGMENT

SUMMARY

The appellant (the claimant below) appealed from the employment tribunal's decision, following an open preliminary hearing ('the OPH'), that (1) his claim against each respondent was properly characterised as one of direct race discrimination and that (2) a deposit order should be made as a condition of continuing each such claim, on the basis that the claim had little reasonable prospect of success.

The EAT held that, properly analysed, the claim advanced against each respondent, as explained by the appellant at the OPH, had been one of indirect race discrimination and that each deposit order, made in relation to a claim which the appellant had not been advancing, should be quashed. In all the circumstances, had the tribunal identified the claims in fact being advanced by the appellant it could not reasonably have concluded that either had little reasonable prospect of success. Accordingly, the claims (which had since been struck out for late payment of the deposits the subject of this appeal) would be reinstated and remitted for a closed preliminary hearing at which a final hearing of the appellant's claims would be listed; all issues arising for determination at that latter hearing would be identified; and all necessary and appropriate case management orders would be made.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE:

Introduction

1. In this judgment, I refer to the parties as they appeared below. This is the full hearing of an appeal by the claimant from the decision of the London Central Employment Tribunal (Employment Judge Khan, sitting alone – "the Tribunal"), following an open preliminary hearing on 20 February 2020 (the "OPH"), (1) identifying the claimant's complaint against each respondent as being one of direct race discrimination; and (2) making an order requiring that the claimant pay a deposit of £250 per respondent, as a condition of being permitted to continue his complaint against that respondent. The deposit order was sent to the parties on 1 May 2020 and provided that each deposit was to be paid no later than 21 days from that date, a deadline subsequently extended by the Tribunal, at the claimant's request.

2. In a later judgment, dated 22 June 2020, the claimant's claims were struck out on the basis that neither deposit had been paid on time. Two separate applications for reconsideration of that decision were refused, in judgments respectively sent to the parties on 27 June 2020 and 12 July 2021. The judgment striking out the claims, together with the second refusal to reconsider that judgment, are the subject of separate extant appeals which have been allowed to proceed to a full hearing (respectively numbered EA-2020-000625-JOJ and EA-2021-000757-JOJ). Those appeals are not before me for determination today but have been listed for directions according to the outcome of this appeal.

3. Before me, as below, the claimant represents himself. The first respondent is represented by Ms Ferber of counsel and the second respondent by Mr Bryan of counsel. Following a Rule 3(10) hearing at which the claimant had the benefit of assistance via the ELAAS scheme, the two grounds of appeal, as amended, which were permitted to go forward were that the tribunal had erred in law:

(i) by characterising the claimant's claim as being one of direct discrimination only, rather than as one of indirect discrimination. It could and should have interpreted his claim as being that the respondents had had a provision, criterion or practice ("PCP") of requiring workers and/or contractors to pass Experian's pre-employment checks as a condition of any offer of work, which PCP had been indirectly discriminatory; and

(ii) in finding that, as the pre-employment checks which had led to the claimant's complaint had been conducted by a third party, there was little reasonable prospect that the respondents could be liable to the claimant.

4. Before summarising the parties' submissions, it is necessary to say a little of the circumstances in which the Tribunal's orders came to be made. The OPH had been listed to determine the respondents' application to strike out the claimant's claims as having no reasonable prospect of success, alternatively for a deposit order. In Schedule A to its record of the OPH, the Tribunal set out the discussion which had taken place at that hearing. It identified the claimant's claim at paragraphs 3 and 4 of that schedule, as follows.

> **"3. By an ET1 the claimant brought a complaint of race discrimination i.e. direct discrimination. The respondents resist this complaint.**
>
> **4. The claimant's complaint is that he was subjected to direct discrimination because of his Greek nationality when the first and/or second respondent(s) relied on the refusal by Experian to accept his Greek ID card as a valid identity document to terminate his assignment with the first respondent. The claimant also complains that the first and/or second respondent(s) refused to use an alternative to Experian to obtain DBS clearance or for him to obtain this clearance himself."**

5. At paragraphs 6, 7 and 9 the Tribunal recorded:

> **"6. On 23 April 2019 the claimant received two emails from the second respondent. He says that the first email informed him that the assignment had been revoked because Experian had been unable to complete the DBS check as his Greek ID card was not an acceptable form of ID. He then received a second email from the second respondent which referred to**

> **paragraph 9.3(c) of the standard terms and conditions for contractors the material part of which provided that it had the right to terminate the assignment forthwith in the event that "the Client cancels the Assignment at any time prior to the Start Date".**
>
> **7. The claimant confirmed that he was bringing a complaint of direct discrimination and he was not bringing a complaint of victimisation in addition or in the alternative.**
>
> **9. There was also the further issue which was that the claimant contends that Experian was operating a discriminatory practice in refusing to accept his Greek ID card as valid ID. This appeared to be the crux of his complaints."**

6. At paragraph 15, the Tribunal stated:

> **"…I was able to conclude that the complaints against both respondents had little prospect of success. This was because the claimant appeared to be complaining about the discriminatory practice of a third party, i.e. Experian, in not accepting his Greek ID card as valid ID evidence for the purposes of completing pre-employment screening for which it is likely that neither respondent is liable."**

7. Accordingly, the issues identified by the Tribunal, in Schedule B, for determination at the full hearing related to a claim of direct discrimination, contrary to sections 13, 39 and 41 of the **Equality Act 2010 (the "EqA")**. In that schedule, the act of which complaint was made was identified as being the first and/or second respondent's revocation or withdrawal of the claimant's assignment with the first respondent.

8. In its separate deposit order, the Tribunal gave as its reasons for the orders which it had made:

> **"Having considered the representations made by the parties at the open preliminary hearing on 20 February 2020, the Employment Judge concluded that the claimant's complaints of race discrimination had little reasonable prospects because the claimant appeared to be complaining about the discriminatory practice of a third party i.e. Experian in not accepting his Greek ID card as valid ID evidence for the purposes of completing pre-employment screening for which it is likely that neither respondent is liable."**

The parties' submissions

For the claimant

9. In his skeleton argument, the claimant submitted that the tribunal's decision was self-contradictory, in as much as it first characterised his case as being one of direct discrimination, *"only because I mistakenly used this term",* whilst, at the same time, recording that his claim was that he had been discriminated against through the practices of a third company; *"Isn't this a textbook definition of a case of indirect discrimination?"*, he asks. He submitted that his detailed description of the events of which he complains had indicated that his complaint had been one of indirect discrimination and that he had simply applied the wrong description, stating that his use, as a lay person, of the term "direct" had been intended to emphasise the discrimination which he had encountered (synonymous with words such as "profound", "obvious" or "extreme") and had not been intended to connote the meaning which that that term had in law, of which he had then been unaware. The claimant contended that the Tribunal's conclusion at paragraph 15 of Schedule A could attach to every complaint of indirect discrimination in which the actions of a third party fall to be considered, such that it could not, without more, indicate that such a claim lacks a reasonable prospect of success.

10. In oral submissions, the claimant submitted that, when drafting his skeleton argument, he had assumed that he must have used the word "direct" when referring to the discrimination which he had alleged, but that, having reviewed the documentation when preparing for this hearing, he could find no relevant occasion on which he had done so. Certainly, he told me, at the hearing, the Tribunal had not explained to him the distinction between direct and indirect discrimination, which he had not at that time appreciated, or, as a lay person, could have been expected to have appreciated. He had focused only on the facts underpinning his claims, which had then been mislabelled by the Tribunal and which were consistent with a claim of indirect discrimination, the

nature of which he now understood. At the OPH, the claimant told me, his understanding had been that there was only one form of discrimination, albeit that it could relate to different protected characteristics, hence the format of section 8.1 of the form ET1. He had not asserted that any discrimination by either respondent had been intentional or malicious; he would have been in no position to have known that. Furthermore, as a person having an obviously Greek name, whose curriculum vitae had been provided to the respondents and had made clear that he had not been born in Britain, and who had been shortlisted and interviewed for the assignment in question, it would have been "crazy" and illogical for him to have asserted that the respondents had discriminated against him thereafter, contrary to section 13 of the EqA, i.e. because of his race or nationality.

11. The claimant referred me to an email which he had received from the second respondent, on 23 April 2019 (sent at 13:48) in reply to an email which he had sent at 11:10 on 18 April 2019 to employees of the first and second respondents, in the following terms:

> **"I have looked into the below and have concluded that Rethink have followed the correct process, which has been stipulated by the client. This is that any candidate can only be provided with a contract upon successful screening by Experian. During the process, Experian confirmed to us that they are unable to conduct the screening checks due to the ID documents you kindly provided not being to the level they require. Therefore, we had no option but to rescind the offer made. From our perspective the documents you provided do prove your right to work but as you can appreciate we are required to adhere to the client's process…"**

In the claimant's submission, that email indicated that he had been required by the respondents to pass Experian's checks. He submitted that a person who was not a British national would have greater difficulty in doing so. The claimant said that he had included the second respondent's email within the hearing bundle for the OPH and that the Tribunal had been referred to it in the course of that hearing. He also pointed to the following paragraphs within a rider to his notice of appeal, under the heading "D. Preliminary Hearing - Justification of decision" (sic and with all emphasis original):

> **"As I explained more than one times during the hearing and as I had explained to the respondents numerous times before they revoked my offer, Experian is not the only company providing the same services (DBS checks etc.) to third parties but the same services are offered by many-many other companies which are happily accepting EU National ID Cards. All my other employers using other companies similar to Experian (PeopleCheck etc.) during the last 9 years were always happy to accept my ID card, in more than 5 different occasions through these years.**
>
> **I had pleaded the respondents numerous times to use another company, or to let me submit the application to DBS in order to get the Certificate in question, because as I have proved in my email to them, providing even copies of the relevant DBS pages, DBS as a UK government organisation, happily accepts EU national ID cards in order to issue a Basic DBS Criminal Record Certificate (please see the attached email of 18 April 2019).**
>
> **They have rejected all these options. Instead they made a clear choice, between all the many choices they had, to violate my rights and to punish me for their own wrongdoings by revoking my job offer.**
>
> **So my point to the judge was summarised in an example. If I hire a racist to perform some checks for a candidate of mine on my behalf, and that racist against the relevant laws discriminates against my candidate by refusing to provide that service, am I excused if I punish my candidate by revoking his job offer, instead of choosing somebody else to provide that same service, always on my behalf, or even to choose some even easier alternatives like in this case? When somebody performs some job on my behalf in a discriminatory matter and I know it and I am perfectly happy with it, and I punish the victim, and I continue following this same discriminatory practice, who is to be blamed, who is responsible from my candidate's side, the person or the company I hired or mainly and foremost myself?"**

Those paragraphs, submitted the claimant, indicate the nature of his complaint, namely relating to the respondents' continued requirement that he satisfy Experian's checks as a condition of taking up his assignment with the first respondent. It would render indirect discrimination a "dead letter," he submitted, if respondents could avoid liability for indirect discrimination by outsourcing the undertaking of necessary checks to a third party.

12. Accordingly, the claimant submitted, the Tribunal had erred in mislabelling his substantive claim and in making a deposit order by reference to the prospects of a claim which he had not been advancing.

For the first respondent

13. On behalf of the first respondent, Ms Ferber submitted that a tribunal's duty to assist a litigant in person to articulate his or her pleaded case has its limits. A tribunal should consider the case which the parties have chosen to put before it: **Muschett v HM Prison Service** [2010] IRLR 451, CA, and will only err in law in failing to raise a point which has not been raised by the parties where that point is very obvious on the pleaded case, or forms an essential ingredient of an existing claim. In **McLeary v One Housing Group Ltd** EAT/0214/18, the test had been articulated as being whether the point *"shouts out from the contents of the particulars of claim."* In **Cox v Adecco Group UK and Ireland & Ors** [2021] ICR 1307, the EAT had given guidance in the context of applications to strike out a claim or for a deposit order, noting that a litigant in person had a duty to help the tribunal to clarify his or her claim and that *"...the more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues"*, which the tribunal could only be expected to take reasonable steps to identify [32]. The EAT could only concern itself with errors of law made in relation to the claim as articulated by the claimant at the OPH. It was not appropriate for the claimant to seek to recast his claim on appeal, with the benefit of counsel's assistance, and then to complain that such a claim had not been identified by the Tribunal, yet that, submitted Ms Ferber, was what he had done. The question before the EAT was whether, at the OPH, the claimant had raised in substance the complaint which he now advanced, the best evidence of which would be the matters recorded by the Tribunal. If not, no error of law could be demonstrated.

14. Against that background, Ms Ferber submitted that the Tribunal had not erred in identifying the claim as being one of direct race discrimination. Section 8.2 of the claimant's form ET1 had set out the detailed factual background to his claim, including not only the non-acceptance of his Greek ID card by the respondents but further allegations, including their non-acceptance of an alternative ID document which he had provided; changing of the reasons given for revoking the assignment;

and revocation of that assignment because of his emailed answers to ID queries. The form of discrimination alleged had not been identified, such that, at paragraph 20 of its grounds of resistance, the first respondent had requested that it be particularised. Ms Ferber submitted that, at the OPH, the Tribunal had spent a great deal of time discussing the details of his claim with the claimant and seeking to understand his allegations, which, as identified in the course of that discussion, had extended beyond those pleaded. In her submission, paragraph 4 of Schedule A was of particular importance in recording that the claimant had not restricted himself to an allegation that Experian had failed to accept his Greek ID document but had asserted that both respondents had themselves directly discriminated against him, as a Greek national, by doing various acts. Paragraph 6 had then set out, in detail, all of the matters discussed with the claimant, of which those set out at sub-paragraphs 6(3); 6(5) and 6(6) had been the most pertinent. Taking the claimant's case as pleaded together with his explanation of his claim at the OPH, it had been clear that his claim had been that the first and second respondents had chosen to discriminate against him intentionally and maliciously on the grounds of his race, using the discriminatory practice of Experian as the basis for so doing, hence the Tribunal's description of the alleged discriminatory act, set out at paragraph 1.1.1 of Schedule B. He had advanced no claim of indirect discrimination, whether expressly or in substance. He had also expressly disavowed any intention to bring a claim of victimisation (notwithstanding an apparent pleaded case to that effect), as recorded at paragraph 7 of Schedule A. That, Ms Ferber submitted, served to illustrate the importance to be placed on the way in which he had explained matters at the OPH, in circumstances in which his claim as pleaded had been inherently confusing and difficult to understand. That the claimant's case had been advanced as one of direct discrimination at the OPH was also strongly supported by his explanation of the basis of his claim, as set out in the rider to his notice of appeal (cited above), submitted Ms Ferber, the final paragraph of which suggested direct discrimination or victimisation, but not indirect discrimination.

15. There had been no error by the Tribunal in identifying the claimant's own characterisation of

his claim as being one of direct discrimination. Furthermore, there had been no error of law in the Tribunal's conclusion that the claimant's contention that the first and second respondents had directly discriminated against him, because a third party had not accepted his ID card when conducting its background checks, had little reasonable prospect of success. Such a claim was self-evidently weak. Even if the claim ought to have been identified as one of indirect discrimination, such a claim had little reasonable prospect of success, in particular by reference to the matters recorded at paragraph 6(3) of Schedule A. No other conclusion reasonably could have been drawn, such that the EAT ought not to disturb the deposit order made.

For the second respondent

16. Mr Bryan pointed to the second respondent's pleaded denial that it had discriminated against the claimant "on the grounds of his race," and that any relevant decision had been "based on" the claimant's race; it had not understood the claim against it to have been one of indirect discrimination. He submitted that the starting point, when identifying the claims being brought, was the form ET1, requiring consideration of the substance of the complaint, approached in a non-technical manner: **Sougrin v Haringey Health Authority** [1992] ICR 650, CA, at 653F. **McLeary** [98] had also referred to the starting point as being a fair reading of the pleadings and had made clear that the EAT should be slow to second guess the employment judge's approach to clarifying the issues in a case management discussion and the wide margin of appreciation which ought to be allowed [97]. In **Cox** the EAT had said that no more or less than a "reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order" ought to be made [30] and that "the overriding objective also applies to litigants in person who should do all they can to help the employment tribunal clarify the claim" [32].

17. Mr Bryan submitted that fundamental to the definition of indirect discrimination for which section 19 of the EqA provides was the primary need to identify the party by whom the alleged PCP

had been applied, as a pre-requisite to consideration of the other elements of the definition. In **Ministry of Defence v Kemah** [2014] ICR 625, the Court of Appeal had considered the "almost identical" [6] statutory predecessor to section 109 of the EqA, concerning the liability of principals for the acts of their agents, holding that "the principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do" [11] and rejecting the employment tribunal's reasoning that an agency relationship would arise where the third party acted merely "for the benefit" of the putative principal [16]. It would be necessary, applying common law principles, (1) "to show that a person (the agent) is acting on behalf of another (the principal) and with that principal's authority" [39]; and (2) to identify the source of any authority [41]. The fact that one party procures services from another does not make the latter the agent of the former: **Hoppe v HM Revenue & Customs** EA-2020-000093-RN [73]. In **Hall v Xerox UK Ltd** UKEAT/0061/14/JOJ, applying **Kemah**, Langstaff P had held that there was "a clear distinction to be made between a commercial provider of services contracted by a principal to provide them in most circumstances and a person properly to be described as an agent" [23], and that an insurer which had provided an income protection scheme to the benefit of certain employees had not been the agent of the employer with which it had contracted. In the instant case, were it instead to be argued that the second respondent had been acting as agent of the first respondent, that argument necessarily would fail because sections 109 and 110 of the EqA did not provide that, in a case of indirect discrimination, agents are liable "for the application of a PCP by the principal": **Murray v Maclay Murray & Spens LLP** [2018] IRLR 710, EAT [28].

18. Against that background, Mr Bryan's primary submission was that, having taken all steps reasonably required to clarify the nature of the claim being advanced, the Tribunal had reached a permissible conclusion that the claimant had been advancing a complaint of direct race discrimination. The language used in the claimant's pleaded case had been consistent with such a claim and there had been no reference to indirect discrimination, or to the application of any PCP by

either of the respondents, including at the case management discussion. Bearing in mind the "wide margin of appreciation" to be accorded to the Tribunal, there had been nothing more which reasonably could have been expected of it. In the alternative, if the Tribunal ought to have characterised the claimant's complaint as one of indirect discrimination, that error had made no difference to its decision to make a deposit order and, by reference to the parties' respective pleaded cases, the Tribunal would have found that there was little reasonable prospect of a tribunal, at the final hearing, finding (1) that the alleged PCP had been applied by the second respondent; and/or (2) the necessary group disadvantage.

19. Here,

a. as to (1), above:

(i) the PCP alleged was that "requiring workers and/or contractors to pass Experian's pre-employment checks as a condition of any offer of work";

(ii) the first respondent had accepted that the policy of requiring an Experian credit check had been its own, arising from the fact that it was an entity regulated by the Financial Conduct Authority;

(iii) consistent with that position, the second respondent had denied any responsibility for Experian's checks, or any relationship with Experian, and had asserted that it had been the first respondent who had outsourced the matter to Experian;

(iv) the Tribunal had recorded that it was the claimant's case that the credit checks had been carried out "by the first respondent and Experian";

(v) putting the case at its highest, the second respondent, a recruitment agency, had informed the claimant of the outcome of the Experian check and any alleged PCP had been applied by its client, the first respondent, a matter which could be tested by considering how section 19(2)(d) of the EqA (the requirement that the alleged discriminator show objective justification) could be satisfied by the second respondent, where the policy in question had been that of its client and any objective justification was unlikely to be within its own knowledge.

b. as to (2), above, there was little reasonable prospect of the claimant establishing that the alleged PCP satisfied the requirement of section 19(2)(b) of the EqA (namely, that it put or would put persons with whom he shared the relevant protected characteristic at a particular disadvantage when compared with persons with whom he did not). The claimant had not identified the relevant group, such that, on his case as formulated before the Tribunal, his prospects of success were, inevitably, weak. In any event, if the relevant group were said to be Greek nationals, it was doubtful that the claimant would be able to establish that that group had been at a particular disadvantage, nor had any evidence of disparate impact been identified; Experian was not itself a party to proceedings.

20. Further, submitted Mr Bryan, there could be no basis for a finding that Experian had been the agent of the second respondent. The first respondent had pleaded an acknowledgement that the decision to use Experian had been its own, arising from its own policy, not from any decision or policy of the second respondent. It had been the first respondent which had provided the claimant's ID card to Experian, in order that the latter could conduct its checks. Thus, Experian had not been acting "on behalf of", or "with the authority of" the second respondent, with which it had had no

dealings, but of, if anyone, the first respondent. Taking the matter at its highest, the second respondent had acted merely as a messenger. Experian's services had not even been provided "for the benefit of" the second respondent, which test, in any event, would not suffice in law. Indeed, in all likelihood, Experian had not been the agent of the first respondent, given that it had been providing merely a third party commercial service. Accordingly, submitted Mr Bryan, there was little reasonable prospect that the second respondent would be held liable for anything done by Experian.

21. In the alternative, and without prejudice to his contention that an amendment to the Claimant's pleaded case would be required in order to pursue such a point, Mr Bryan submitted that the effect of **Murray** was that the second respondent could not be held liable as agent for the application of a PCP by the first respondent, as putative principal.

22. In the course of argument, Mr Bryan acknowledged that the issues summarised at paragraphs 20 and 21 above would not be engaged in the event that the proper construction of the claim against each respondent was that it was one of indirect discrimination, whereby it was alleged that that respondent had itself been applying the alleged PCP.

Discussion and conclusions

23. In accordance with **Sougrin**, I begin with a consideration of the case being advanced on a fair reading of the claimant's form ET1. Contrary to Mr Bryan's submission, in my judgement nothing can be gleaned from the boxes ticked in section 8.1 of the form ET1, the proforma language of which does not distinguish between direct and indirect discrimination. Section 8.2 refers to the claimant's contemporaneous contention, when informed that his Greek ID card had not been accepted, that, *"what they were stating was against the EU and the UK directives and legislation and it's considered as discrimination on the basis of nationality"*, going on to plead, *"... I got a*

copy of an email which shows that the HR manager handling my role revoked the offer because of my answers to her that same day ... which stated ..., that ... their denial to accept my ID card is against the law because it's considered as discrimination .... Please take into consideration that the online pages I have provided contain very detailed information, like the relevant EU directives and specific decisions, the UK government actions, UK court cases etc, which should leave no doubt even to somebody unaware of the relevant legislation that the rejection of an EU National ID card as a prime ID document is considered as discrimination in all EU states." (emphasis added)

24. This was not a claim which was prolix or convoluted in its expression. It focused on the claimant's core claim, albeit not expressed in terms which a lawyer would have pleaded. In my judgement, the fair, non-technical reading of the claimant's pleaded case is that the act of which complaint is made is the respondents' allegedly discriminatory refusal to have accepted his ID card. The form of discrimination alleged is neither definitively specified nor discernible, including from the online documentation to which reference is made in section 8.2 of the form ET1, which the claimant fairly acknowledges he cannot recall whether he attached to that form[1]. Acknowledging the claimant's use of the words "on the basis of nationality," I do not consider that, in the context of the other matters pleaded, by a lay person, they are to be construed as an unequivocal intention to plead a case of direct discrimination, which would be to adopt the technical construction deprecated by Balcombe LJ in **Sougrin** [653F].

25. Accordingly, at the OPH, the Tribunal properly sought, in accordance with **McLeary** (subsequently underlined in **Cox**) to clarify the issues arising, recording the outline of the claimant's claim at paragraph 6 of Schedule A. None of the parties asserts that outline to have been inaccurate in any material respect. The Tribunal then identified the facts in issue, including, at paragraphs 8(3) and 8(4) of Schedule A, *"Who made the decision to revoke the assignment?"* and *"What was the reason for this decision?"* Separately, it identified the further issue set out at paragraph 9 of

[1] No documentation was attached to the form served by the Tribunal on each respondent.

Schedule A, cited above.

26. At paragraph 14 of schedule A, the Tribunal found that, *"Taking the claimant's case at its highest did not resolve the fundamental issue of how and why the incomplete DBS check by Experian on 18 April 2019 culminated in the decision to revoke or withdraw the assignment. Applying the approach in Schnorbus* [v Land Hessen Case C-79/99 [2001] 1 CMLR 40] *which Mr Bryan contended for, if a criterion had been applied to the claimant it was not clear to me what this was and by whom it was applied. This will require a factual inquiry without which I was unable to conclude that there was no reasonable prospect of success."* As Experian is not a party to these proceedings, the relevance of that issue could only have been to the liability, or otherwise, of each respondent. It is not in dispute that the claimant had been required to pass a clearance check carried out by Experian, nor, sensibly, has it been suggested in submissions that such a requirement could not, as a matter of principle, constitute a PCP. Taking the claimant's case at its highest, that requirement had been one imposed by each respondent. Nothing in the claimant's pleaded case, or in the outline at paragraph 6 of Schedule A, itself is consistent only with a claim of direct discrimination, or hence, inconsistent with a claim of indirect discrimination. The adverse disparate impact is implicitly said to fall on those non-British nationals (of which a Greek national would be one) who might be less likely to hold, or have available, a form of ID which would satisfy Experian's requirements. Whether that contention could be made good at a full hearing would require consideration of the evidence then available. Whether or not the claimant might also have been advancing other claims of direct discrimination of the nature put forward by Ms Ferber, the proper characterisation of the claimant's claim arising from the requirement that he pass Experian's clearance check fell to be considered independently. Indeed, if it were not possible to construe that claim as being other than one of direct discrimination, one questions why the first respondent considered it necessary to plead the need for provision by the claimant of further particulars of the type of discrimination alleged. In fact, in my judgment, the further possible claims of direct

discrimination, as asserted by Ms Ferber, were simply identified consequences of a requirement that the claimant pass Experian's checks.

27. Section D of the rider to the claimant's notice of appeal does not assist the respondents. If anything, it serves to emphasise the fact that the PCP in question was alleged to have been constituted in the need for the claimant to have satisfied Experian's particular requirements, said not to have been adopted by other similar companies. In relation to each respondent, the liability asserted is primary, under section 39(1) or 41(1) of the EqA, i.e. that it is that respondent's requirement that the claimant satisfy the Experian checks which is alleged to have led to one or both of them revoking his assignment when those checks were not satisfied.

28. Even if Mr Bryan were correct that section 109 of the EqA might be engaged when considering the relationship between the two respondents and, specifically, whether the second respondent had been acting as agent of the first, it cannot be said that the claimant's case is that the PCP had been applied exclusively by the first respondent. **Murray** is distinguishable on that basis. Accordingly, if the second respondent were found to have applied the alleged PCP as agent for the first respondent, and with the latter's authority, that act would be treated as having been done also by the first respondent as principal, per section 109(2) and the second respondent would itself have acted in contravention of section 110(1) of the EqA if its doing of that act amounted to a contravention of the EqA by the first respondent. Those are fact-sensitive questions on which, as matters stood before the Tribunal and now stand, it cannot be said that there is little reasonable prospect of success.

29. **McLeary** is not authority for the proposition that a wide margin of appreciation must be accorded to employment judges as to the proper construction of a party's case. At [88], the EAT held (with emphasis added):

"However, what was necessary here, starting with the Case Management

> **Hearing, was simply to clarify the substance of what the Claimant was saying and the claims that she was seeking to bring. A margin of appreciation should indeed be allowed to the judge below, as to how such matters are managed, but when, as in this case in my judgment, it shouts out from the contents of the Particulars of Claim that it is being alleged that there have been a number of acts of disability discrimination that have, along with other acts, contributed to an undermining of trust and confidence that has driven an employee to resign and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least be raised at the Case Management Preliminary Hearing so that clarification can be sought."**

In similar vein, at [97], the EAT held (with emphasis added):

> **"Drawing all the threads together, I stress that every case will turn on its particular circumstances, the contents of the documents, the attributes and capabilities of the litigant and the Judge's appreciation of how best to manage things, in order to make due allowance for a litigant in person, while not intervening to take their side. Generally, it must be left to the appreciation of the Employment Judge, whether, or how, a point of this sort needs to be proactively raised or addressed. The EAT should be slow to second guess the Judge's approach, and a wide margin of appreciation should be allowed..."**

30. In these proceedings, no criticism can attach to the approach which, at the OPH, the Tribunal adopted in seeking to ascertain the nature of the claimant's case, or in setting out the alleged factual basis of that case. The difficulty lies in its characterisation of that case, as a matter of law. That is not something to which a margin of appreciation may be said to apply. In my judgement, properly characterised the substance of the claim, as identified at the OPH and not merely on appeal, was one of indirect race discrimination, constituted in the alleged application by one or both of the respondents of a PCP requiring workers and/or contractors to pass Experian's pre-employment checks as a condition of any offer of work. The application for each deposit order fell to be considered in that context, consistent with the emails to which the Tribunal's attention was drawn by the claimant. Accordingly, the Tribunal's characterisation of the claim as one of direct race discrimination constituted an error of law and Ground 1 of the appeal, as amended, succeeds.

31. Turning to Ground 2, I reject the respondents' submissions that the above error made no

difference to the Tribunal's decision to make a deposit order. First, self-evidently, the Tribunal had considered the respondents' application on the wrong basis and had reached no conclusion by reference to the cause of action in fact being advanced against each respondent. That, of itself, means that its decision cannot stand. Secondly, on the information which was before the Tribunal, and is before this tribunal, the reason for either respondent's actions is yet to be established and the claimant's case cannot be said to be "straightforwardly very weak," as Ms Ferber contends (albeit on the basis of her submission that the claim had been properly construed as one of direct race discrimination). I also reject Mr Bryan's submission that a claim of indirect race discrimination against the second respondent would have no, or little, reasonable prospect of success. Whether or not the second respondent had been a (joint) primary actor; the agent of the first respondent; or simply a messenger will be a matter to be explored in evidence, hence the Tribunal's conclusion at paragraph 14 of Schedule A that, *"if a criterion had been applied to the claimant, it was not clear to me what this was and by whom it was applied. This will require a factual inquiry without which I was unable to conclude that there was no reasonable prospect of success."* That conclusion is unsurprising given the first respondent's thrice-pleaded assertion that it had been the second respondent which had made the decision to terminate the claimant's engagement (grounds of resistance, paragraphs 13, 17 and 21). Whilst, when considering an application for a deposit order, the test is whether the relevant allegation has little reasonable prospect of success, the same logic would apply. In essence, the Tribunal mischaracterised the complaint as being directed at each respondent's liability for Experian's acts, rather than at its liability for the application of its own alleged PCP that an Experian check be passed. It is that PCP to which the four elements of section 19(2) of the EqA must relate and it cannot be said that, as matters stood before the Tribunal, or now stand, the claim against either respondent has little reasonable prospect of success. It follows that Ground 2 of the appeal, as amended, also succeeds.

Disposal

32. Each respondent's position was that, were the appeal to succeed on both grounds, the matter ought to be remitted to the same employment tribunal for fresh consideration. I disagree. The effect of my conclusions on Grounds 1 and 2 is that the deposit order was made on the basis of the Tribunal's mischaracterisation of the claim being advanced against each respondent and its associated conclusion that that claim had little reasonable prospect of success. I have concluded that the claim being advanced against each respondent is one of indirect discrimination, contrary to sections 19, 39 and 41 of the EqA. According to the findings of fact made at the substantive hearing, it may be that a question will arise as to the liability, if any, of the second respondent, as agent for the first respondent as principal, under section 110, and of the first respondent as principal, under section 109, of the EqA. I have further concluded that it cannot be said that, as matters stood before the Tribunal, or now stand, the test for a deposit order could be held to have been satisfied.

33. Thus, it seems to me that, had the claim being advanced against each respondent been correctly identified by the Tribunal, no outcome other than the refusal of the deposit order sought by each respondent would have been possible. It follows that, in accordance with **Jafri v Lincoln College** [2014] EWCA Civ 449, the order which I should and do make is that both grounds of appeal, as amended, be allowed and that the deposit order in relation to the claim against each respondent, in the aggregate sum of £500, be quashed.

34. That being so, as both respondents acknowledge the Tribunal's subsequent order that the claimant's claims against each respondent should be struck out for late payment of the deposit automatically falls away and the appeals from such order and from the Tribunal's second refusal to reconsider it are rendered moot. Each such appeal would be dismissed, on that basis only. However, recognising that permission may be sought to appeal from the orders which I have made, at this stage I stay those related appeals pending the outcome of any appeal from this judgment for which

permission is granted, or, in the absence of any application for permission to appeal, the expiry of the time within which any such application is to be made. The matter can be restored to me at such time as either of those events occurs.

35. The claimant's claims against both respondents are reinstated and remitted to the London Central Employment Tribunal for a closed preliminary hearing, to take place at the earliest opportunity, at which a final hearing shall be listed; all issues arising for determination at that latter hearing shall be identified; and all necessary and appropriate case management orders made. The closed preliminary hearing may be listed before any employment judge, including Employment Judge Khan. That judge should be provided with a copy of this judgment.