Neutral Citation Number: [2023] EAT 76

Case No: EA-2022-000292-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 April 2023

Before :

HIS HONOUR JUDGE WAYNE BEARD

- -

Between :

MR P LOUIS	**Appellant**
- and -	
NETWORK HOMES LIMITED	**Respondent**

- -
- -

The **Appellant** appeared in person
MR C MILSOM (instructed via Trowers & Hamlin LLP) for the **Respondent**

Hearing date: 25 April 2023

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JUDGMENT

SUMMARY

[TOPIC NUMBER] 13 & 19

The Employment Judge erred in effectively striking out a claim of indirect race discrimination without allowing a litigant in person sufficient notice that the issue would be raised. However, the decision that the facts did not disclose a viable claim pursuant to section 19 Equality Act 2010 was correct. Despite the procedural irregularity, a correct process would not have led to any different outcome, and on that basis the appeal would be dismissed.

HIS HONOUR JUDGE WAYNE BEARD:

1. This appeal relates to a decision made at a preliminary hearing on 22 May 2022 by EJ Quill that, upon oral clarification of matters by the claimant, during the course of the hearing, the pleaded case did not raise a claim of indirect race discrimination.

2. I shall refer to the parties as they were before the Employment Tribunal as claimant and respondent. The claimant represents himself before me and the respondent is represented by Mr Milsom of counsel.

3. The appeal was listed for a preliminary hearing by HHJ Auerbach at first consideration of the appeal on the papers. That preliminary hearing, before Deputy Upper Tribunal Judge Stout, heard directly from the claimant and considered written submissions from the respondent. Judge Stout permitted the claimant's first ground of appeal to be considered at a full appeal hearing. The permitted ground was that the Tribunal had failed to correctly consider section 19 of the **Equality Act 2010.** The foundation of considering this ground to be arguable was: that the respondent had a policy to apply the "Rooney Rule" (along with other positive actions) to address low numbers of BAME employees at a senior level; that a practice applied to fixed term employees and to the claimant as a fixed term employee, of dismissing them without following the respondent's redundancy procedures; that if redundancy procedures had been followed this would have activated the application of the "Rooney Rule" and the other positive actions. The claim of indirect race discrimination was put as follows: that the respondent applied a PCP (Provision Criterion or Practice) of not following a redundancy process which put fixed term BAME employees at a disadvantage because a non-fixed term BAME employee at risk of redundancy would and could benefit from the "Rooney Rule" and the other positive actions. The claimant would have benefitted from that but for the PCP. Judge Stout considered that there were potentially substantive and

procedural errors of law in the way that the employment judge had approached this issue.

4. The claimant made claims in three separate claim forms. The last of these contending race discrimination in claim number 3303095. The claimant had made it clear at the preliminary hearing before the Employment Tribunal that he was not making a claim of direct discrimination of any sort. The relevant aspects of the ET1 and the attached particulars were as follows. The claimant had indicated he had made claims of discrimination and had entered a tick into the box marked "race" on the ET1 form. At paragraph 1.13 the claimant describes a number of positive actions adopted by the respondent and at 1.13.2 he describes the adoption of the Rooney Rule as requiring the respondent to shortlist for interview any applicant of BAME background who met the minimum criteria for a senior management team role.

5. The claimant's particulars of claim referring to the respondent as NH, at paragraph 1.58 stated:

> **"As I was unfairly denied the opportunity of benefitting from NH's positive actions, NH's PCP led me to suffering indirect race discrimination which is in breach of EA 2010 [Equality Act 2010]."**

6. At paragraphs 1.41 to 1.47 the following was averred:

> **"The respondent had a practice of not applying its redundancy procedure to fixed term employees; that it applied the practice to the claimant and another fixed term employee; that it would have been applied to others; that this was less favourable to the claimant than permanent employees."**

7. The claimant then at paragraphs 1.53 to 1.58 sets out that, because he was not taken through the redundancy procedure, he was not able to benefit from those elements of the policy set out in para 1.13 and its subparagraphs.

8. The decision in the judgment is recorded in this way:

> **"The claims as presented, and as clarified during the preliminary hearing, do not include claims of race discrimination (even though the box was ticked on claim 3)."**

9. In terms, the judgment reasons show that the employment judge considered that the factual matters that had been raised by the claimant fitted a complaint of discrimination but on the grounds of being a fixed term employee and not in respect of race and, as such, without requiring amendment, relabelled those factual matters under that jurisdiction.

10. Section 19 of the **Equality Act 2010** provides:

> **"(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."**

11. Subparagraph (3) then sets out the relevant characteristics which include race.

12. It is important to have in mind the Employment Tribunal Rules 2013 in regard to this

appeal. Rule 5 indicates that:

> **"The Tribunal may, on its own initiative or on application of a party, extend or shorten any time limits specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired."**

Rule 26(1) provides:

> **"As soon as possible after the acceptance of the response, the Employment Judge shall consider all of the documents held by the Tribunal in relation to the claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal …"**

Rule 27 provides:

> **"(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—**
>
> > **(a) setting out the Judge's view and the reasons for it; and**
> >
> > **(b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed."**

If representations are received, they can be considered by an employment judge and should be decided at a hearing if that is requested.

Rule 37 provides:

> **"(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 …"**

Under (a) that includes has no reasonable prospect of success. At Rule 37(2) it says:

> **"A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."**

Rule 48 provides:

> **"A Tribunal conducting a preliminary hearing may order that it be treated as a final hearing, or vice versa, if the Tribunal is properly constituted for the purpose and if it is satisfied that neither party shall be materially prejudiced by the change."**

Rule 53 provides:

> **"A preliminary hearing is a hearing at which the Tribunal may do one or more of the following -**
>
> **…**
>
> **(b) determine any preliminary issue;**
>
> **(c) consider whether a claim or response, or any part, should be struck out under rule 37;**
>
> **…**
>
> **(3) 'Preliminary issue' means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed)."**

Rule 54 provides:

> **"[A preliminary hearing may be directed by the Tribunal on its own initiative at any time or as the result of an application by a party. The Tribunal shall give the parties reasonable notice of the date of the hearing and in the case of a hearing involving any**

> **preliminary issues at least 14 days' notice shall be given and the notice shall specify the preliminary issues that are to be, or may be, decided at the hearing.]"**

Rule 56 provides:

> **"Preliminary hearings shall be conducted in private, except that where the hearing involves a determination under rule 53(1)(b) or (c), any part of the hearing relating to such a determination shall be in public …"**

13. In his written submissions on the single ground of appeal, the claimant argues that the Tribunal simply failed to apply section 19 of the **Equality Act,** because, in his pleadings, he had claimed indirect race discrimination, relying on the respondent dismissing him without taking him through its redundancy procedure. He contended there was a practice of not following a redundancy procedure with fixed term employees, quoting its application to at least one other individual. He specifically stated that he had been subject to discrimination because he did not benefit from the advantageous policies and actions as a consequence of this policy. The claimant accepts that he was asked by the employment judge if he was alleging that BAME employees were more likely to be fixed term employees, and that he stated he was not making that argument. However, that, he argues, was because at the time he did not have the statistics available to make that assertion and the respondent had declined to answer his questions on that claim.

14. He now relies on two matters in support of the proposition, one an acknowledgment by the respondent that BAME employees are not proportionately represented in the roles at a senior level. Secondly, that BAME were more likely to be fixed term employees based on the project team he worked in, all of whom were fixed term employees and three out of four were BAME employees.

15. The claimant relies on **Mogane v Bradford Teaching Hospitals NHS Foundation Trust** [2022] EAT 139, where consultation and a fair selection criteria are fundamental aspects of a fair

procedure, even where there is the ending of a fixed term contract. He referred also to **Royal Surrey County NHS Foundation Trust v Drzymala** UKEAT/000063/17 to indicate that a failure to discuss a suitable alternative role could be procedurally unfair when a fixed term contract was not renewed. He said that the respondent was aware of the potential risk of redundancy in the months prior to dismissal. He was given notice of dismissal later without consultation on redundancy or to place him in a redeployment pool where suitable alternative roles could have been discussed, despite at least one being available. The claimant asserts that this was a procedurally unfair dismissal and, as an aside, he relies on the fact that he was given notice of one day, which he contends could not be unilaterally withdrawn by the respondent, referring to **CF Capital plc v Willoughby** [2011] EWCA Civ 1115.

16. The claimant contends that this case was dealt with on a pleading point and **Amin v Wincanton Group Limited** UKEAT/0508/10/DA indicates that that is undesirable that determination of important issues in the Employment Tribunal should not follow a lack of overly technical interpretation of the pleadings. The claimant's pleadings overtly contained a claim of indirect race discrimination. He argues, even if not pleaded with legal clarity, he is a litigant in person and it is a pleading point if that lack of clarity is relied upon in deciding whether the claim is advanced or not. He argued that in the pleading he claimed indirect race discrimination and had identified a PCP as "not to provide a redundancy procedure to fixed term employees". That PCP affected all fixed term employees, putting BAME fixed term employees at a particular disadvantage. He identified that disadvantage as being unable to benefit from the policies, such as the “Rooney Rule”, and that he was denied an opportunity by the absence of the redundancy process. He argued that it was not within the wide discretion afforded to the employment judge under Rule 29 not to allow a claim of indirect discrimination without the merits of the claim being considered. The claimant argues whether the employment judge could have used strike out powers should not be considered because the claim was arguable on the facts.

17. The claimant also contends **Mervyn v BW Contorls Limited** [2020] EWCA Civ 393 is important because lists of issues can be amended up to and including at a merits hearing, particularly when there is an unrepresented party. He made the point that it was too early for this decision to be made at this case management stage. He relies on **Ishola v TfL** [2020] EWCA Civ 112 to demonstrate that the concept of a "practice" in a PCP is a broad contention and it includes not only the way in which things generally are or will be done, but also, if a particular approach would be applied again in the future in a similar case, that would be considered a PCP. So a PCP does not necessarily have to be consistently applied to everyone in the pool. He has also referred to **Carreras v United First Partners Research** UKEAT/02666/15/RN in that regard dealing with the nature of legislation requiring a liberal rather than a technical or narrow approach to the definition of a PCP. The claimant also refers to **Allen v Primark Stores Limited** [2022] EAT 57 which deals with the need to address the specific PCP in order to correct construct a pool for comparison. The claimant had indicated that the respondent had a practice of not applying the redundancy procedure to fixed term employees.

18. In oral submission the claimant contends that, amongst claims made there was an indirect claim. It was referred to by both parties in their agendas for the hearing. He made the point that the indirect race discrimination claim was not withdrawn or amended at any stage by him. The employment judge had instead taken those facts and applied them to a claim for less favourable treatment of a fixed term employee, citing the "Rooney Rule". He said by doing this the judge had clarified the claim of indirect discrimination out of existence. That was tantamount to a strike out, and instead of that, the claim should have been decided at a full hearing, it should not have been dismissed at a case management stage. He referred me to **Cox v Adecco** [2021] ICR 1307 saying that there are nine points to take into consideration in that case, some of which he relied upon, citing the special care needed in discrimination cases. It is very rarely, the case says, appropriate to strike out. The claimant's case should be taken at its highest and assessing reasonable prospects of

success, requires sufficient information to make that assessment and that information should not be ascertained under the pressure of a hearing. This is because, when pushed, a litigant in person can fail to explain a case properly. He argued that during that hearing he became effectively a rabbit in the headlights and his pleading was not, perhaps, as a lawyer would have drawn it up. The claimant then made submissions about the case which I referred the parties to yesterday, **Mendy v Motorola Solutions UK Ltd & Ors** [2022] EAT 47 before the President, Eady J where an employment judge inadvertently struck out a case by simply stating as part of case management there was no case of indirect discrimination. He argued that what is set out in the case is that such an approach would not be consistent with the overriding objective. It is a case where there was a private preliminary hearing, the claim was properly before the Tribunal.

19. In answer to questions from me, the claimant said he was not aware of the rules that I have referred to as a litigant in person. Further, as someone not legally trained, it was not made clear to him what was happening in the hearing before the employment judge. Because of that, the parties were not, as required by the overriding objective, put on an equal footing. He described, when asked about the disadvantage that is required under section 19 that this was not having access to the positive actions which could lead to a senior management team role. I asked about the question of disadvantage as it is dealt with in **Cowie v Scottish Fire and Rescue Service** [2022] IRLR 913 and he argued that there the claimants had to use existing leave and time off in lieu first in order to benefit from the additional leave. That meant, he said, that there was an access requirement to the additional leave, there was a separate stage in the case. He argued that there was no separate requirement to benefit from the positive actions in this case.

20. The respondent's submissions in writing began with indicating that the ET enjoys broad case management powers pursuant to rule 29 ET Rules 2013, referring to **Eurobell Holdings plc v Barker** [1998] ICR 299 that an employment tribunal must have and be able to use case

management to ensure a fair hearing takes place eventually. He makes the point, properly, that on appeal, interference with the exercise of case management powers is limited, as seen in **X v Z Limited** [1998] ICR 43, where it is made clear that employment tribunals deal with case management decisions every day and that only in rare cases a decision could be interfered with on appeal. An appeal against the exercise of a case management discretion can only succeed in a case where the employment tribunal had exceeded the parameters within which reasonable disagreement is possible, referring to **CIBC v Beck** [2009] IRLR 740, or where the decision is plainly wrong as in **Bache v Essex County Council** [2000] ICR 313.

21. Mr Milsom also relies on the limited ability of the EAT to interfere as set out in such seminal decisions as **DPP v Greenberg** [2021] IRLR 1016. He also makes the point it is not enough for there to be a procedural error, if the practical effect is that the error had no impact on the outcome of the decision, an appeal cannot succeed, **Bangs v Connex South Eastern Ltd** [2005] ICR 763 and **Crinion & Anr v IG Markets Limited** [2013] EWCA Civ 587 set out as much.

22. Mr Milsom referred to the power to strike out, pointing out that this can be on application or by the Tribunal's own initiative and an employment tribunal can strike out any part of a claim because it has no reasonable prospect of success. He argued that a judge is expected to clarify a claim before that course is adopted as set out **Cox v Adecco** [2021] ICR 1307. Sometimes, he argued, pleadings and core documents may show that there is not a claim. He argued that although strike out is an exceptional step, the power exists for a reason and should be exercised in an appropriate case, and commented where there are undisputed facts, such as most of the facts here, there is no principle preventing a discrimination being struck out if they demonstrate no substance. That can be seen in a number of authorities, **Anyanwu v South Bank Student's Union** [2001] IRLR 305 and, even where there are factual disputes, if a case is hopeless it should be struck out, **Patel v Lloyds Pharmacy Limited** UKEAT/0418/12 and **ABN Amro Management Services &**

Anr v Hogben UKEAT/0266/09.

23. Mr Milsom argued that the Employment Tribunal was entitled to proceed to case management. There were three ET1 forms and the Employment Tribunal had to identify the issues which they contained to officially deal with the case. He contended it was apparent that there was no arguable complaint of race discrimination so the Employment Tribunal was required to ensure that the claim did not proceed in order to comply with the overriding objective. He contended that the practical effect was that no arguable complaint was raised at all and, following **Cox**, the Employment Tribunal reformulated the claim to more arguable complaints based on the facts and avoided an amendment application in accordance with the principles of effective case management. That should not be interfered with on appeal.

24. In respect of section 19, he makes the point that the indirect discrimination requires that the PCP is applied indiscriminately to everyone, both the advantaged and disadvantaged groups as set out in **Rutherford v Secretary of State for Trade and Industry** [2006] ICR 785. Hypothetical application to others can be sufficient, but the PCP must be applied to the claimant, **Iteshi v General Council of the Bar** UKEAT/0161/11. The PCP must give rise to a particular disadvantage compared to those who do not share the same protected characteristic.

25. He also referred to conferring a benefit on an employee subject to certain pre-conditions. He said that this cannot give rise to indirect discrimination because entitlements cannot give rise to a disadvantage, relying on **Cowie v Scottish Fire and Rescue Service** [2022] IRLR 913. Attempts to afford beneficial treatment cannot give rise to unfavourable or disadvantageous treatment, **Williams v Trustees of Swanswa University Pension and Assurance Scheme & Anr** [2019] ICR 230.

26. He talks about the pool that needs to be selected is the group which the PCP effects, either

negatively or positively and does not include those who are not affected, and if the disadvantage is experienced by everyone, the claim is bound to fail, again relying on **Rutherford**. He contended that fairness is no indication of a PCP as **Ishola v TfL** [2020] ICR 1204 shows.

27. In terms of the protected characteristic, he argued that there were two cases, **Taiwo v Olaigbe** [2013] ICR 1039 and **BMA v Chaudhary** [2007] IRLR 800 which were of particular importance because, in his argument, they require that not everyone in the pool can experience the disadvantage. If the proper pool, as the claimant argues it is, is all fixed term workers, the claim would fail because, taking the claimant's case at the highest, none of the fixed term workers could benefit from the positive action measures, including non-BAME employees.

28. In oral submissions, Mr Milsom conceded that the ET1 in the third claim clearly ticks the box for race and refers to indirect race discrimination and that both parties referred to such a claim in the agenda for the hearing. The issue of a race claim was dealt with, he said, in the Employment Tribunal judgment and it is a judgment which, he says, is important in these circumstances.

29. Asked about the impact of the rules, he said that there was no time limit for the Employment Tribunal to consider a strike out on its own motion. That can be done at any stage. The claimant, he said, had opportunity to make representations and the Tribunal had grasped the nettle. The hearing had become extended to a full day and a strike out could have been heard because the Tribunal is determining whether there was a viable claim in this case. He said the judge had made a proper analysis of the pleadings, as he was required to do by the requirements of **Cox**. The claim was effectively amended, as the Tribunal was attempting to put the facts in the complaint into the best possible legal framework for the claimant.

30. He made the point about the Employment Appeal Tribunal respecting case management powers unless a ruling is plainly wrong, and in addition he made the point that, even if there is a

procedural error, that is of no impact if, in a practical sense, it was what would have happened in any event. Even where there is an error of procedure, unless that impacts on the outcome, the appeal should fail. He referred me to **Bache** again and talked about how impressed with the representative the Tribunal were so that there was no sensible prospect of the case improving if the representative had remained, even though it was a procedural error to remove the representative.

31. Mr Milsom argued that the effect of **Cowie** is to extend **Williams** into section 19 complaints. It is based on an analysis that it is not appropriate to draw narrow distinctions between detriment, disadvantage and unfavourable in the law. He made the point that, in terms, there is only one of the protected characteristics that is entitled to a positive adjustment, and that is in disability discrimination where there is a reasonable adjustment made. He said the effect of **Cowie** and **Williams** is such that it is essentially any advantage cannot be considered a disadvantage.

32. In terms of my judgment, I ask is there a procedural failing? Does the claim contain an indirect discrimination complaint? The claim clearly pleads race and indirect discrimination, setting out a PCP and a detriment, therefore, there was a pleaded case of indirect race discrimination. If that was a case with no reasonable prospects of success, there were two routes to it being struck out or dismissed. The application of Rule 27 or Rule 37. It is to be noted that in each case there is a general requirement of notice if the ET, of its own motion, decides that the issue of no reasonable prospect of success is to be explored. Whilst Rule 5 permits an curtailment of time, that is something that should not generally be done if it prejudices a party, unless there is a good reason to do so, despite that prejudice.

33. Rule 27 requires the judge to set out their reasons for considering strike out in writing, where their view is that there are no reasonable prospects of success; in addition they must offer a hearing if a hearing is requested. It is also to be noted that in those circumstances the claim is

dismissed and not struck out. There are questions, therefore, as to what impact that might have on further claims being made.

34. Rule 37 again requires that a claim or response should not be struck out without a reasonable opportunity being given to make representations in writing or if requested by the party at a hearing. Whilst it is correct that Rule 48 allows conversion of a preliminary hearing to a final hearing, that would need clear reasons to explain why that process was followed and why there would be no prejudice to a party in doing so. Although this was an open preliminary hearing in public, as set out in Rules 53 and 54, it was not the case that the claimant was given 14 days' notice of the issue that was to be decided in respect of the matters on appeal before me. In any event, the judgment is made that the claim of indirect discrimination does not exist. The Judge, therefore, has not considered the claim by specifically considering the questions of there being no reasonable prospects of success. The Judge has adopted a legal analysis of the facts alleged and attached a different jurisdictional label to them.

35. In my judgment, it could only be to a litigant in person's prejudice to be confronted with a complex point of law at a hearing without notice. To expect a litigant in person to deal with such a question effectively without forewarning is asking too much. The practical effect of this case management decision, as in **Mendy**, was to strike out a claim that was clearly pleaded within the ET1. In my judgment, the employment judge erred in approaching matters in this way. This, even at the cost of a further hearing, would not be an appropriate manner to approach dismissing a pleaded claim.

36. I therefore have to consider whether this error of law in terms of procedure is one that has affected the position in terms of the substantive law. In section 19, someone falls foul of the section by applying a provision, criterion or practice which is discriminatory. It seems to me that there

were, before the employment judge, two potential PCPs which can be discerned from the pleading. The first of those was not applying a redundancy process to a fixed term employee. This is the one that the claimant has argued for and which is clearly set out within the ET1. However, in the alternative, there was also the possibility that not applying the "Rooney rule" and the other positive actions to fixed term employees could be considered a PCP, albeit that the claimant contends that this is actually the detriment or disadvantage.

37. In terms of the first PCP, it would apply to all fixed term employees, including those that do not share the characteristic, but in my judgment, all of those individuals would suffer the disadvantage of not being granted the positive actions. Although the positive actions would only be available to those of BAME background or characteristics, the impact of the process would be that the individuals would not be involved in any further steps. In my judgment, therefore, it seems to me at first glance that those where BAME characteristics are placed in exactly the same category as those without those characteristics.

38. It could be argued, as the claimant has said, that in a sense because it is only available to BAME individuals, then it is only they that are suffering the disadvantage. It seems to me that the problem with that argument is that in limiting the pool to only BAME individuals, because of the **Chaudhary** and **Taiwo** decisions, means that there is no indirect discrimination because all in the pool would be affected.

39. In any event, even if I were wrong about both of those issues, I have come to the conclusion that I agree with the approach taken by the President in **Cowie**. There is no disadvantage in not being given an advantage. A detriment, disadvantage or unfavourable treatment all refer to circumstances where a negative event occurs. In terms, this failure to be given an advantage cannot fall into that category. This is an advantage being given to a particular group that meet certain

criteria. That advantage, it seems to me, cannot be converted to a disadvantage because it is not an opportunity given to those who do not meet that criteria.

40. The claimant argued that in **Cowie** this involved separate steps, the exclusion of accrued leave and time off in lieu before taking the additional advantageous element. It seems to me that that is an argument that actually works against the claimant in the circumstances of this case. In that case, an argument was that, because there were these two separate steps, they had to be considered separately and the disadvantageous part was the use of the accrued leave and the advantage was only limited to the additional leave. The Tribunal concluded that the two elements had to be considered as part of one process, which I agree must be the correct approach. That means that in this case, if it is considered that there is necessarily a step before the advantage because, without the PCP relied upon there could not be a claim, and that PCP must be a step before the process that would provide the advantage. In those circumstances the argument works against the claimant.

41. As to the second PCP I have identified, although the claimant did not advance this as his argument, it seems to me that this cannot apply as the policy would then only apply to people who share the characteristic because only BAME individuals could be given the advantages in the positive actions process.

42. It seems to me, therefore, that it is impossible for the claimant to argue that there is a basis upon which section 19 could apply. Whichever PCP is considered there is either a problem with the group to which it is applied, or there is a problem with the absence of disadvantage. In those circumstances I have to ask myself would it be appropriate to allow this appeal despite the procedural irregularity I have identified.

43. As has been indicated in the course of argument, the approach that must be taken by this Tribunal is to consider whether there is any practical effect of the error identified as in **Bache**. In

my judgment, even following the correct procedure where the claimant was given a warning, had an opportunity to attend a hearing where strike out was dealt with on notice, the same arguments that have been advanced and the same basis of claim that has been advanced would have been considered. As such, it would be inevitable that the claim would have been struck out at that stage. That being the case it seems to me that I cannot permit this to be remitted back to the Tribunal solely for a redundant step to be undertaken and on that basis the appeal is dismissed.

