Appeal No. UKEAT/0184/16/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 8 November 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

RMC (RULE 50 ORDER APPLIED) APPELLANT

CHIEF CONSTABLE OF HAMPSHIRE CONSTABULARY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	RMC (The Appellant in Person)
For the Respondent	MR GARY SELF (of Counsel) Instructed by: Chief Constable of Hampshire Constabulary Hampshire County Council EII Court South The Castle Winchester SO23 8UJ

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

SEX DISCRIMINATION - Indirect

Striking out - indirect sex discrimination claim - identification of PCP - objective justification

The ET had struck out the Claimant's claim of indirect sex discrimination in circumstances in which it had been agreed that there were no disputes of fact and the ET had all the evidential material before it to carry out its task.

On the Claimant's appeal.

Held: dismissing the appeal. The ET had proceeded on the basis of the case pursued by the Claimant, as clarified at an earlier case management discussion and without the Claimant having taken issue with the identification of the PCP. The PCP had legitimately been identified as the application of Standard Operating Procedure 8, relating to the recruitment of police officers and civilian staff, where the applicant had previous criminal convictions. Allowing this placed men at a disadvantage as compared to women (being more likely to have previous criminal convictions), the ET nevertheless found the Respondent was bound to make good its defence of justification such as to mean the Claimant's claim had no reasonable prospect of success. The ET had been entitled to proceed on the agreed basis that there was no dispute of fact, there was no need to call oral evidence and all the relevant material was available at the Preliminary Hearing. In those circumstances, it could not be said that the ET had erred in law.

HER HONOUR JUDGE EADY QC

Anonymity Order

1. Pursuant to the power afforded to the EAT by section 35 of the **Employment Tribunals Act 1996** and given the legitimate concerns raised by the Claimant, in particular as to the position of his family should an anonymity Order not be continued in this matter, I vary the ET's earlier Order in this respect to extend to these proceedings before the EAT.

Introduction

2. In this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Claimant's appeal against a Judgment of the Southampton Employment Tribunal (Employment Judge O'Rourke sitting alone on 5 February 2016; "the ET"), sent out on 17 February 2016, by which the Claimant's claim of indirect sex discrimination was struck out as having no reasonable prospect of success. The parties appeared below as before me.

3. Considering the Claimant's appeal on the papers, HHJ David Richardson allowed that this challenge should proceed to a Full Hearing on the following bases:

> **"It is reasonably arguable that the Claimant's claim should not have been struck out, having regard to the well-known criteria set out in *Anyanwu* [*v South Bank Students' Union* [2001] ICR 391 HL], *Ezsias* [*v North Glamorgan NHS Trust* [2007] ICR 1126 CA] and other cases.**
>
> **There appears to have been an issue as to whether a "blanket ban" PCP existed which affected the Claimant. … Was this an issue which required determination at a hearing?**
>
> **There was then an issue as to whether the ban was proportionate. Can this be decided without findings about the job for which the Claimant was applying? - [The ET's Judgment] contains what appear to be findings [on this issue], but was it appropriate to make them on a strike out application? …"**

4. The Respondent resists the appeal, essentially relying on the reasoning of the ET.

A

The Relevant Background and the ET's Decision and Reasoning

5. In August 2015 the Claimant, a 31-year-old man with criminal convictions, applied to the Hampshire Constabulary for a position as a Force Enquiry Centre Officer, which involves answering and logging predominantly non-emergency calls from members of the public. His application was rejected pursuant to the Respondent's application of a policy document called Standard Operating Procedure ("SOP") 8, which provides (as recorded by the ET):

> **"8. … that each case will be considered on its merits and if the applicant's offence(s) is/are deemed sufficiently serious, they will be rejected, irrespective of age at the time of offending."**

6. The Claimant had disclosed criminal offences dating from 2002 until 2009, which included offences of criminal damage and non-dwelling burglary, possession of a firearm with intent to cause fear and violence, and arson; the last offence, arson, having been committed when the Claimant was 25. The Claimant had served two separate custodial terms relating to these offences: a four year detention in a young offender institution and two years' imprisonment. In his ET claim, the Claimant complained that the rejection of his application amounted to indirect sex discrimination in that:

(1) the application of SOP 8 - the provision, criterion or practice ("PCP") the ET understood to be relied on by the Claimant - put men at a particular disadvantage when compared to women because men commit significantly more crime than women do;

(2) the application of that PCP put the Claimant at that disadvantage, in that he had criminal convictions;

(3) the Respondent was unable to show that the said PCP did not go further than was reasonably necessary to achieve any legitimate aim or aims and/or that alternative measures would not have achieved the same aims;

(4) in particular, the Respondent was unable to justify a blanket ban;

(5) the Respondent had treated seriousness as the beginning and end of the matter with no reference to countervailing factors; and

(6) evidence from the Claimant's probation officer would suggest that he was a reformed character and suitable for appointment.

7. The issues had been clarified at an earlier hearing (before EJ Pirani) and the matter set down to consider, relevantly, whether the claim should be struck out as having no reasonable prospect of success or whether a deposit should be ordered. At the subsequent hearing before EJ O'Rourke, the parties agreed there was no dispute as to the facts of the case, the ET had all the relevant material before it and no oral evidence was necessary.

8. At the hearing, the ET had regard to a policy document entitled "Recruitment Vetting", which was contained within SOP 3 and which, relevantly, provided as follows (as set out by the ET at paragraph 15.2):

> ***"3.1. The purpose of RV (Recruitment Vetting) is to protect the community and the organisation by ensuring that only those who demonstrate the highest standards of conduct, honesty and integrity are recruited or appointed.*** **(It was undisputed between the Parties that such policies applied equally to police officers and police civilian staff.)**
>
> ***3.3. It should be noted that the convictions/cautions criteria set out in NPIA circular 01.2010 does not fully satisfy the requirements of this policy. A revised convictions/cautions criterion is set out in SOP 8 which should be followed in order to assist Chief Officers in discharging their responsibility to run an efficient and effective police force*** **(SOP 8 will be referred to separately).**
>
> ***5.2. Applicants with convictions/cautions and judicial or other formal disposals recorded may be granted*** **[Tribunal's emphasis]** ***vetting clearance in accordance with the Convictions and Cautions SOP 8. The vetting decision on applicants with impending prosecutions and current investigations should be deferred until the outcome is known.***
>
> ***5.5. The impact of appointing a police officer or a member of police staff who is or can be within the evidential chain and who is effectively tainted cannot be underestimated and can heavily affect the deployment of such an officer or member of police staff on appointment, and in some cases throughout their career. Generally the impact of 'taint' will lessen as the time since the finding recedes. Thus when allowing a 'tainted' individual to become a police officer or fulfil any other role which will involve them being placed in the evidential chain, they must be made aware of the impact that such a requirement will have on their career. Particular care must therefore be taken when clearing an applicant who will have to disclose criminal convictions, criminal cautions and penalty notices*** **(and several other issues relating to disciplinary offences).**
>
> **Page 37 of the policy at paragraph 5.1 … (as the entire SOP was not included the bundle [sic], as presumably very bulky, the paragraph numbering is not sequential)** ***5.1. the following factors may, through dishonesty or lack of integrity, create a presumption of unfitness for appointment to 'designated posts': criminal convictions or cautions*** **(amongst other matters, to include drug and alcohol misuse, association with criminals etc.)**

> **Page 61 paragraph 5.4 …** ***The criminal convictions and cautions criteria defined by this SOP must be used to assess each application on an individual basis. Eligibility will depend on the nature and circumstances of the offence. It is not possible to set out a full list of convictions that will preclude a person from joining the police service. Each case will be considered on its merits and if the offence is deemed sufficiently serious a person will be rejected irrespective of age at the time of offending. Force Vetting Units (FVU) should base their decision on the available information. There is no obligation upon the FVU to reinvestigate the allegation."***

9. The Claimant has told me that the reference there made to paragraph 5.1 and "designated posts" was in fact taken from SOP 4 and applied to management roles and thus was not relevant to the position he was applying for. Before me, the Claimant further placed reliance on paragraph 3.4 of SOP 3, which reads as follows:

> **"3.4. There are no national guidelines in respect of police staff recruitment. However, due to the increasingly wide range of duties carried out by police staff, and resultant access to information, assets and premises, the vetting criteria for the recruitment of police officers and members of the Special Constabulary has been extended to include persons applying for police staff vacancies."**

He says that makes it clear that a policy initially intended for the recruitment of police officers had been extended so it would also be applied to police staff positions.

10. It is SOP 8 that provides the detailed guidance on the criteria for consideration of convictions on recruitment vetting, the policy being based on the following principles:

> **"● The public is entitled to expect that police forces will recruit people who demonstrate the highest standards of professional conduct, honesty and integrity;**
>
> **● Those who work for and with police forces can be vulnerable to pressure from criminals and others to disclose information;**
>
> **● Convictions, cautions and other material information which reflects on personal integrity must be revealed by police officers and others in the evidential chain, in accordance with the Crown Prosecution Service (CPS) Prosecution Team Disclosure Manual, to the CPS on every occasion that they submit a statement of evidence in a criminal case. This information will be used by the CPS to assess the strength of the individual's evidence and if the case proceeds, it is likely then to be disclosed to the defence and may be used in open court to attack the credibility of the officer. Such an occurrence could undermine the integrity of the evidence, the witness and the force.**
>
> **● Police forces should not recruit people with convictions, cautions and judicial or other formal disposals which may call into question the integrity of the applicant or the service.**
>
> **● Although each case must be dealt with on its individual merits."**

11. The ET further recorded, in relation to SOP 8, as follows:

> **"15.4. It goes on to state, under 'type one' offences (which indicate that an applicant of any age should be rejected) are "offences such as" (i.e. non-particularised) 'firearms offences'.**
>
> **15.5. Under 'type two' offences (which should lead to rejection unless there are "exceptionally compelling circumstances") are included 'unlawful possession of weapons', 'criminal damage' and 'burglary'.**
>
> **15.6. Under the 'General' heading it states that:**
>
> > **Consider the circumstances of the offence(s), whether offending has been repeated, the applicant's age at the time of the offence, the length of time since the offence and above all, bearing in mind the overriding policy guidance outlined above this table.**
> >
> > **Further rejection criteria. Any offence committed as an adult or juvenile which results in a prison sentence (including custodial, suspended or deferred sentence and sentences served at a young offenders' institution or community home) should result in rejection."**

12. As for the statistical evidence relating to criminal offending as broken down by gender, the ET recorded the information before it showed:

> **"15.7. … that males (who form roughly half the population) receive 75% of convictions awarded by the Courts, with women obviously receiving 25%. 10% of men who are convicted receive custodial sentences, as opposed to 3% of women. These figures were not seriously disputed by the Respondent, so it is clear that men are three times more likely to be convicted of offences and if convicted, three times more likely to be sent to prison, thus reflecting the relative seriousness of the offences for which they are convicted, or, alternatively, the extent of their previous criminal record (the statistics also show that of those criminals who have fifteen or more previous convictions, 90% are men and 10% women)."**

13. The Claimant's criminal record was not in dispute (see above). The ET further recorded that there was a letter from the Claimant's former probation officer dated 26 November 2015 in the form of a "*to whom it may concern*" job reference, which stated that he trusted that the Claimant would not re-offend. Whilst the content of that letter was not disputed, as the ET observed, it postdated the decision in issue and had plainly not been taken into account by the Respondent before rejecting the Claimant's application; indeed, it is part of the Claimant's objection in this case that the Respondent never considered the actual merits of his application.

14. Accepting that men as a group were put at a particular disadvantage (when compared to women) by the Respondent's PCP of potentially excluding applicants with criminal convictions

and prison sentences, the ET turned to consider the Respondent's justification defence, implicitly accepting that the Claimant was as an individual disadvantaged by the PCP. It accepted the Respondent had demonstrated legitimate aims, in that:

> (1) the public legitimately expected that those who join a police force, whether as officers or civilian staff, are persons of good standing whose probity and trustworthiness is of the highest standard;
>
> (2) the public image of the police could be damaged by press reports of police criminality, and it was legitimate for the Respondent to seek to protect the force against that risk by vetting applicants;
>
> (3) even relatively junior civilian staff might become involved in the evidential chain of a criminal investigation, and the Respondent was entitled to take into account that the evidence of someone with a serious criminal record would inevitably be subject to greater challenge; and
>
> (4) there was a risk that persons with criminal convictions, particularly those who had served lengthy terms of imprisonment, might be vulnerable to pressure from criminals to disclose confidential information, and the Respondent was entitled to seek to protect against that (see the ET at paragraph 21 of its Reasons).

15. The ET then asked itself whether the means used by the Respondent to achieve those aims were proportionate; it concluded:

> **"22.1. These are not 'blanket' policies, as alleged by the Claimant. Offences are graded by seriousness, reflecting their effect on the possibility of recruitment. In considering a 'level 2' offence, while the test is still "exceptionally compelling circumstances", in order to permit employment, many of the offences listed are still of a very serious nature - to include, by way of example, sexual offences involving children and as stated above, the Claimant's offences within this category included burglary and criminal damage.**
>
> **22.2. The fact that consideration is given in SOP 8 to mitigating factors, such as whether the person was sentenced to prison, the number and currency of offences and the age at which committed all indicate that the Respondent is exercising proportionality in reaching its decision. In the Claimant's case, he had served two lengthy prison sentences, committed the most recent offences as an adult, five or six years ago. It is not the case, as the Claimant argues that once 'seriousness' of offence is established that no other factor is considered.**

> **22.3. The Claimant refers to the Respondent not having considered 'alternative means' of achieving the same aim, but does not suggest what such means might be. Presumably, it might, theoretically, be possible to argue that the Police could closely supervise such a person to ensure that they behaved with probity, but it cannot, I find, be proportionate to expect a police force to have to establish such supervision over its employees, or, as any such employee with mal-intent could simply await the expiry of a probationary period before behaving improperly, to do so effectively indefinitely. I consider, therefore, applying *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, that the means engaged by the Respondent were both appropriate and necessary.**
>
> **23. I find that the Claimant's application was dealt with proportionately and the range and scale of his offences dictated that his interest in securing employment was outweighed by the Respondent's legitimate aims, as I have found above."**

16. Reminding itself of the guidance in **Chandhok and Anor v Tirkey** [2015] IRLR 195 EAT, and earlier case law, that dismissal of discrimination claims at the preliminary stage should be exercised in a sparing and cautious way and not before the full facts have been established, the ET nevertheless concluded this was an appropriate case to do so, observing:

> **"25. … I have seen all the relevant evidence and also heard full submissions from both parties. There is no suggestion from either party (in particular the Claimant) that there may be other evidence of which I am not yet appraised. The facts are not in dispute and I therefore feel enabled to reach the decision that the Claim has no reasonable prospects of success and that there would be no benefit for either party in this matter proceeding to a full hearing."**

The Relevant Legislative Provisions and the Approach to be Adopted

17. Indirect discrimination is defined by section 19 of the **Equality Act 2010** ("EqA"):

> **"(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."**

18. The justification defence allowed by virtue of section 19(2)(d) places the burden on the Respondent but gives rise to an objective test, requiring the ET to carry out its own assessment as to whether the means adopted were proportionate, weighing the real needs of the employer

against the discriminatory effects of the requirement (**Hardy & Hansons plc v Lax** [2005] ICR 1565 CA and per Baroness Hale in **Homer v CC West Yorkshire Police** [2012] UKSC 15).

19. Pursuant to Rule 37(1)(a) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), an ET can strike out a claim where it considers it has no reasonable prospect of success. Where an ET does not consider it appropriate to strike out a claim or any part of a claim under Rule 37(1)(a) but still considers that the claim has little reasonable prospect of success, it may instead decide to order that further pursuit of the claim is made subject to a deposit order under Rule 39 of the **ET Rules**.

20. Given the draconian nature of any decision to strike out a claim, it has been made clear in a number of cases that it is a power to be exercised sparingly (see, for instance, per Lady Smith in **Balls v Downham Market High School & College** [2011] IRLR 217 EAT). That is particularly so in cases involving claims of unlawful discrimination, for the reasons revisited by Langstaff P (as he then was) in the case of **Chandhok**, to which the ET made reference in its reasoning, and in which it was observed:

> **"19. … those occasions on which a strike out should succeed before the full facts of the case struck-out [sic] had been established in evidence were rare. This is particularly so where the claim is one of discrimination. Such a claim will centrally require a tribunal to establish why an employer acted as it did. That will usually require an evaluation of the reasons which the relevant decision-maker(s) or alleged discriminators had for acting as they did. Such an evaluation depends, often critically, upon what may be inferred as well as proved directly from all the surrounding circumstances, including evidence of the behaviour (whether by word, deed, or inaction) of such individuals not only contemporaneously to the events complained of but also in the past and, sometimes, even since the events on which the claim was founded; and it may include an assessment, in the light of the evidence that was called, of whether the failure to call other evidence was of significance. These can often be challenging assessments, all the more so where there are complications of language and culture. Considerations such as these led Lord Steyn in *Anyanwu* … to express the view at paragraph 24 (echoed by Lord Hope in his paragraph 37) as follows:**
>
> > **'In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is**

> **necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university.'**
>
> **20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out - where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in *Madarassy v Nomura International plc* [2007] IRLR 246 CA):**
>
> > **'… only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'**
>
> **Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."**

The Appeal

The Claimant's Submissions

21. The Claimant first contends that the ET erred in its identification of the PCP, which it wrongly assumed was simply taking into account criminal convictions (see paragraphs 11.1 and 21 of the ET's Reasons). There had not been a proper identification of the PCP. Whilst he had not clearly identified the PCP in his ET1 (although his Particulars of Claim had referenced SOP 8), his intended objection had been to the blanket ban on those who were not of previous good character; that was the PCP he relied on before the ET, as set out in his written representations. The ET had proceeded on the basis of the PCP assumed by EJ Pirani at the earlier telephone case management discussion: that is, that each case would be considered on its merits and if the offence was deemed sufficiently serious an applicant would be rejected irrespective of age at the time of offending (see paragraph 8 of the ET's Reasons, referencing paragraph 5 of EJ Pirani's Order). That was not a proper reflection of the Claimant's case.

22. Even if the ET had properly approached this case, appreciating that the Claimant was objecting to a blanket policy (see paragraph 22.1), it had wrongly rejected his argument that no

other factor was considered once seriousness of offence had been established (see paragraph 22.2 of the ET's Reasons). The Claimant's case in this regard was made good by paragraph 5.4 of SOP 8, paragraph 17 of the Respondent's grounds of resistance in the ET proceedings, and paragraphs 11 and 20 of the strike out application. Given that no evidence was called before the ET, it could not go behind the primary facts in this regard.

23. Moreover, the ET had erred in concluding the Respondent had made good its case on objective justification and thus that it was appropriate to strike out the claim as having no reasonable prospect of success. The ET had permitted the Respondent to justify on the basis of stereotype, without scrutiny. There was no discussion of alternative means. Again, the ET had proceeded (see paragraph 22.3) on the basis of assumption. Specifically, it had failed to consider whether the Respondent's justification defence was in fact based on subjective impression of stereotyped assumptions and had failed to carry out the requisite degree of scrutiny (see **Homer**). It was apparent that SOP 8 was originally designed for police officers and had been extended to persons applying for civilian staff vacancies. Although the aims were as set out within the documentation, as the ET recorded, there was insufficient information provided by the Respondent to explain why those aims applied to the role the Claimant had applied for. The question for the ET was whether there was sufficient nexus between the particular job role and the legitimate aims of SOP 8: the legitimate aims might apply to some roles - certainly, police officers - but not others, not to all staff roles. Here the ET knew little or nothing about the particular role in question. It seemed not to appreciate, for example, that calls would be recorded, thus reducing the risk it identified in terms of giving evidence, it had no evidence as to whether the role actually entailed contact with any confidential information, and had failed to properly consider that the application of the PCP meant that the Respondent failed to take into account mitigating and other circumstances, including the Claimant's record since

offending, the life changes he had made and the good references he could point to. Furthermore, the ET had wrongly assumed that his obtaining a Rule 50 anonymity Order meant that he was conceding there was a reputational risk to the Respondent and had thus taken into account an irrelevant factor.

The Respondent's Submissions

24. For the Respondent, Mr Self observed that the recruitment vetting policy in issue is a national one and thus of more general importance than just in respect of the Respondent. As for the approach the ET had been required to adopt, recognising that discrimination cases can be particularly fact sensitive and that the facts require full consideration before being determined, the Respondent observes nonetheless that there is no special test for such cases when it comes to applying Rule 37. The real point of distinction is whether the claim is fact sensitive, not whether it is a discrimination complaint per se. Specifically, the particular recognition given to discrimination claims in cases such as **Anyanwu** and **Ezsias** did not suggest there was a bar to the striking out of such claims, merely that care needed to be taken. The ET in the present case was mindful of this approach. It had recorded that there was no dispute in respect of the facts, and it had been agreed that no oral evidence was necessary. This took the case outside those considered in the authorities as unsuitable for a strike out. As for the case as considered by the ET, it had taken the PCP to be that relied on by the Claimant - SOP 8 - as had been confirmed by EJ Pirani at the earlier hearing. It had, further, asked itself the correct questions and applied the correct test when considering justification. It reached a permissible conclusion with which the EAT should not interfere.

25. On the identification of the PCP, the Respondent had dealt with the case assuming the PCP was SOP 8, which seemed to be the position from the ET1 (see paragraphs 6, 10 and 12 of

A the Particulars of claim attached to that form), which was what the Respondent had understood when drafting its ET3 (see paragraph 10 of that document). It was, further, what EJ Pirani had understood at the telephone case management discussion, and that was what the Respondent had addressed in its written submissions. That was also the basis on which EJ O'Rourke had proceeded (see paragraphs 7 and 8 and then paragraph 15.3 of the Decision). If the Claimant had not been relying on SOP 8 as the PCP, he would have been able to make that clear. If the Claimant now sought to put the case differently, that was not permissible.

26. Turning to the question of justification: accepting this was an indirect discrimination case that required the ET to carry out an objective assessment, there could be no general rule that this could not be done at a Preliminary Hearing. The parties had agreed no oral evidence was required, a factor that plainly weighed with the ET (see paragraphs 14, 18 and 25). The ET's carrying out of the requisite balancing exercise was then apparent from paragraphs 21 to 24. The ET was entitled to take into account - as was the Respondent - the public perception of the trustworthiness of its employees. It was not irrelevant that the Claimant wished to have anonymity in the ET proceedings, even if that was in respect of his family rather than his reputation alone; it again went to the question of perception. The ET had addressed the points raised in SOP 8 as legitimate aims (see paragraphs 21.1 to 21.4). Had the Claimant sought to take issue with those points in respect of the particular job in question, he could have raised that as an issue of fact to be determined at a Full Hearing; he did not. More generally, the ET had the correct test in mind on proportionality (see paragraph 22.3) and had carried out the balancing exercise required. There was nothing further (see paragraph 25).

The Claimant in Response

27. When the ET recorded the concession that the facts were not in dispute, the Claimant had understood that to mean the primary facts; there was, plainly, a dispute in terms of interpretation. The Claimant, further, did not consider he had conceded that the ET had the necessary facts regarding the specific job role for which he was applying; notwithstanding the agreement not to call oral evidence, the ET clearly did not have enough information about the nature of the role the Claimant was to undertake. There was no evidence that any member of the public had any particular concern about the past record of a non-emergency call handler. There would simply be no reason for the Claimant's record to become public. The ET had failed to take on board that this was the Respondent's application and it had the burden to prove justification. It was simply wrong for the ET to make assumptions as to the role.

Discussion and Conclusions

28. The ET was here concerned with an application to strike out a claim of indirect discrimination. As such, the claim was not fact sensitive in the same way as would more commonly be the case in direct discrimination claims; the issues on an indirect discrimination case will be different. That does not mean that an indirect discrimination case will not give rise to important factual disputes that need determination at a Full Hearing; it is just an observation that the questions for the ET are different to those arising on a direct discrimination case. Moreover, the factual and evidential issues that will arise on any case of indirect discrimination will be claim-specific. Some such claims will be determined on the basis of largely agreed facts. Where, however, an issue arises in relation to a justification defence, the ET will need to make sure that it does not lose sight of its role and the requirement upon it to carry out effective scrutiny of the Respondent's case, itself weighing the legitimate aims, as it has found them to be, against the discriminatory impact of the PCP in question.

29. Turning then to the specific issues raised by this appeal, the first question is whether the ET properly carried out its assessment against the correct PCP; specifically, whether it approached this case as involving a blanket ban against those who had criminal convictions or had been convicted of offences deemed to be of such seriousness that the Respondent would simply not consider any employment application further.

30. The difficulty for the Claimant on this point is that, as he has volunteered before me, he had not himself defined the PCP he relied on with any clarity in his claim. It seems that EJ Pirani had assumed a PCP that entailed the application of SOP 8, and that was the basis upon which the hearing proceeded before EJ O'Rourke. EJ Pirani's definition of the PCP was not unreasonable given how the parties' cases had been put in the ET1 and ET3. Further, no objection was taken to his identification of the issues either during the telephone case management discussion or thereafter. Whilst the Claimant - in his written representations - put his case before EJ O'Rourke on the basis of a blanket ban, he never expressly objected to the earlier characterisation of the issues and it is hard to see how his characterisation of the PCP was permissible given the terms of SOP 8, on which he had relied in his ET1.

31. Proceeding on the basis that the PCP was essentially the application of SOP 8, the ET rejected the Claimant's characterisation of this as a blanket ban. Having been taken to the various policy documents that record the Recruitment Vetting Policy, I am unable to say that the ET was not entitled to reach that conclusion. Indeed, the paragraph emphasised by the Claimant before me in oral submissions - paragraph 5.4 - only serves to underline that eligibility will depend on the nature and circumstances of the offence. The importance of this point is that the ET was required to assess the Respondent's justification defence against the application of the PCP in issue in this case. Here, the ET legitimately took into account the

degree of flexibility - none for the most serious of offences; some for those falling into the secondary category - afforded by SOP 8 in determining whether the Respondent had shown the requisite proportionality. The PCP had been identified as the application of SOP 8, and the ET was entitled to consider how that policy applied as a whole. Doing so, it took into account that it did not operate as a blanket exclusion on all candidates who could not show they were of good character. Given how the issues had been identified and on the material before the ET, I am unable to say that was other than a permissible conclusion.

32. I turn then to consider whether the ET erred in striking out the Claimant's claim on the basis that it had no reasonable prospect of success as the Respondent had made good its justification defence.

33. On this point, I have to confess I have some sympathy for the Claimant. It does appear that there was not a full explanation of evidence relating to the particular job for which he was applying and I would normally expect an ET to scrutinise the Respondent's evidence on this question at a Full Hearing. That said, I am bound to consider the appeal on the case as it was presented before the ET and not some other. As Mr Self has pointed out to me, the ET, on three occasions in its Reasons, recorded that the parties were agreed that the facts were not in dispute, no oral evidence was required, and (see paragraph 25) there was no suggestion that there might be other evidence to which the ET had not been taken. Accepting that the Claimant was, and remains, acting in person, I also have to bear in mind that this was an adversarial process, and in this case the issues had been made plain at an earlier stage. That having been done, it was clear that one of the issues to be determined was the question of objective justification and whether the Respondent's case on that point was so strong as to mean the Claimant's claim had no reasonable prospect of success. Indeed, EJ Pirani had even flagged up the approach that

would need to be adopted when considering the objective justification defence (see paragraphs 9 and 10 of his Order).

34. Thus, it was on the basis that there was nothing more - the facts were not in dispute and oral evidence was not required - that the ET approached its task in this case. This was not, therefore, the striking out of a claim at the preliminary stage when it was apparent that there was further evidence to come. The position of the parties was that there was nothing more: the ET was as well placed to determine the merits of the case as it was ever going to be. Doing so, the ET tested the Respondent's defence of objective justification against the available policy documentation. Although I can allow that it did not have specific details in relation to the job that the Claimant had applied for, I also have to note that it was not suggested that there was anything more it needed in terms of the evidence (see paragraph 25 again). The ET accepted the legitimate aims as set out in SOP 8 (see paragraph 21), as I have allowed it was entitled to do. It then turned to question whether the measures taken were proportionate given the discriminatory effect the ET had found existed. On this point, the ET had regard to SOP 8 in full, which included the gradation of offence by seriousness and the fact that consideration of mitigating circumstances could be permitted. Allowing that the Respondent might not have considered alternatives - such as taking steps to allow for the employment of a particular individual whilst meeting the stated concerns of SOP 8 - the ET did not consider that would have been a proportionate requirement to make of the Respondent in these circumstances (see paragraph 22.3).

35. Given the way in which the case had been argued before the ET, I am unable to hold that it was not entitled to reach this view on the material before it. I consider therefore that I am bound to dismiss the appeal.