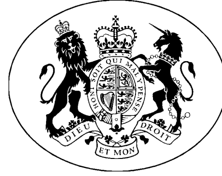

EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr R Davda	**Institute and Faculty of Actuaries**

Heard at: London Central **On**: 4 – 6 December 2019

Before: Employment Judge Lewis
Ms S Campbell
Ms L Simms

Representation

For the Claimant: Mr J Jupp, Counsel

For the Respondent: Ms A Del Priore, Counsel

RESERVED JUDGMENT

The unanimous decision of the tribunal is that

1. The claim for indirect race discrimination under section 19 of the Equality Act 2010 is not upheld.

2. The tribunal does not make a declaration under section 145 of the Equality Act 2010.

REASONS

Introduction

1. This case arises because of the introduction by the respondent of a new curriculum (Curriculum 2019). Generally, exams already passed were recognised under the new curriculum as going towards overall qualification as an actuary. However, Curriculum 2019 combined two previous study modules (CT1 and CT5) into a new CM1. Students who, like the claimant, had only passed one of

the component exams, were given a two year transition period to pass the other. The claimant did not achieve this and now has to pass CM1, losing the benefit of the CT1 exemption he already had. This is particularly distressing for the claimant who has taken many years attempting and gradually passing the individual exams.

2. Arising out of this curriculum change, the claimant brought a previous case for direct discrimination and indirect discrimination based on his nationality, making comparison with the position of an Indian national who has access to the Indian Actuarial Institute ('IAI'). He was successful but the respondent has appealed. In essence, the claimant argued that the IAI ran exams four times/year rather than twice/year which benefitted its students. In turn, the respondent would recognise the equivalent exam gained in India.

3. The present case alleges that South African students are advantaged in a different way over British students in that the South African body ('ASSA') continued to run CT1 and CT5 equivalents as separate exams, and that the respondent continued to recognise those exams after the cut-off date for the new curriculum and/or recognised a Fellow of ASSA under a Mutual Recognition Agreement ('MRA'). The claimant says that this is indirect discrimination against him as a British national because he cannot take the ASSA exams as it requires attending workshops in South Africa.

4. As well as defending the claim on factual and legal bases, the respondent also argues res judicata and Henderson v Henderson by reason of the previous claim.

5. Mr Jupp also represented the claimant in his previous successful claim. However, much of the case preparation for the present claim was carried out by the claimant in person. Given the legal complexity of the argument, this explains why certain factual content in the ET1 and in the claimant's witness statement is superfluous to the present claim.

Claims and issues

6. The claimant claims indirect race discrimination based on his nationality and a declaration under s145 of the Equality Act 2010 that the respondent's rule that he must pass exam CM1 and can no longer sit CT5, having had his exemption for CT1 erased, is void and unenforceable.

7. The issues were agreed between the parties as follows. For the avoidance of doubt, the claimant confirms that the agreed issues cover all arguments which he wishes to run, notwithstanding any formulation in the ET1 or amended ET1 which may be different.

7.1. Does the claim for indirect discrimination substantially duplicate claim 2 in case number 2207536/2017 so that it should be struck out as res judicata?

7.2. Is it an abuse of process because of the principle in Henderson v Henderson?

7.3. Does the respondent operate a PCP of requiring a student member, either to pass or to have been exempted from, examinations CT1 and CT5 in order to be exempted from examination CM1 under Curriculum 2019?

7.4. Does the respondent apply this PCP to its non-British student members?

7.5. Did this PCP put British student members at a particular disadvantage compared to non-British student members whose circumstances were materially the same?

7.6. Was the claimant put at that disadvantage?

7.7. Can the respondent show that the PCP was a proportionate means of achieving a legitimate aim?

7.8. Insofar as the claimant is required to pass examination CM1; is no longer able to sit CT5, and has had his exemption for examination CT1 erased, is this an indirectly discriminatory rule entitling him to a declaration that it is void and unenforceable?

The respondent did not pursue the issues on time-limits.

Procedure

8. The tribunal heard from Mr Davda and, for the respondent, from Clifford Friend and Mike McDougall. Mr McDougall gave evidence by video link. There was an agreed trial bundle of 1443 pages. Mr Jupp also provided a written opening statement. We reassured Ms Del Priore that we would read this for the law and how the case was put and would not rely on it for fact findings. Both representatives provided two sets of written closing submissions.

9. During the afternoon break on the first day, both Counsel asked to speak to the tribunal without the parties. Ms Del Priore felt she was in difficulty presenting the respondent’s case. Mr Jupp suggested it might be helpful to pause the cross-examination of the claimant and interpose the respondent’s two witnesses. Ms Del Priore would then see from his questions, exactly how the claimant put his case. Ms Del Priore thought this a good idea, as did the tribunal. It would also assist the claimant, in that it would give context to his replies in cross-examination. An important aspect of this case was the respondent’s account and justification, which the claimant would be in a better place to answer once he had heard it.

10. As the claimant was in the middle of his evidence, the usual rule would apply that he could not discuss the case with others. However, in the

circumstances, it was agreed that the claimant could discuss with Mr Jupp anything in relation to the cross-examination of the respondent's witnesses.

11. In addition, the tribunal prepared for the next day a list of the key facts on which it would like evidence and where it would be helpful to focus. The parties were told that they could of course address any other facts which they thought relevant to the present case.

Fact findings

12. The respondent is the qualifications body for actuaries in the UK. It sets exams for qualification as a Fellow or as an Associate Member of the respondent. Students of any nationality can join the respondent and go through the qualification process. In 2017, the respondent had 5,600 student members based in the UK plus 5800 based in India, 468 based in China, 397 based in South Africa and others. The respondent wants to attract overseas members and has exam centres overseas. The respondent is an internationally respected and prestigious body.

13. Students must pass or be exempt from all the respondent's relevant exams in order to qualify as a Fellow or Associate. These do not need to be taken at the same time.

14. Prior to Curriculum 2019, which was introduced with effect from 1 January 2019, students had to take nine core technical exams (CT1 – CT9).

15. With effect from 1 January 2019, the respondent introduced a new curriculum, known as 'Curriculum 2019'. Prior to that date, students were required to pass a number of exams or have an individual examination exemption ('IEE'). IEEs were granted where the respondent recognised passes of equivalent exams from sister actuarial associations in other countries.

16. Mr Davda has British nationality. He wants to qualify as an actuary. He has been studying for over 16 years and has been gradually passing the exams, although often failing and retaking them several times.

17. When Curriculum 2019 was announced, it contained a new CM1 exam. Students who had passed the previous CT1 and CT5 (or who had exemptions from them) did not need to take CM1. There was two years advance notification which was regarded as a 'transition period'. The claimant was exempt from CT1 because its content had been covered on his degree. However, he had not yet passed CT5.

18. The claimant was notified by email from Karen Bocklesby on 10 October 2016 that the changes in curriculum would be implemented in 2019. On 12 January 2017, the Stakeholder Relationship Manager (Mr Herringman) wrote to the claimant explaining the effect on him of Curriculum 2019. He said that each subject from the previous curriculum would transfer over but there were

a few exams in the new curriculum which would combine two previous exams. Relevant to the claimant were CM1 and CS2. Mr Harriman explained that in order to obtain CM1 in the new system, the claimant would need to pass CT5 by 31 December 2018 or to have been granted an exemption in CT5 by 1 February 2019.

19. In addition, to obtain the new CS2, he would need to pass or gain exemption for CT4. This is not however the subject of the present claim.

20. The claimant did not sit any CT5 exams in this period. (He unsuccessfully sat CT4.)

The reason for the new curriculum

21. Apart from small annual changes to the syllabus, the last time the respondent had fully reviewed its curriculum prior to Curriculum 2019 was in 2004. It therefore decided a fundamental reappraisal was necessary to meet contemporary needs.

22. The respondent began the substantive process of reviewing its curriculum in 2015. It consulted widely with students, universities, its qualified members, employers, other actuarial associations and its oversight body, the Financial Reporting Council. Based on the feedback and the new International Actuarial Association syllabus, it brought its core syllabus up-to-date. The form of some assessments also changed so that professional competency could be more overtly demonstrated. CM1 was one of the assessments changed in this way.

23. The respondent released details of the new Curriculum 2019 to students through its website and student newsletters in 2016. Students who had to deal specifically with the new position on CT1 plus CT5 (or CT4 plus CT6) were contacted by email. The definitive new syllabus for Curriculum 2019 was released to students two years before the changes took place. This gave students a two year ‘transition’ period with four exam ‘diets’ (sitting opportunities) to pass any outstanding exam of those pairings. Curriculum 2019 came into effect on 1 January 2019 and the first exams sat under it were in April 2019. The last sitting to avoid CM1 and pass any outstanding CT1 or CT5 was September 2018.

24. One part of the extensive consultation for the new curriculum had concerned transition arrangements. The feedback received was that the transition rules should be simple and parallel systems should not drag on indefinitely. We were not given evidence regarding exactly what question was put out in the consultation on this point and the nature of the response. In particular, we do not know whether consultees’ minds were explicitly focussed on the position regarding CT1 plus CT5 (or CT4 plus CT6).

25. The only modules which were combined in Curriculum 2019 were CT1 plus CT5 and CT4 plus CT6. The respondent took the view that, at worst, an existing student member would be asked to pass two exams over a two year

period with four sitting opportunities for each. All other exams transitioned seamlessly. The respondent thought this was proportionate and fair.

26. The assessment pattern for CM1 (and indeed CS2) differed from the old system which had been 100% exam-based in an examination centre. The exam component would in future comprise only 70% of the total marks. The remaining 30% was a one hour 45 minute problem-based assessment, delivered on-line and undertaken unsupervised at home.

27. As for whether CM1 could continue to have been divided into two component parts, the respondent says this was not feasible because other elements have been added into CM1 and there is also the different assessment method. Mr McDougall on the other hand said that, in his view, CM1 was essentially the same as the previous CT1 plus CT5 with only minor updating.

28. About 3900 student members of the respondent had only a CT1 or CT5, but not both, at the time the new Curriculum was announced. Of those, about 1000 managed to pass the outstanding exam before the cut-off date of 31 December 2018.

<u>The position in South Africa</u>

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29. The relevant body in South Africa is the Actuarial Society of South Africa ('ASSA'). We heard from Mr McDougall, who is CEO of ASSA, which role he has held since 2013. We accept his evidence regarding the system in South Africa and the content of its continuing CT1 and CT5 equivalent exams.

30. Nationals of any country can become members of ASSA. It is also possible to be a member of both ASSA and the respondent. However, individuals cannot mix and match exams of each body. They have to pass the exam programme of one or other body and become a Fellow of that body. They can then seek to become a Fellow of the other body through a Mutual Recognition Agreement ('MRA'), which we discuss further below. It is also possible for students of one or other body to gain individual examination exemptions ('IEEs') where they have taken an equivalent exam with the other body. We have explained this above.

31. ASSA is an independent association and it is not controlled by the respondent. Historically the respondent played a significant role in ASSA including providing the syllabus and setting ASSA's exams on certain subjects where ASSA chose to outsource this. Prior to Curriculum 2019, ASSA outsourced to the respondent its equivalent exam modules for CT1 and CT5.

32. The equivalent to CT1 was called A201 and more recently, A211 and the equivalent to CT5 was called A203 and more recently A213. Prior to Curriculum 2019, ASSA and the respondent used the same syllabus and exams for these subjects and the respondent marked the exams.

33. When the respondent decided to move to Curriculum 2019, ASSA generally followed suit. The only difference between ASSA's Curriculum 2019 and the respondent's Curriculum 2019 was that ASSA it decided to keep A211 and A213 as separate exams rather than combining them as the respondent had in CM1. The respondent still owns the copyright on the study material for A211 and A213, but ASSA now sets the exams, marks them and validates them independently.

34. To the extent that the respondent had slightly updated CT1 and CT5 when combining them for CM1, ASSA matched the updating, but then split the content back into two. The content is the same.

35. A British national is permitted to join ASSA. If a student of the respondent had passed CT1 and/or CT5, and then joined ASSA as a student, ASSA would credit that student with A201 (A211) and/or A203 (A213) respectively towards their own Fellowship.

36. Mr McDougall explained that if a student of the respondent joined ASSA, ASSA would recognise a number of equivalent exams taken as a student of the respondent. However, there would still be a few ASSA specific Fellowship level exams which would have to be taken. In addition, such a student would have to do ASSA's three year 'Normative skills programme'. This can be done in parallel with the technical exams or at a different time. That programme would involve attending workshops every six months in South Africa. However ASSA's technical exams can be taken in various locations around the world, including London.

37. We accepted Mr McDougall's evidence on the above points. He was the witness best placed to understand the ASSA system and we had no reason to disbelieve his evidence.

38. ASSA has MRAs with other institutions to recognise equivalent qualifications. The MRAs apply to Fellow members of the respective institutions, not to students. The MRA with the respondent is still on ASSA's website.

The effect of Curriculum 2019 on IEEs and MRAs

39. The respondent had Mutual Recognition Agreements ('MRAs') with nine major actuarial associations including ASSA. MRAs apply to qualified actuaries as opposed to students.

40. An important issue in this case is whether the respondent continued to operate its MRA with ASSA from January 2019 and/or whether it continued to grant Individual Examination Exemptions ('IEEs') from that date. Professor Friend, on behalf of the respondent, says all MRAs and IEEs were suspended from January 2019. The claimant does not believe this is correct. We have therefore looked at the evidence very carefully on this point.

41. At page 343 of the trial bundle was a Briefing report written by Professor Friend for the respondent's Council on IEEs. This reported the decision taken by the respondent's Management Board. It notes that they have had ongoing discussions regarding the future of MRAs and IEEs, and this had become particularly urgent in relation to the IAI, where the majority of the respondent's IEE arrangements existed. The decision in the claimant's previous tribunal case (in May 2019) had added further significance to the issue.

42. The Briefing report notes the Management Board's decision 'to withdraw completely from IEE arrangements with sister associations subject to appropriate transition arrangements being in place'. The Briefing report recognises the potential impact on relationships with sister associations as well as the financial implications of this action, 'however, IEEs are currently suspended which already signalled to these associations that there may be some level of change in the near future'.

43. Based on this, which is consistent with Professor Friend's evidence, we conclude on the balance of probabilities, that the IEE arrangements were already suspended at the time of the Board decision, although a permanent withdrawal had not yet taken place. The table in Appendix 1 notes the Management Board's decision was on 12 July 2019.

44. Appendix 1 also notes that on 24 April 2019, the Management Board agreed to 'un-pause the IFoA's MRAs and IEEs subject to formalising new agreements with sister associations'. Clearly new agreements had not been formalised and therefore the 'un-pause' had not happened by the time of the further meeting and further decision on 12 July 2019.

45. This leaves the question as to when MRAs and IEEs were first paused.

46. The (draft) minutes of the Management Board meeting on 12 July 2019 note the Board's agreement with 'the Steering Committee's conclusion that the IFoA could not continue with the IEE arrangements in their current form.' It was also agreed that to be fair to existing members of the respondent and the IAI, the IEE arrangements should continue until the end of December 2021. Then at paragraph 12.6, the minutes say that the respondent's arrangements with other actuarial associations would also need to cease with the same transitional arrangements.

47. On 31 July 2019, the respondent announced on its website that from 31 July 2019, it would cease awarding IEEs to new student members. However, existing students would continue to be eligible for IEEs up to 31 December 2018. The respondent said it was currently reviewing the curricula of other actuarial associations to ensure they mapped to Curriculum 2019. While the process was being undertaken, the respondent would not accept IEEs from 1 January 2019. Where the mapping process resulted in a positive mapping of subject matter and examination level, exemptions would reopen based on a new agreement which would run until 31 December 2021 and be backdated to 1 January 2019. Student members would then have until 2022 to apply for these exemptions.

48. As at the date of the full merits hearing before us, the mapping has not been completed and the IEEs for pre 31 July 2019 students are still suspended.

49. The claimant suggested that the MRA and IEEs with ASSA were not originally paused or suspended as at 1 January 2019, but that this was retrospectively suggested.

50. We were shown an email between the respondent and ASSA on 19 September 2018 where Mr Bristow (Head of Education Partnerships and Lifelong Learning) asked Mr Backeberg for materials necessary to progress the mapping for subject exemptions and MRA. On 23 April 2019 and 1 May 2019 there is an exchange of emails which shows this mapping has not yet completed.

51. On the balance of probability, we accept Professor Friends' evidence that the respondent suspended IEEs and MRAs with other associations (including ASSA) from 1 January 2019. It is logical that they would have done so, since this was the point at which the new Curriculum 2019 took effect and a mapping exercise needed to be carried out. Preparations to carry out the mapping exercise started prior to January 2019 as indicated by the Bristow email of 18 September 2018. By April 2019, the arrangements were already 'paused' since there was talk of unpausing them. As we say, it is logical that the pause would have occurred on the new Curriculum 2019 coming in. The subsequent discussions were all about whether to stop the arrangements altogether and concerned various transitional arrangements.

52. During cross-examination, it was pointed out that the MRA with ASSA was still on the respondent's website. This was true, but as a search by the parties on the spot revealed, the respondent has a generic comment on its website that:

> 'Following the introduction of Curriculum 2019, all MRAs other than the AAE MRA are temporarily suspended. The IFoA will continue to receive and consider on an individual basis applications for individuals who are qualified by one of these associations'

Law

53. Under s53(1) of the Equality Act 2010, a qualification body must not discriminate (a) in the arrangements it makes for deciding upon whom to confer a relevant qualification (b) as to the terms on which it is prepared to confer the qualification or (c) by not conferring a relevant qualification.

54. Under s19 of the Equality Act 2010, indirect race discrimination occurred if the respondent applies to the claimant a provision, criterion or practice which (a) the respondent applied or would have applied to those who do not share the claimant's protected characteristic (British nationality), (b) put, or would have put those who share the claimant's protected characteristic at a

particular disadvantage when compared with those who do not, (c) put, or would have put the claimant at that disadvantage, and (d) the respondent cannot show it to be a proportionate means of achieving a legitimate aim.

55. Under s23, on making the comparison, there must be no material difference between the circumstances relating to each case.

56. Under s145, a rule of an undertaking is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of the person that is of a description prohibited by the Equality Act 2010.

57. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

58. The law on res judicata was agreed by the representatives and set out in written submissions.

59. The modern understanding of the rule in Henderson v Henderson is set out by Lord Bingham in Johnson v Gore Wood and Co [2002] 2 AC 2, HL. In summary, the bringing of a claim in a later case may in itself amount to abuse if the tribunal is satisfied that the claim should have been raised at the earlier proceedings. It is not enough that the matter could have been raised in the earlier proceedings. The onus is on the party alleging abuse to satisfy the tribunal that this is the case. It is not necessary to identify any additional element, such as a collateral attack on a previous decision or some dishonesty, but where those elements are present, the later proceedings will be much more obviously abusive. There will rarely be a finding of abuse unless the later proceedings involve unjust harassment of a party. The tribunal's decision should be a broad merits-based judgment taking account of the public and private interests involved. The crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

Conclusions

60. We now apply the law to the facts to decide the issues.

Issue 1: res judicata

61. We received written submissions on res judicata, which we do not propose to repeat in these Reasons and on Henderson v Henderson. We do not find that res judicata applies or that there is an abuse of process by the claimant.

62. This claim does not reopen the 2017 judgment or any finding in that judgment. The cause of action here, is not identical. It is true that the disadvantage in each case centres on the fact that the respondent changed the curriculum such that the claimant has to have passed (or been exempt from) both CT1 and CT5 in order to be credited with CM1. However, the complaint in the previous case was that up to 31 December 2018, Indian nationals could join the IAI and have twice as many exam sittings per year in which to try to pass the exams. This was not open to the claimant because British nationals could not join the IAI. The complaint in this case was that ASSA students, post 31 December 2018, could continue to take a CT5 equivalent and have it recognised by the respondent, and that this was indirect discrimination because British nationals could less easily access ASSA than South African nationals. Of the two case examples shown to us, we find this distinction closer, albeit not identical, to the Brunsden v Humphrey distinction than to the Conquer v Boot scenario.

Issue 2: Henderson v Henderson

63. We do not find the claim was an abuse under Henderson v Henderson. The claimant did not know about the ASSA system until long after he presented his previous claim. We do not find that the claimant was misusing or abusing the process of the tribunal by seeking to raise before us an issue which could have been raised before.

Issue 3

64. The claimant relies on the following provision, criterion or practice: 'the requirement of the respondent for a student member to pass (or be treated as having passed) both examination CT1 and examination CT5 in order to be exempt from examination CM1 when seeking to qualify either as an Associate or as a Fellow of the respondent.'

65. 'Be treated as having passed' refers to having got an Individual Examination Exemption ('IEE').

66. The respondent does apply this provision, criterion or practice to its student members. Students have to pass the CM1 unless they have passed (or have an exemption from) both the former CT1 and CT5.

Issue 4

67. The respondent applies this provision, criterion or practice to all its student members. Whatever their nationality, they have to pass CM1 unless they have already passed CT1 and CT5 or been exempted.

Issue 5

68. Issue 5 concerns whether this PCP puts British student members at a particular disadvantage compared with non-British student members.

69. The claimant's argument is that non-British student members of the respondent, ie people of South African nationality, have had the opportunity to join ASSA and, following 31 December 2018, to take the equivalent exams with ASSA and be granted an IEE by the respondent. He says that although ASSA allows British people to join as students and take its exam, this is practically very difficult for British nationals because of the required attendance at workshops in South Africa.

70. The first difficulty for the claimant is that an ASSA student is no better off than a student of the respondent who is based in Britain. Up to 31 December 2018, a student of the respondent could still take any outstanding CT1 or CT5 exam. Equally an ASSA student could take the ASSA equivalent and gain an IEE. After 31 December 2018, although an ASSA student could still take the new equivalent of CT1 or CT5 separately, the respondent would no longer grant an IEE.

71. It is possible that after the end of the mapping exercise and up to 31 December 2021, the respondent will retrospectively grant an IEE for the ASSA equivalent exam, but we do not know whether that will happen. On the basis that currently the mapping exercises have not been completed, there is not at present an advantage for South African nationals because they can more easily access the ASSA route.

72. Equally, it would not advantage an ASSA student to become a Fellow or Associate of ASSA by taking the ASSA exams, because the respondent suspended its MRA with ASSA from 1 January 2019 and it is still suspended.

73. For this reason alone, the indirect discrimination claim fails.

74. There is also another problem for the claimant in trying to prove a British student would be disadvantaged compared with a non-British student, even if it were the case that the respondent recognised the ASSA equivalent exam after 31 December 2018. This concerns the nationality of those who have been disadvantaged by the new rule. We were not satisfied on the evidence that the PCP put British people at a particular disadvantaged compared with non-British people.

75. It was agreed that the pool for comparison was student members of the respondent who already had a CT1 or CT5 exam or exemption, but not both. We were told that about 3,900 students were originally affected of whom about 1000 managed to pass the outstanding exam before the cut-off date of 31 December 2018. We were given no statistics as to the nationalities of those in the pool or those who were able to pass the outstanding exam by 31 December 2018. We do not even know the mix of nationalities in the pool, let alone the breakdown, or whether any were South African nationals. We do not know whether those of nationality other than British or South African had Associations in their own country of origin which they could practically have joined and which continued to offer CT1 or CT5 equivalents after 31 December 2018. We do not know if they were advantaged in any other way.

76. The question is therefore whether we can infer from any other material or logic that student members of the respondent who were British nationals and who did not have both CT1 and CT5 would be at a particular disadvantage compared with non-British nationals. We have nothing other than the fact that the organisation most accessible to the majority of British nationals (ie the respondent) applied the 31 December 2018 cut off and that ASSA continued to run the exams. We do not find that sufficient to prove the required disadvantage to the affected students.

77. For this reason also, the claim fails.

78. As the claim has failed because it is not proved that British students were at a particular disadvantage, issues 6 and 7 do not need to be answered. Indeed they cannot sensibly be answered on that premise.

Issue 8

79. As Mr Jupp accepted, issue 8 follows on from the indirect discrimination claim in issues 3 – 7. There was no indirectly discriminatory rule for the reasons we have said.

Employment Judge Lewis

Dated:10/12/2019 …………………………………..

Judgment and Reasons sent to the parties on:

12/12/2019...

………...
For the Tribunal Office