



# THE EMPLOYMENT TRIBUNAL

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**HEARING:** BY CVP VIDEO CONFERENCE  
**BEFORE:** EMPLOYMENT JUDGE BALOGUN  
**BETWEEN:**

Mr H Ouedraogo

**Claimant**

And

ABM Facility Services UK Limited

**Respondent**

## **PRELIMINARY HEARING**

**ON:** 14 January 2021

### **Appearances:**

**For the Claimant: Mr A Decker, Lay Representative**  
**For the Respondent: Mr O'Neill, Solicitor**

## **JUDGMENT ON PRELIMINARY ISSUE**

The indirect race discrimination claim is struck out pursuant to Rule 37 of the Employment Tribunal Procedural Rules 2013 on grounds that it has no reasonable prospects of success.

## **REASONS**

1. This was an application by the respondent for strike out of the claimant's application of indirect race discrimination on grounds that it has no reasonable prospect of success or for a deposit order to be made as a condition of the claimant being allowed to pursue his claim on grounds that it has little reasonable prospect of success.
2. I heard submissions from the parties' representatives and was provided with an electronic bundle.

3. The claim arises out of the claimant's dismissal from the respondent's employment with effect from 25/11/19. The dismissal letter gives the reason as; failing to provide the correct documentation to prove that he had the right to work within the UK.
4. The claimant brings an unfair dismissal claim in relation to that dismissal but that is not the subject of this application and will proceed to full hearing.
5. Under section 19 of the Equality Act 2010, where A (*the respondent*) applies a provision, criterion or practice (PCP) to B (*the claimant*), it is discriminatory in relation to the protected characteristic (*in this case race*) if:
  - a. A applies or would apply the PCP to persons who do not share the claimant's race
  - b. It puts, or would put, persons of B's race at a particular disadvantage compared with persons not of his race
  - c. It puts, or would put, B at that disadvantage and
  - d. A cannot show that the PCP is a proportionate means of achieving a legitimate aim.
6. The claimant defines his race as Black African.
7. At the previous case management hearing, before Employment Judge Nash, on 31 July 2020, there was considerable discussion around indirect discrimination but at the end of it, EJ Nash was unable to identify the PCP. The claimant was therefore given more time to particularise this.
8. At today's hearing, Mr Decker initially described the PCP in these terms:

*"The PCP is the general policy of the respondent requiring a positive Employment Checking Service (ECS) confirmation from the home office".*
9. That PCP was subsequently abandoned after Mr O'Neill submitted that the PCP was misconceived and was not, in any event, applied by the respondent.
10. The PCP was then amended to *"the requirement that everybody who works for the respondent has to demonstrate that they have a right to work in the UK."* Mr O'Neill accepted that this was a PCP applied by the respondent. The first limb of section 19 EqA is therefore satisfied.
11. In relation to limb b), Mr Decker describes the disadvantaged group to which the claimant belongs as *"Non EEA citizens married to EU nationals"*. In my view, the claimant would struggle to show that members of this group comprise mainly Black Africans as opposed to other races. Even if the claimant were able to establish that fact and also that the group were at a particular disadvantage in complying with the PCP compared to non-Black Africans, he would have difficulty showing that he was at that disadvantage. I say that because Mr Decker has spent much of this hearing asserting that the claimant did have the documents proving his right to work. He told the Tribunal that at the dismissal meeting, the claimant had in his possession a decision from the First-Tier (Immigration and Asylum) Chamber, promulgated on the 14 November 2019,

confirming his permanent residence. Mr O'Neill said that that document would most likely have been sufficient evidence of the claimant's right to work, but it was never produced prior to his dismissal. That is disputed by the claimant, though that is a separate issue for the unfair dismissal complaint.

12. Turning to the issue of proportionality, the respondent's stated legitimate aims include ensuring that it has up to date immigration documents for its employees to minimise the risk of falling foul of the law by employing someone illegally. The final tribunal is likely to accept that this is a legitimate aim. I also consider that a final tribunal is likely to find that, asking the claimant to produce documents showing his right to work in the UK was a proportionate means of achieving that aim.
13. In the circumstances, I consider the indirect race discrimination claim to have no reasonable prospects of success and it is accordingly struck out.

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Employment Judge Balogun  
Date: 14 January 2021