Case No: 2302864/2020, 2307127/2020, 2307128/2020, 2307129/2020, 2307130/2020, 2307131/2020, 2307132/2020 & 2307133/2020

EMPLOYMENT TRIBUNALS

Claimants: Mr. L D Ncube and six others

Respondent: St George's, University of London

Heard at: London South – Croydon (by video) **On:** 14 to 17 March 2022 and 4 May 2022(in chambers)

Before: Employment Judge C H O'Rourke
Ms N Beeston
Ms B Leverton

Representation
Claimant: Mr O Isaacs - counsel
Respondent: Mr S Neaman - counsel

RESERVED JUDGMENT

The Claimants' claims of indirect race discrimination fail and are dismissed.

REASONS

Background and Issues

1. The Claimants are security officers, employed by a company called Bidvest Noonan (UK) Ltd ('BN') and working on various sites of the Respondent university, pursuant to a contract between the Respondent and BN. The Claimants are all of BME/BAME race.

2. Their terms and conditions of employment with BN differ in several respects from those of employees of the Respondent, in particular as to the availability of pay increments and provision of contractual sick pay, holiday pay and pension terms, all of which the Claimants consider disadvantage them.

3. As a consequence, the Claimants bring claims of indirect discrimination on grounds of race. The claims being identical, they are simply referred to as 'the claim' from hereon. The issues in respect of the claim will be set out below, following consideration of a preliminary issue.

Preliminary Issue

4. The parties had attempted, as ordered at a case management hearing of 29 March 2021 [100], to agree a list of issues and a draft had first been prepared, as part of the Parties' agreed agenda for the case management hearing [Supplementary Bundle (S) 13-14]. This included the following:

   '(c) Is there an objectively justifiable reason (real business need) for the Respondent to outsource security services from the Claimants' then employer (Bidvest Noonan) instead of employing security officers directly? If so, what is it?
   (d) Is the justification given at 2(c) above a proportionate means of achieving a legitimate aim?'

   Although, in a subsequent draft list of issues, attached to the final case management agenda, that issue was simply stated as '*… has the Respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim?'* [S122].

5. Despite a year having passed, since then, the parties do not appear to have made any positive steps in finalising those issues, until that is, this Hearing was imminent. In the month or so before the Hearing, both parties' solicitors engaged in cordial and co-operative correspondence as to preparation for the hearing generally and the list of issues in particular [S170]. The Respondent's solicitor asked his counterpart on 21 February 2022 whether he was '*happy with the list of issues'* [S172], to which he responded that he had made '*some minor tweaks'* to it, seeking the Respondent solicitor's approval [S177]. On 23 February 2022, the Respondent's solicitor wrote stating that when he looked through the draft, '*I realised that I've not included as issues the St George's justification. Sorry, I had it in an earlier version of the List but mixed them up when I sent them to you. … Clearly, the list of issues must include our justification, so I do hope this is uncontroversial.'* [S184].

6. That draft [S189] included the following:

   '… has the Respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? The Respondent contends that

   a) The legitimate aims of the Respondent that the PCP(s) was/were a proportionate means of achieving, are:

i) Ensuring that the Respondent can deliver and maintain an adequate and satisfactory security service from a practical and operational perspective, in the particular circumstances and given the particular challenges facing the Respondent, its premises and its function;

ii) Ensuring that the Respondent can maintain the goal (and its raison d'etre) of safe, effective, and high quality medical education and training for the next generation of this country's medical and health professionals, which involves maintaining its viability and academic reputation;

iii) Ensuring that the Respondent can balance its books, come within budget on a year-by-year basis, and make decisions as to how best to allocate its limited resources in response to financial pressures in such a way as to achieve, and whilst still achieving, (i) and (ii) above.'

7. The Claimant's solicitor responded the same day that '*That should be fine re: justification. Are these legitimate aims coming from an earlier document that I've missed, or are they being added at this stage? Either way, clearly your justification needs to go in the list of issues, I just wanted to check if I've missed something.'* [S191].

8. On 9 March 2022 (so, two working days before this Hearing), out of office hours), the Claimant solicitor wrote, referring to an earlier telephone call and stating, '*As mentioned, we never fully finalised or agreed the List of Issues (LOI). I've spoken with counsel and we've clarified a few points, see attached. In particular, he pointed out that no justification has been pleaded, so we've taken this out of the LOI.'* [S197], which it was [S206].

9. The next day, the Respondent solicitor replied, setting out the history of this matter and pointing out that there had been no previous allegation of lack of formal pleading and that if there had been, an application would have been made to the Tribunal to amend the pleadings, accordingly [S208]. He also pointed out that both parties had informed the Tribunal, on 14 February 2022 that the case was ready for hearing, without mention of this issue.

10. Respondent's Submissions. At this Hearing, the matter still being in dispute, Mr Neaman resisted Mr Isaac's application for the Tribunal to refuse to consider the defence of justification, as having not been effectively pleaded and that therefore evidence and submissions should not be made in respect of it and for it not to be determined by the Tribunal. He made both written and oral submissions, as follows (in summary):

    a. He set out the history of this matter (as set out above), submitting that it was quite clear that the list of issues (to include justification) had been agreed in writing, for over a year, until that is the Claimant reneged on that agreement, two working days before the Hearing.

b. It is incorrect, as asserted that the defence was not pleaded: it was, but even if not that is a technical argument when it is considered that both parties had agreed the issues and proceeded on that basis, a year ago, with the Claimant's solicitor stating that it 'clearly needed to go in'.

c. In any event, the Claimants themselves raise the pleading in their particulars of claim, by stating that '*the PCP is not a proportionate means of achieving a legitimate aim.'* [29], with the Grounds of Resistance, pleading a general denial of the claims [43], thus answering that assertion.

d. Even if the pleading suffers from some technical formal defect, in a complex discrimination claim, where the parties have agreed a schedule of issues (and certainly an issue within that schedule) and which therefore requires adjudication, they should stick to it or only depart from it by consent – see **North Essex Partnership NHS FT v Bone [UKEAT/0352/12/DA**] at para 17. This is in accordance with the general rule, set out by the EAT in **Centrepoint Soho Ltd v Omaboe** that there is a "*need to avoid undue formality in Tribunal proceedings and the discouragement that should be given to technical pleading points in circumstances where the substance of the issue between the parties is plain*" and that this is such a case.

e. The overriding objective requires that cases be dealt with justly. It would plainly be unjust for this case now to go ahead without an agreed issue which was only purportedly "unagreed" two days before the start of the hearing, and in any event, was pleaded (or if for any technical or formal reason it was not, no objection was ever taken and no prejudice was ever suffered by the Claimants).

f. This is not a case, as in **Chandhok v Tirkey [2015] ICR 527 UKEAT**, where a Tribunal took it upon itself to decide an issue which had not been identified in the pleadings. In that case there was no previously agreed list of issues, nor was it expressly agreed that the issue in question was one to be decided by the Tribunal, in contrast to this case.

g. (There were also further supplemental issues as to late disclosure of documents, which, following discussion, centred on one exhibit to one of the Claimants' statements and what was referred to as a clip of email correspondence.)

11. Claimant's Submissions. Mr Isaacs made the following submissions (in summary):

a. The justification defence was not pleaded in the ET3 and nor was it an agreed part of the claim, in 2021 and 2022. The Respondent is misreading the correspondence in this respect.

b. The procedure is for the Claimant to set out his or her case and then for the Respondent to respond to those issues. As established in **Chandhok**, the purpose of the pleadings is not simply 'to get the ball rolling' and it is not appropriate for new issues to be added at the whim of the parties. Therefore, contrary to Mr Neaman's assertion, all cases are **Chandhok** cases.

c. Accordingly, the focus should be on the claim and the response, not the list of issues.

d. He referred to paragraphs 51, 55, 57 and 67 of the **Centrepoint** case.

e. The Respondent's reliance on the **North Essex** case, namely that '*where a schedule has been agreed of acts relied on and therefore requiring adjudication, parties should stick to it or additions should be made in open tribunal and with consent, so that if something is not on the schedule it should not be the subject of an adjudication without notice'* (17) does not obviate the need for such a schedule to relate to the issues set out in the pleadings.

f. Applying the overriding objective, the position is straightforward, it is for the Claimant and the Respondent to identify the issues in dispute.

g. It is for the Respondent only to plead the justification defence and a general denial as to assertions in the grounds of complaint does not suffice for the Respondent to rely on this defence. Nor had the Respondent identified any facts to pin its case to.

h. In the Claimant's Further and Better Particulars of 12 February 2021 [66], they, in turn, ask the Respondent to provide same and the subsequent correspondence makes no mention of the defence. The Claimant was expecting an amended response, in order to consider the issues fully and until then was taking only a preliminary view. Despite the agreed case management agenda [S78] stating that the Respondent wished to do so, none was ever forthcoming. It was incumbent on the Respondent at the subsequent case management hearing to do so, but they did not. Therefore, there was no clarification of the justification argument.

i. This matter 'died a death' until February 2022, when, for the first occasion, the defence is set out [S189]. It is not correct that the position was agreed by the Claimant's solicitor on 23 February, but he stated that '*it should be fine'*, effectively indicating that he needed

to take instructions, which, when he did, confirmed that this proposed amendment was being made too late in the day.

j. The Claimants are not being opportunistic in this respect – they are entitled to know, before the last minute, the response they have to deal with.

k. As to other supplemental disclosure matters, only two of the emails in the 'clip' are relevant and relate to the Respondent's control over the Claimants' terms and conditions of employment and it is therefore proportionate to include them. The exhibit to the statement is a publically-available consultation document.

12. Decision. The Tribunal permitted the Respondent to rely on the justification defence set out in the list of issues, for the following reasons:

a. While, clearly, it is for a party in litigation to set out its case, at the earliest opportunity (in this case in its response, or, if appropriate, an amended response), this is not a situation where the other party was unaware, until very belatedly that its opponent intended to rely on a justification defence. Such a defence, at least in broad terms, was set out over a year ago in the first agreed list of issues, without then objection by the Claimant as to it not having been formally pleaded.

b. The case management order is silent as to any need for an amended response, implying therefore to us that the parties were in agreement at that hearing that they could set out the issues between themselves, without the need for such formal pleading.

c. We consider that there is a degree of fault on both parties' sides in this respect. The correspondence between the solicitors is very relaxed and informal, conveying the impression of consensual agreement as to how the case should proceed and indicating a desire not to inconvenience each other. And while of course, it is for the Respondent to set out the details of the defence, the Claimants' solicitors permitted the Respondent to fail to do so for over a year, conducting disclosure and even drafting and exchanging witness statements without knowing, or enquiring as to what their witnesses might need to say in this respect, or what documents they might need to adduce, to address the issue.

d. This is not a 'new' issue, as in **Chandhok**, but one that has not been particularised. If, perhaps, the Claimants had been unrepresented, we may have taken a different view on this matter.

e. We note the guidance in **Centrepoint**, as to the '…*discouragement that should be given to technical pleading points in circumstances*

where the substance of the issue between the parties is plain', albeit that in this case, the 'substance' is thin.

f. We do not consider it in the interests of justice, or in the spirit of the overriding objective, to grant this application, as to do so would potentially place the Respondent on a very unequal footing and be disproportionate. We offered the Claimants the opportunity, if they considered that they were unable to properly present their case, to adjourn the hearing to October of this year, with the prejudice to them being potentially ameliorated by a costs order against the Respondent, but they chose to proceed with this Hearing.

g. In respect as to the submissions about the Claimants' late disclosure, we granted them permission to adduce such evidence.

The Issues

13. The preliminary issue having been resolved, we set out the overall issues, as follows:

a. Has the Respondent applied a provision, criterion, or practice (PCP) to persons with whom the Claimants do not share their characteristic? There was considerable discussion as to the nature of the PCP(s) and with which we deal in detail below, but it/they centred on the disparity between the terms and conditions of the Respondent's employees ('the in-house staff') and those of the Claimants.

b. If that PCP is applied to the Claimants, does it put, or would it put persons of the same racial group as the Claimants at a particular disadvantage, when compared to persons not of that racial group? In that respect, there are two sub-questions:

i. What is the correct pool for comparison?
ii. Whether there is a material difference in the circumstances relating to BME and non-BME groups.

c. Did it put, or would it put, the Claimants at that disadvantage; and, if so

d. Can the Respondent show it to be a proportionate means of achieving a legitimate aim?

e. Further, the Claimants needed to establish that they could, as contract workers (which status was accepted by the Respondent) rely on s.41(1) EqA, in relation to the terms under which a principal must not discriminate against a contract worker.

The Law

14. Section 41 of the Equality Act 2010 ("EA 2010") provides,

"(1) A principal must not discriminate against a contract worker –
(a) as to the terms on which the principal allows the worker to do the work;
(b) by not allowing the worker to do, or to continue to do, the work;
(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
(d) by subjecting the worker to any other detriment. …

(5) A "principal" is a person who makes work available for an individual who is –
(a) employed by another person, and
(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

15. Mr Isaacs referred us to the cases of **Harrods Ltd v Remick & Others [1998] ICR 156 EWCA**, **Jones v Friends Provident Life Office [2004] IRLR 783 NICA** and **Leeds City Council v Woodhouse [2010] IRLR 625 EWCA**, as to the tests to establish whether or not a worker can be a 'contract worker' providing services to a 'principal' and thus be able to rely on s.41 EqA. However, as became clear during the Hearing, this issue was not really in dispute, the Respondent accepting that in respect of these claims, it was the 'principal' and the Claimants were its contract workers.

16. Section 19 of the EqA 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."
Race is a relevant protected characteristic under section 19.

17. In **R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others [2009] UKSC 15**, Lady Hale stated that:

'56. The basic difference between direct and indirect discrimination is plain: see Mummery LJ in R (Elias) v Secretary of State for Defence [2006] EWCA

1293, [2006] 1 WLR 3213, para 119. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.'

18. Section 23(1) EqA provides,

"*On a comparison of cases for the purposes of sections 13, 14 or 19 there must be no material difference between the circumstances relating to each case*."

19. The EqA Statutory Code of Practice issued by the Equality and Human Rights Commission ("EHRC Code of Practice") provides,

"*6.10 The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions …* "

20. In **Ishola v Transport for London [2020] EWCA Civ 122** Simler LJ said, "*The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited, in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely… In context and having regard to the function and the purpose of the PCP in The Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it would be done again in future if a hypothetical similar case arises… I consider that although a one-off decision or act can be a practice, it is not necessarily one.*"

21. The EHRC Code of Practice advises,

"4.17 People used in the comparative exercise are usually referred to as the 'pool for comparison'.
4.18 In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively,

while excluding workers who are not affected by it, either positively or negatively."

22. In **Allonby v Accrington and Rosendale College [2001] IRLR 364** Sedley LJ said, "*once the condition or requirement [the wording used instead of PCP in legislation that preceded the Equality Act 2010] is identified the 'pool' within which its impact has to be gauged falls into place. So here … the pool was 'all persons who would qualify for continuous employment if the requirement or condition had not been taken into account … once the impugned requirement or condition has been defined, there is likely to be only one pool which serves to test its effect. I would prefer to characterise the identification of the pool as a matter neither of discretion nor of fact-finding but of logic*."

23. In **Essop & Others v Home Office (UK Border Agency) [2017] UKSC 27** Lady Hale said, "*all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact on the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"- ie the PCP in question – puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison*." She went on *to* conduct a review of the legislative history of indirect discrimination and identified a series of 'salient features' that were common to every version of the statutory test up to and including s.19 EqA:

    a. Indirect discrimination provisions have never included any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men but a requirement to hold a high chess grade will put them at a disadvantage.

    b. Instead of requiring a link between the treatment the individual received and his or her protected characteristic, indirect discrimination requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. Unlike direct discrimination, indirect discrimination assumes equality of treatment — the PCP is applied indiscriminately to all — but aims to achieve a level playing field where people sharing a particular protected characteristic

are not subjected to requirements that many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers that are not easy to anticipate or to spot.

c. The reasons why one group may find it harder to comply with the PCP than others are many and various. They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between 'women's jobs' and 'men's jobs' or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in **Homer** (below), where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by H and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are 'but for' causes of the disadvantage: removing one or the other would solve the problem

d. The PCP need not put every member of the group sharing the particular protected characteristic at a disadvantage. Some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP that may be indirectly discriminatory

e. It is commonplace for disparate impact, i.e. the particular disadvantage, to be established on the basis of statistical evidence. Such evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link, and

f. Finally, it is always open to the employer to show that its PCP is justified — in other words, that there is a good reason for the particular height requirement, the particular chess grade or the particular test. Lady Hale detected that there was some unwarranted reluctance on the part of the lower courts to reach this stage in the **Essop** case. There will be no finding of unlawful discrimination until all four elements of the statutory definition of indirect discrimination are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden on employers. Nor should it be seen as casting some sort of shadow or stigma upon them.

24. The wording of s.19(2) EqA 2010 is different from the wording used in earlier legislation to define indirect discrimination. The earlier legislation required a claimant to establish that the proportion of persons who shared his protected characteristic who could comply with the PCP was considerably smaller than the proportion of persons who did not share the protected characteristic who could comply with it. In **Chief Constable of West Yorkshire Police v Homer [2012] ICR 704** Baroness Hale said that the new formulation, "*was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not comply and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages*." Although there is no requirement to adduce statistical evidence, the requirement to show that those who share the protected characteristic in question are placed at a disadvantage still remains. Evidence given by the claimant and by others who belong to the group sharing the protected characteristic can be important evidence for the tribunal to consider, and it might provide compelling evidence of disadvantage even in the absence of statistics – **Games v University of Kent [2015] IRLR 202**.

25. Paragraph 4.15 of the EHRC Code of Practice provides, "*Once it is clear that there is a [PCP] which puts (or would put) people sharing a protected characteristic at a particular disadvantage, then the next stage is to consider a comparison between workers with the protected characteristic and those without it. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances*." Paragraph 4.20 provides, "*The way that the comparison is carried out will depend on the circumstances, including the protected characteristic concerned. It may in some circumstances be necessary to carry out a formal comparative exercise using statistical evidence.*"

26. **Greenland v Secretary of State for Justice [EAT/0323/14**] was a case of indirect race discrimination concerning the different rates of remuneration paid to different categories of members of the Parole Board during a certain period. The two categories were retired judges and non-judicial members. At the material time only the former chaired oral hearings relating to the release of prisoners sentenced to life imprisonment. Both categories chaired hearings relating to the release of prisoners who had been sentenced to indeterminate terms for public protection. During the period in question the retired judges were paid a higher daily rate for chairing oral hearings. The EAT held, "*on the evidence before the tribunal, the retired judges were paid a daily fee for their work as a member of the Parole Board. The evidence does not support the assertion that they were paid a fee for a specific task. In those circumstances, given the remuneration was paid for the work done by the retired judges, the tribunal was entitled to consider the entirety of the work in respect of which they received remuneration. They were entitled to conclude that there were material differences in the cases of the retired*

judicial members as compared with the cases of the non-judicial members. The retired judges did undertake a broader range of work and had legal skills and experience relevant to their work which was not possessed by the non-judicial members. In those circumstances, the tribunal were entitled to find that there were material differences for the purpose of section 23 of the 2010 Act and to conclude, therefore, that it was not appropriate to compare those two groups for the purposes of section 19 of the 2010 Act."

27. It was emphasised in **Essop** (cited above), at paragraph 32 that there has to be a causal link between the PCP and the disadvantage suffered by the claimant in order for the claimant to establish indirect discrimination.

28. In **Homer** (cited above) Baroness Hale set out the test for establishing justification under section 19 of the 2010 Act. She said,

"*19 The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground … is not limited to the social policy or other objectives derived from articles 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business…*

20 As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213, para 151, "the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group." He went on, at para 165, to commend the three-stage test for determining proportionality derived from … "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?" … it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."

29. In **Heskett v Secretary of State for Justice [2021] ICR 110 EWCA** Lord Justice Underhill explained that '*the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle… but it is real'.* The Judgment held however that the proposition that an employer's need to reduce its expenditure, and specifically its staff costs, in order to balance its books can constitute a legitimate aim for the purpose of a justification defence was correct in principle, to include '*how best to allocate a limited budget*', going on at paragraph 99, to state:

"… almost any decision taken by an employer will inevitably have regard to costs to a greater or lesser extent; and it is unreal to leave that factor out of account. That is particularly so where the action complained of is taken in response to real financial pressures."

30. The burden of establishing justification rests upon the Respondent. In **Hardy & Hansons Plc v Lax [2005] EWCA Civ 846** the following was said (at paragraphs 32 and 33) of the concept of justification of indirect discrimination:

'… The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby [2001] ICR 1189 and in Cadman [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal.'

The Facts

31. We heard evidence from one of the Claimants, Mr Abayomi Shittu, on behalf of them all and also from Mr Petros Elia, the General Secretary of their trade union, United Voices of the World ('UVW'). On behalf of the Respondent, we heard evidence from Ms Liz Gilby, the deputy Director of Estates and Facilities; Ms Susan McPheat, the Director of Finance and from Ms Jenny Winters, the Director of Human Resources and Organisational Development.

32. We set out the following uncontentious matters:

    a. The Respondent's contract with BN, for the provision of security services, commenced in February 2017, having previously been supplied by a company called CIS Security Ltd. It set out the requirement that BN use personnel who were suitably skilled and went on to list various qualifications required [181].

b. The Respondent's contract with both CIS and BN allowed, in the price paid for the security services, for payment by those companies of the London Living Wage (LLW) to their employees [201 & 799]. This resulted in an approximate increase of £2.50 in the hourly rate of pay, above the National Minimum Wage previously paid to the Claimants. It was unclear, in fact, if either of those companies actually paid the LLW to their employees from the outset, with Mr Shittu stating that LLW was only paid to him from September 2019.

c. Following the onset of the COVID Pandemic, in March 2020, the Claimants were granted the right to three weeks' paid sick leave per annum, having previously only been entitled to SSP. A letter from BN to the Claimants of 15 April 2020 [241] informing them of this stated that '*It should be noted that this term of your employment will only be applicable while you are working on the SGUL* (the Respondent's) *contract. If you move to any other contract within the Bidvest Noonan portfolio, you will lose this benefit.'*

d. In 2015, Ms Gilbey's predecessor in her deputy director role and with the support of that person's director, wrote a business case to bring the security services and other out-sourced services, 'in-house' [108]. It recorded that '*There has subsequently in the last month been communications with the unions and a petition raised to increase this* (the LLW) *to total parity of terms and conditions including sickness and annual leave entitlements, both of which would have a significant impact on the contract price*'. Mr Elia said that this followed a campaign by the Union and consultation with him. The business case recommended that these services be brought in-house, affording parity of terms and conditions to the Claimants and their colleagues, but nonetheless with annual savings to the Respondent of £200,000. A subsequent review of this report, by a 'SPARC' committee (the highest executive decision-making committee of the Respondent), challenged the costings, stating in a minute of May 2016 that there would be no savings in 2016-17, but that £100,000 per annum was anticipated thereafter (but only referring to the cleaning contract) [126]. It agreed that market testing would be undertaken, but there was no evidence that any was done, or that the business case received any further consideration.

e. The Respondent's employees benefit from annual increments to their pay, which are not available to the Claimants. They have four days extra leave, over the statutory minimum the Claimants receive. They have access to a career-average defined benefit pension scheme, as opposed to the 'People's Pension' defined contribution scheme offered to the Claimants, with BN paying a 3% of annual wages contribution. In respect of sick pay, as opposed to the three weeks' contractual sick pay provided to the Claimants in 2020, the Respondent's employees are permitted a month's pay from the outset of their employment, increasing incrementally to six months' full pay and six months' half-pay, after four years' service.

33. Contract Worker and the application of s.41 EqA. The Respondent does not dispute that the Claimants are contract workers and that it is the 'principal', but does not accept that it discriminated against the Claimants in the ways set down in s.41. We deal with each sub-section of s.41(1), which requires that a principal must not discriminate against a contractor worker, as follows:

    a. '*As to the terms on which the principal allows the worker to do the work'*. Mr Neaman contends that firstly, generally, s.41 prohibits discrimination *against* a contract worker, but not *on the ground of being* a contract worker. Secondly, he submits that an example of what this sub-section would apply to would be if, in its contract with BN, the Respondent stipulated that the Claimants should be able to speak English, resulting in the potential for contract workers of other races or nationalities to be disadvantaged. In a non-racial context, an example might be requiring contract workers to be of a certain height, which may disadvantage women. However, he stated, no such stipulation exists in the contract, which merely requires various types of security-related qualifications to be held by the Claimants. Mr Isaacs said that this ignored the reality of the relationship, based on Ms Gilbey's evidence that by setting minimum terms and conditions of employment, the Respondent was setting the terms upon which the Claimants were allowed work. We disagree, however, for the following reasons:

        i. There is nothing in the contractual terms set down between the Respondent and BN, as to the persons that they put forward to the Respondent to provide security services that are discriminatory against the Claimants.

        ii. The reality of the situation was that the Respondent did not check if the Claimants were in fact receiving the LLW, or benefitted from the three weeks' paid sick leave and neither of those criteria had any influence on the Respondent 'allowing' individual Claimants to do the work. The Respondent simply left that matter to BN, or, indirectly, the Claimant's union, to resolve.

    b. '*by not allowing the worker to do, or to continue to do, the work'*. There were no submissions by either party in respect of this stipulation.

    c. '*in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service'*. Mr Neaman submitted that this sub-section covered, by way of example, not permitting a contract worker access to the staff canteen, or gym facilities, or counselling services, such as might be available to employees. We agree, the use of the phrase 'access to opportunities' implies exactly such.

    d. '*by subjecting the worker to any other detriment'*. This sub-section was that principally relied upon by Mr Isaacs, who pointed out that applying

Shamoon v Chief Constable of the RUC [2003] ICR 227, 'detriment' should be widely interpreted and be construed as treatment that a reasonable worker would or might take the view, in all the circumstances, was to his or her detriment. The differentials in pay, sick leave, holiday and pension between the Claimants and the Respondent's employees were clearly detriments. Mr Neaman submitted that the Respondent did not 'subject' the Claimants to any detriment. The terms they had agreed with BN could not be 'detrimental' of themselves, as BN had no control over the terms offered to the Respondent's employees. We concluded that the Claimants cannot rely on this sub-section, or s.41, as a whole, for the following reasons:

i. The Respondent is not 'subjecting' the Claimants to anything, detrimental or otherwise, in relation to pay, sick leave etc. Their terms of employment are between them and BN and the fact that the Respondent has, in the past, chosen to require BN to pay the LLW and enhanced sick pay (and provided the funds to BN necessary to provide such) does not alter that situation. As a high-profile, publically-funded body, based in London, it obviously concurred with the then (and subsequent) Mayor's campaign for employers in London to recognise the true costs of living in the Capital, by itself voluntarily paying the Wage and also ensuring that those who contracted with it did also. It will, no doubt, have been conscious of its public image in doing so, particularly when so many other employers will have done the same. Similarly, at the time of the COVID outbreak, when so much was unknown as to effects of the virus, many unprecedented decisions were taken, at all levels of society. Ms Gilby explained (35) that as the students were not on-site and the campus had effectively been taken over by the neighbouring NHS Trust, the Claimants were carrying out hospital portering duties, which put them at greater risk of infection, at a time when the bulk of other staff were working from home. The Respondent considered that the Claimants should be afforded greater security in the event of falling ill, than simply the payment of SSP and negotiated with BN to arrange this. She accepted in cross-examination that there had been ongoing lobbying, for some time, by the Union on this point and therefore, there will have been some pressure upon the Respondent in this respect, exacerbated by the onset of the Pandemic, to concede on it. Nonetheless, in the end, these were voluntary acts of the Respondent and their choice to exercise their discretion in these respects, does not mean that by also choosing not to do so in respect of the alleged detriments, they are 'subjecting' the Claimants to anything. Indeed, it would be somewhat perverse to conclude that because a principal had exercised such discretion, their failure to do so in other respects, was discriminatory, when compared to the situation where another principal, who takes no such action, or even considers doing so,

has therefore not permitted any 'chink to appear in their armour' and is thus beyond such criticism.

ii. The Claimants have, of course, under the EqA, full protection from discriminatory acts by their employer, BN, therefore implying, to us that the purpose of s.41 is to prevent discriminatory acts by a principal, above and beyond areas of potential discrimination by their employer, by the fact of contract workers being on the principal's premises. In other words, whereas an employer, who sets out terms and conditions of employment, is liable for any discriminatory effect of such, a principal may be liable for incidents or actions that happen on their premises and outside the employer's control, or even knowledge. The examples given in The Government's Explanatory Notes to the Bill for the EqA, we consider, bear this out and state as follows:

"Examples

- *A hotel manager refuses to accept a black African contract worker sent to him by an agency because of fears that guests would be put off by his accent. This would be direct discrimination.* (to our mind, an example of the principal not allowing the worker to do the work.)
- *A bank treats a female contract worker less well than her male counterparts, for example by insisting that she makes coffee for all meetings. This would be direct discrimination."* (This again is, we consider, an instructive example. It is not a coincidence that it is an act of direct discrimination, rather than indirect, as that is, in our view, the thrust of s.41: to protect contract workers, out of sight and mind of their employers, against discriminatory acts of principals or their employees, focussed on their day-to-day working lives and interactions, rather than their specific terms and conditions of employment.

34. Conclusion on Claimant's reliance on s.41. We conclude, therefore that while the Claimants are contract workers, providing services to the Respondent, as principal, it has not discriminated against them under any of the terms of s.41(1). Accordingly, therefore, the claims fall at this first hurdle. However, conscious, as we are, of the lack of guidance on this issue from the higher courts and in the event that we are incorrect in this decision, we nonetheless go on to consider the other issues in this claim.

35. PCP(s). The Claimants advanced six PCPs, but Mr Isaacs, in closing submissions, accepted that they were all very similar, or iterative in nature (apart perhaps from the sixth) and that in reality what both counsel referred to as '*the Overarching PCP'* was the operative PCP and that that PCP had to succeed for the others to be valid*. This was stated to be that 'the Respondent relied upon the following PCP: a two-tier system of terms and conditions for in-house and outsourced staff ….*' [Cs' Opening Note]. As with

all the issues in this claim, we had extensive and detailed written and oral submissions from both counsel, which we incorporate into our findings below.

36. Was this a PCP? We summarise the submissions in respect of this issue as follows:

    a. Claimants

        i. The fact that the Respondent considered parity of terms and conditions, by taking the Claimants in-house, but decided against doing so, indicates a practice.

        ii. There is no real dispute that the Respondent's employees' terms and conditions are more favourable than those of the Claimants.

        iii. The true nature of the relationship between the Respondent, BN and the Claimants, is that BN hide behind the Respondent, as Mr Elia said '*without fail the answer* (from BN) *always is: that depends on if the client is willing to pay it and fund it.'* The Respondent does have the power to determine the basis upon which it contracts with suppliers and can (and did in respect of the LLW) impose terms and conditions on BN and it can choose to exclude from the tender process any supplier unwilling to meet such terms.

        iv. As identified by the EHRC Code and per **Ishola** (the way in which things generally are or will be done) there is a "practice" in the sense that it was understood that outsourced services would create different and less favourable terms and conditions for contracted staff to that which was provided to staff employed by the Respondent. This is often one of the reasons for outsourcing, to seek to make financial savings on that basis.

        v. The Respondent regularly contracted with BN, based on minimum terms and conditions which did not mirror or provide parity with its employees, indicating a practice on their part.

        vi. By providing only three weeks' paid sick leave to the Claimants, in comparison to its employees' entitlement, it further applied this practice.

    b. The Respondent

        i. The Respondent agrees with its own employees (via collective bargaining) what their terms and conditions will be. It also agrees various contracts with outsourcing providers (via a tendering process) for the provision of services. Those providers agree employment terms with their employees. These series of arrangements cannot, therefore, be characterised as a singular PCP.

ii. The Respondent does not know the terms and conditions of its various contractors (less LLW and three weeks' sick pay) and it would not mind if those terms and conditions were the same or better. This is wholly inconsistent with the Respondent having a system of terms and conditions.

37. Conclusions on existence of a PCP. Based on the authorities and statutory guidance as to the broad interpretation of what can be a PCP, namely 'the ways things are generally done', we find that it is possible that the Respondent's decision to keep some of its functions in-house and some out-of-house, thus resulting in differing terms and conditions for those persons concerned could constitute a PCP.

38. Did the Respondent apply that PCP to non-BME persons? Without consideration of the submissions on this point, our short answer is 'no'. There was no application of such a PCP to anybody, let alone non-BME persons. The PCP, if it is one, is the business decision by the Respondent as to how it chooses to run its affairs. That decision is not 'applied' to 'any person', but simply results in the Respondent deciding to employ some persons to carry out functions in-house and to contract with providers for other services. Again, we consider that this decision means that even if the Claim could meet the test in s.41, it would fail at this point, but nonetheless proceed to consider the remaining issues.

39. Was the PCP applied to the Claimants? For the same rationale as set out above, we find that the PCP was not applied to the Claimants.

40. Nonetheless, if it was a PCP applied equally to non-BME persons and the Claimants, did it put BME persons at a particular disadvantage, when compared to non-BME persons?

a. The first question is as to what is the pool of comparators. There seemed to be general agreement between the parties that the most appropriate pool against which to compare the Claimants would be the pool of those of the Respondent's employees in grades 1 to 3 of their staff grading system, working in not dissimilar roles to that of the Claimants, such as in reception/helpdesk/assistants of various kinds/shop supervisor roles etc. [744]. The racial profile of this group was 65% white, 30% BME/BAME and 4% unknown [745]. If the entire workforce were in the pool, then the BME profile was 28%. This compared to 42% of outsourced employees being BAME [749]. The Claimants considered, therefore that they (and their BAME colleagues) were far more likely to be affected by the imposition of such a PCP and accordingly be on inferior terms and conditions.

b. Mr Neaman submitted that while the differential in proportions is approximately 30%, to 42%, this was not significant enough to put the Claimants at a particular disadvantage, when absolute numbers were factored in. As there are far more in-house employees, 30% BAME

represents approximately 210 persons benefitting from in-house terms, compared to 33 outsourced persons, not benefitting.

c. The second question in this respect is as to whether, applying s.23 EqA, there is no material difference between the circumstances of the pools. Mr Isaacs contended that the only material difference was in-built, the lack of parity in terms and conditions, due to the PCP.

d. Mr Neaman submitted that the circumstances in which those terms and conditions came to be agreed are materially different, with in-house employees engaged in collective bargaining, whereas, following a tendering exercise by the Respondent, a discrete contract is drawn up with each outsourced provider, who, in turn, negotiates and agrees the terms and conditions of its employees.

41. Conclusions on Particular Disadvantage. We find that if the PCP was a valid one and equally applied to both pools (which we have found not to be the case), it would result in particular disadvantage to BME outsourced workers, for the following reasons:

a. While there is only 12 percentage points between the two pools, when the two percentages are compared, the BAME pool is 33% more likely to have worse terms and conditions than the non-BAME pool, a sufficiently significant difference, we consider, to show particular disadvantage. (by reference to **McCausland v Dungannon District Council [1993] IRLR 583, NICA**)

b. We do not consider that the overall numbers in each pool alter that position. We note the case of **London Underground Ltd v Edwards (No.2) [1999] ICR 494, CA**, where the claimant was one of only 21 women in a total pool comprising 2,044 train operators. All 2,023 men were able to comply with a requirement for flexible working hours, as were all the women save for the claimant herself. An employment tribunal (with which the Court agreed) held that the claimant had nonetheless been indirectly discriminated against on the ground of sex. The question posed in the Edwards case was really: 'Is it enough that only one employee in a small pool is unable to comply with a requirement when her reason for not being able to do so is one that is common among more women in the general working population than men?'. The Court's answer, that a tribunal ought to take a wider view of the situation when the affected group is too small to be representative, has the effect not only of protecting existing employees but of easing the way for potential recruits of the same sex (or as in this case, race). Taking that 'wider view', we accept that those at the lowest end of the earning spectrum are more likely to be BAME and take judicial notice of, for example, the Office for National Statistics figures for 2019 that show that the pay gap between white British employees in London and BAME employees was 24%.

c. As to material difference, we agree with Mr Isaacs that the only such difference is the lack of parity of terms and conditions, dependent on the identity of the employer, which is, of course, the whole raison d'etre for this claim. As per **Essop**, the 'reason why' there are such differences is not relevant to consideration as to whether or not there was indirect discrimination.

42. If there was indirect discrimination by the application of the PCP (which we have found there was not), can the Respondent show it to be a proportionate means of achieving a legitimate aim? The Respondent's aims were accepted by the Claimant to be legitimate (less that a financial aim would not, in isolation, be legitimate) and they are as follows:

a. Ensuring that the Respondent can deliver and maintain an adequate and satisfactory security service from a practical and operational perspective, in the particular circumstances and given the particular challenges facing it, its premises and its function ("the First Aim");

b. Ensuring that the Respondent can maintain the goal (and its raison d'etre) of safe, effective, and high quality medical education and training for the next generation of this country's medical and health professionals, which involves maintaining its viability and academic reputation ("the Second Aim"),

c. Ensuring that the Respondent can balance its books, come within budget on a year-by-year basis, and make decisions as to how best to allocate its limited resources in response to financial pressures in such a way as to achieve, and whilst still achieving, (i) and (ii) above ("the Third Aim"). This is expressed not simply to be a 'wish to do no more than save costs' (**Heskett**).

43. Proportionate Means. The submissions in respect of this issue were as follows:

b. Respondent.

i. The First Aim is nothing to do with cost saving, but instead providing the best solution for provision of security to one of the largest teaching hospitals in the UK, with 5,500 students, open 24 hours a day, containing several highly sensitive areas, to include a mortuary and anatomy suite, a pathology facility and Cat 3 labs, containing various pathogens. Its student accommodation is clad in the same material as caused the Grenfell Tower disaster and therefore a constant watch is required, in the event of the need to evacuate. Ms Gilby explained that by outsourcing security, a specialist provider could be engaged, rather than any 'generalist' provision if in-house. BN ensured 20% resilience to cover illness and absence, which an in-house team could not do. It could be held accountable for any shortfall and was insured for that purpose. Finally, providing the service in-house would require the recruitment of a relatively senior-level manager, with associated HR and

clerical support. Ms McPheat said that '*outsourcing security is a necessity rather than an option.*' If an outsourced security provider was contracted with to provide its employees with parity of terms and conditions with the Respondent's employees that would be unaffordable and affect the achievement of the other two aims.

ii. The Second and Third Aims elided, in that without adequate funding, neither could be met. Ms McPheat set out that next year the Respondent will face a reduction of approximately £2m, without any matching ability to increase income. That reduction stems from increased employer pension contributions, the removal of 'London Weighting', the capping of student fees, in the face of inflation elsewhere and the increase in National Insurance contributions. She also explained why the Respondent would be unable to raise additional income. An estimate received from BN as to the costs of partial harmonisation of terms (not including pension), in 2019, was £200,000 per annum [467]. Such an annual sum would, therefore, on top of estimated losses of £0.7m in 2021/22 and doubling in 22/23, hugely contribute to an inability to 'balance the books' and to thus maintain the Respondent's professional standing. Not funding the harmonisation of terms and conditions is, accordingly, a proportionate means of achieving those aims.

c. <u>Claimants</u>

i. The evidence provided by the Respondent, despite the voluminous bundle, is wholly inadequate, rendering it impossible for the Tribunal to objectively balance the discriminatory effect of the Respondent's actions on the Claimants against the reasonable needs of the Respondent.

ii. Ms Gilby's evidence did not explain why an in-house security team would not be able to provide the same resilience as BN and nor was there any detailed assessment of the feasibility of new rotas or what the staff provision would need to be, or detailed evidence as to costings (the short email from BN is insufficient for these purposes [467]. Nor were the full implications of the Protect duty assessed.

iii. The reality of this defence is that it is not about such organisational difficulties, but about costs and there was no detailed assessment of the costs, nor how they could be accommodated within budgets. It is inappropriate to provide the Tribunal with a 'bottom-line' figure, without being able to determine expenditure on other matters. Also, such figures as have been provided are current figures only and therefore even if they indicate difficulties for the Respondent that does not mean that such difficulties existed in previous years.

iv. While Mr Neaman asserts that because the Claimants did not accuse the Respondent's witnesses of lying, their evidence is unchallenged, it is in fact the case that the Claimants do not know whether the figures are correct, or not and are therefore unable to challenge them, as there has been no disclosure. The Respondent is entirely at fault for this situation, because of the way and the timing in which the 'legitimate aims' were identified.

v. The Tribunal is reminded that the burden of proof is on the Respondent in this respect. While bald assertions are made by their witnesses, there is no evidence to support such.

vi. The Public Sector Equality duty is pleaded and is a relevant factor in considering the justification defence and it is instructive that this litigation and its potential consequences were not covered in the Respondent's Public Sector Equality report.

vii. The Respondent's case is over-exaggerated.

44. Conclusions on 'Proportionate Means'. By a majority decision (Employment Judge O'Rourke dissenting), we find that the Respondent has satisfied the burden of proof upon them, in this respect. We do so for the following reasons:

a. We found Ms Gilbey and Ms McPheat's evidence on this point to be credible and persuasive. Any general financial statements made by them were backed up by the audited accounts provided.

b. Whilst the Respondent conceded that it did not carry out a fully- costed analysis of such a proposal, this is not simply a matter of costs alone. We found Ms Gilbey's evidence in relation to the non-costs reasons, in particular the need for a specialist security service, to be persuasive. The business of security, when it is done properly, as it no doubt needs to be on a site such as St. George's, for all the reasons set out by Ms Gilbey in paras 46 onwards of her witness statement, is a skilled operation, best performed by a specialist organisation (para 50). This need is emphasised by the requirement for 100% cover at all times, with surplus resource available in the event of absence, or unwillingness to take on overtime. In order for the Respondent to carry this function out to the highest standard and with the appropriate degree of resilience, it would effectively need to set up a small organisation specialising in this, which would seem contrary to common sense. Providing out-sourced security services was not a means in itself, but merely necessary to safeguard the Respondent's legitimate aims, as set out above.

d. Turning to the issues as to costs and budgeting, we were satisfied that the Respondent's evidence indicated the exercise of proportionate means, in this respect. Ms McPheat stated (para 21) that the "*.....budgetary challenge has always been to balance the books and*

break even by ensuring that costs are saved, rather than extra income generated, precisely because of the great difficulty in generating extra income.....It is a question of survival" . This would seem to fit with the statement of 'how best to allocate a limited budget' as constituting a legitimate aim in **Heskett**. She also stated further (para. 36) that *"...outsourcing is a necessity rather than an option..*", and that (para 39) *"....for as long as I have been at St George's, outsourcing has proved to be (both operationally / practically and financially) a necessary means available to achieve our ends*."

e. Were there significant savings to be made by in-sourcing, this surely would have been looked into. As it is, the initial 2016 proposal only identified savings in the region of £50k pertaining to the security service, hence one of the reasons why it was said that more work was needed on this. Such *potential* savings, when balanced against the need for a specialist security services, hold, in our view, little weight.

f. When this issue was re-examined in 2019, the figures provided by BN showed that the costs of harmonising even some of the terms and conditions, would result in a 31.6% (or approximately £200k) increase [468 and Ms McPheat's statement para. 32). This is not an insignificant cost when viewing Ms McPheat's evidence and the audited accounts as a whole.

45. Dissenting Conclusions on Proportionate Means. Employment Judge O'Rourke does not agree that the Respondent has satisfied the burden of proof upon them, in this respect. He does so for the following reasons:

a. The test, applying **Hardy**, is an onerous one, with the implication that considerably more evidence would be required (perhaps even expert evidence, if beyond the Tribunal's expertise). As that authority says:

'…The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in ***Allonby***

[2001] ICR 1189 and in ***Cadman*** *[2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal*.'

b. The manner in which the Respondent advanced its justification defence undermined it. They only provided their 'legitimate aims' a month in advance of the Hearing and did not set out their evidence as to 'proportionate means' until exchange of witness statements. While, as identified in the Tribunal's findings in respect of the preliminary issue, some fault also rests with the Claimants' solicitors, in failing to press the Respondent on this point, the prime fault rests with the Respondent. How, without having identified the issues, in particular the details of the justification defence, appropriate disclosure, or drafting of relevant witness statements was to be achieved is anybody's guess. Entirely contrary to Tribunal orders, the bundle was not finalised until a month before the Hearing (due June 2021) and witness statements (as stated, containing the first detail as to 'proportionate means') were only exchanged in the two weeks before the Hearing (due July 2021). As stated in the Tribunal's findings above, such conduct by the Respondent would, had the Claimants sought an adjournment, have almost certainly merited a costs order against the Respondent.

c. I agree, therefore, with Mr Isaacs that the Claimants were not, due to this failure, in a position to properly challenge the Respondent's evidence. While I would not, of course, suggest in any way that the Respondent witnesses were being untruthful in their evidence, it is entirely possible, in situations where the entire picture is not available to the other party, for witnesses to 'cherry-pick' evidence that suits their case, ignoring that which may not. Again, I do not say that this is what happened in this case, but without the fuller picture, that cannot be known.

d. I note the argument that engaging a professional, external, security provider was a proportionate means of achieving the Respondent's legitimate aims, but don't consider that sufficient evidence was presented on this point, such as, for example, descriptions of the individual roles and the degree of 'specialisation', or training truly required to fulfil them, to support the Respondent's case that they could not have feasibly carried out such roles, in-house. I take judicial notice, for example, that it will have been routine, in years past, for large organisations such as the Respondent, to undertake their own security provision, without obvious mishap and the possibility that all that may have changed since then is the ease with which such functions can be outsourced and the costs-savings accrued as a consequence.

e. The 2016 business case found in-housing and parity, for all out-sourced services to be not only feasible, but cost-saving, to the tune of £200,000 per annum, in total and therefore, for, in my view, the Tribunal to consider how the Respondent's situation may have changed since, considerably

more evidence was required. I don't consider that BN's somewhat 'back of the envelope' assessment was sufficient, particularly in view of their obvious conflict of interest in doing so.

Final Conclusion

46. For these reasons, therefore, the Claimants' claims of indirect race discrimination fail and are dismissed.

Employment Judge O'Rourke
Dated: 20 May 2022