Neutral Citation Number: [2023] EAT 63

Case Nos: EA-2019-000652-DA

EA-2019-000974-DA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 May 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Institute and Faculty of Actuaries

Appellant on liability appeal
Respondent on remedy appeal

- and –

Mr R Davda

Respondent on liability appeal
Appellant on remedy appeal

- -

Joanne Connolly (instructed by Clyde & Co (Scotland) LLP)
for the **Appellant on liability appeal, Respondent on remedy appeal**
Jeffrey Jupp and Kate Temple-Mabe (instructed by Quantrills Solicitors)
for the **Respondent on liability appeal, Appellant on remedy appeal**

Hearing date: 26 January 2023

- -

JUDGMENT

SUMMARY

Race discrimination

The employment tribunal erred in law in holding that the respondent subjected the claimant to direct race discrimination in respect of the "number of opportunities it gave him to pass examinations" compared to Indian nationals or, alternatively, indirect race discrimination by offering only 2 sittings of its examinations per annum, while granting exemptions to equivalent examinations set by the Indian Actuarial Institute. The employment tribunal erred in law in its approach to the claim of indirect discrimination. The finding that the respondent had "subjected the claimant to direct race discrimination by directly or indirectly instructing, causing, inducing and or aiding the IAI not to admit British nationals as students" was made in error of law and was unsafe. The employment tribunal did not err in law in rejecting a complaint that the respondent had subjected the claimant to "indirect race discrimination by requiring that, in order to be regarded as a fully qualified actuary of the respondent, a member of the respondent must be appointed as a Fellow of the respondent."

HIS HONOUR JUDGE JAMES TAYLER

Introduction and key findings of the employment tribunal

1. This is an appeal and cross-appeal against the judgment of the employment tribunal, Employment Judge Brown sitting with members, sent to the parties on 13 May 2019, after a hearing from 14-17 January 2019, in chambers on 18 January 2019, and at a resumed hearing on 3 May 2019. There is also an appeal and a cross-appeal against the remedy judgment, sent to the parties on 5 September 2019, after a hearing on 17 and 21 June 2019, and in chambers on 9 August 2019.

2. The respondent is the qualifications body for actuaries in the UK. The claimant is a student member of the respondent. The claimant alleged that he had been subject to direct or indirect race discrimination as a British National in the arrangements that the respondent makes for conferring its qualifications. The employment tribunal upheld complaints of direct race discrimination in respect of the "number of opportunities it gave him to pass examinations" compared to Indian nationals or, alternatively, indirect race discrimination by offering only 2 sittings of its examinations per annum, while granting exemptions to equivalent examinations set by the Indian Actuarial Institute ("IAI"). The employment tribunal also held that the respondent had "subjected the claimant to direct race discrimination by directly or indirectly instructing, causing, inducing and/or aiding the IAI not to admit British nationals as students". The employment tribunal rejected a complaint that the respondent had subjected the claimant to "indirect race discrimination by requiring that, in order to be regarded as a fully qualified actuary of the respondent, a member of the respondent must be appointed as a Fellow of the respondent." The claimant was awarded £37,966.27, made up of £15,000 for injury to feeling, interest of £11,520 (calculated as 8% per annum since 2010) and £20,446.27 for future loss of income.

3. The claimant graduated in 2000 with a BSc in Mathematics from Kings College London. He joined the respondent in 2001 as a student member and took his first actuarial examination in April 2002. The claimant lives and works in Switzerland.

4. Student members of the respondent undertake examinations to become Associates or Fellows.

The respondent introduced a new curriculum with effect from 31 December 2018. In order to be exempt from the requirement to take examinations under the new curriculum, it is necessary for existing students to have passed equivalent exams under the old curriculum. The claimant has repeatedly failed examinations set by the respondent.

5. The respondent grants exemptions to students who have passed examinations with some actuarial associations in other countries that are considered to be equivalent to its own. The respondent also grants exemptions to those who have passed equivalent examinations or modules with a number of UK universities. The claimant had gained such an exemption himself. The respondent describes an exemption from the requirement to pass any of its examinations as an Individual Exam Exemption ('IEE').

6. The judgment records that the respondent has entered MRAs with bodies in the USA, China, India, South Africa, and Australia. There are also recognition arrangements in place with European countries, including Switzerland.

7. Pursuant to the IEE arrangements with the IAI, the respondent recognises a pass in an IAI examination as a direct equivalent of a pass in the respondent's corresponding examination. The exemptions granted for IAI examinations cover all of the examinations required to become an Associate or Fellow of the respondent, save for one Specialist Application (SA) subject. The IAI follows an identical syllabus to the respondent, uses the same educational materials, and sets examinations that are directly equivalent to the respondent's examinations. Members of the IAI can obtain the most extensive IEEs available to members of bodies with which the respondent has IEE arrangements. The respondent sets examinations twice a year. The IAI also sets examinations twice a year, but not on the same dates as the respondent's. The IAI examinations can be taken in the UK.

8. Students from countries around the world can join the respondent. A student member of the IAI can also be a student member of the respondent, and so can take the exams set by both the respondent and the IAI. A student who joins both could potentially take an equivalent examination four times a year, whereas a person who is only a member of the respondent can only do so twice.

Student members who are able to sit examinations from bodies other than the IAI that provide IEEs may also have more than two opportunities each year to take equivalent examinations.

Can UK nationals join the IAI?

9. The claimant asserted that UK nationals were not permitted to be members of the IAI as a result of an agreement made with the respondent. The determination of this factual dispute was of considerable significance in all of the claims.

10. The respondent sought to introduce further evidence about its dealing with the IAI after the main hearing. The application was mostly rejected, on the grounds that the new evidence had been submitted so late that it was not in the interests of justice to permit its introduction, particularly having regard to the importance of finality in litigation. A consequence of that decision was that there was limited evidence about whether UK nationals are permitted to be members of the IAI and about the precise nature of any agreement or understanding between the respondent and the IAI at the relevant time.

11. The employment tribunal considered evidence about Mr Hirani who was a student member of the respondent and the IAI. On 30 October 2010, Mr L Khan, who was then President of the IAI, wrote to Mr Hirani and stated that he had no alternative but to cancel Mr Hirani's membership of the IAI. Mr Khan stated that the IAI's examinations (save that at SA level) were based on the syllabus and study materials of the respondent. The respondent provided the study materials at low cost. Mr Khan said that the IAI did not conduct examinations in the UK for UK residents and subjects, to avoid competing with the respondent. Mr Hirani was unhappy about the response he received from the IAI and raised the matter with Dr Watkins, the respondent's Director of Education. Dr Watkins wrote to Mr Khan and asked if he had a copy of the agreement he had referred to. Mr Khan replied, "There was no agreement, it was more of understanding with Liz Goodwin". Dr Watkins did not respond to Mr Khan, but wrote to Ben Kemp, General Counsel for the respondent, enclosing the email exchange and stating "As I thought there is no agreement (Liz was my predecessor)".

12. The claimant applied to join the IAI in September 2017. On 13 September 2017, Swetha Jain,

described by the employment tribunal as a "Senior Executive-Examination" at the IAI, wrote to the Claimant stating, "Regret to inform you that we will not be able to give you admission in IAI since you are a UK citizen". The claimant sent a number of emails asking why he was not allowed to join and asking what provisions of the rules and regulations excluded him as a British National. He did not receive a detailed response to the points he raised. The IAI sent an email, that was the last in a chain, stating "This is to inform you that as per the Institute of Actuaries of India (Admission as Member) Regulations 2017 a student has to clear ACET to take admission in IAI. Kindly refer the below admission link".

13. The employment tribunal also considered an email chain from October 2017 between the IAI and an unnamed potential UK student member. On 11 October 2017 the potential student member sent an email asking: "I am a UK citizen. I am based in the UK. Can I join the IAI? I've heard that UK citizens are not allowed to join." Ms Jain responded on 13 October 2017 "You can join IAI by clearing the entrance exam ACET."

14. The employment tribunal considered a "Frequently Asked Questions" document. In answer to the question: "I live outside India, can I appear for the exam from outside India?" the response was:

> No, currently the exam is being offered only in cities within India, there is however no restriction based on citizenship and/or residence for the exams to be taken from any one of the twenty-four centres, however IAI will reject applications from countries/nationalities "alien" to India and any other nationality/country that IAI make consider it should not conduct its examinations for. The decision of IAI in this regard will be absolute and final.

15. The evidence suggested that while the claimant had initially been told that he could not join the IAI he was subsequently told that he could take the ACET examination and, if successful, could join the IAI, unless the IAI considered the UK to be "Alien" or that it should not "conduct its examinations for" a person who was a member of the respondent. The claimant has not taken the ACET examination in India. There was no evidence that the other potential student member had taken the ACET examination at a location in India and then applied to join the IAI, or whether any UK

national student members of the respondent have done so.

16. The employment tribunal concluded:

> 76.… it was plain to the Tribunal that, having been pressed strongly by the Claimant for an explanation about why he could not join as a UK citizen, the IAI never said, in plain terms, that he could join as a UK citizen. It never retracted its 13 September 2017 statement that he could not.
>
> 77.The Tribunal concluded that, if the IAI genuinely did not have a bar to UK citizens joining it, it would have been very easy for the IAI to say this, either in answer to the Claimant, or in answer to the later applicant, or indeed in answer to Mr Briscow when he raised similar questions in December 2018.
>
> 78.Furthermore, the very considerable practicable difficulties to a UK citizen taking the ACET exam - obtaining an Indian visa, travelling to India to take the exam - provided some support for the contention that the IAI's statement that students could gain admission to the IAI through taking the ACET exam was, in fact, intentionally disingenuous.
>
> 79.Taking all the evidence together, the Tribunal concluded that the statement by the IAI that students in general (including UK students) could gain admission by taking the ACET exam was disingenuous. If the IAI did not have a citizenship bar on UK students, then the IAI would have said so, in answer to direct questions, on several different occasions. It did not. The Tribunal did not accept the truth of the IAI statement that students could gain admission to the IAI through taking the ACET exam insofar as that statement was said to apply to UK citizens.
>
> 80.On the evidence, the Tribunal found that the IAI does have a policy of not allowing UK nationals to join it and that this policy was also applied to the Claimant when he tried to join in 2017. The last email to him on 27 September 2017 was properly to be understood as explaining why he had not been permitted to join the IAI because of his nationality.
>
> 81.By contrast, as set out above, it was not in dispute that Indian student members of the IAI could sit IAI exams in the UK and also be student members of the Respondent and sit the Respondent's exams.
>
> #

17. Thus, the employment tribunal concluded that the IAI does not permit UK nationals to join.

Consideration of the claims subject of the appeal

18. I consider it is helpful to consider the claims in a different order to that in the judgment of the employment tribunal and the revised grounds of appeal.

Direct Race Discrimination in relation to the finding that the IAI will not admit British Nationals as students

19. I will start by considering the appeal against the finding that the respondent had "subjected the claimant to direct race discrimination by directly or indirectly instructing, causing, inducing and or aiding the IAI not to admit British nationals as students".

Discrimination by a qualification body

20. Discrimination by qualifications bodies is prohibited by section 53 of the **Equality Act 2010** ("**EQA**"):

> 53 Qualifications bodies
>
> (1) A qualifications body (A) must not discriminate against a person (B)—
>
> (a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;
>
> (b) as to the terms on which it is prepared to confer a relevant qualification on B;
>
> (c) by not conferring a relevant qualification on B.

21. The term "qualifications body" is defined by section 54 **EQA**:

> 54 Interpretation
>
> (1) This section applies for the purposes of section 53.
>
> (2) A qualifications body is an authority or body which can confer a relevant qualification.
>
> (3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.

22. The respondent is a qualifications body within the meaning of these provisions.

Section 111 and 112 EQA

23. Sections 111 and 112 EQA make a person liable for discrimination carried out by another in specific circumstances.

24. The employment tribunal held at paragraph 4 of the judgment:

> The **Respondent subjected the Claimant to direct race discrimination** by **directly or indirectly** ***instructing, causing, inducing and or aiding*** the

> Indian Actuarial Institute not to admit British nationals as students. [emphasis added]

25. The employment tribunal gave brief reasons for this determination:

> 166. The Tribunal has found that there was an understanding between the Indian Institute and Liz Goodwin, Dr Watkins' predecessor at the Respondent, that the Indian Institute would not admit UK nationals. The Tribunal decided that having an "understanding" with another person/body did come within the meaning of "instructed, caused, induced and/or aided" another to do something which contravenes Part 5 Equality Act 2010.
>
> 167. Furthermore, **the Tribunal found that the complaint was one which was capable of coming within s.53(1)(a), (b) or (c) EqA 2010, because it related to the arrangements which the Respondent made for deciding upon whom to confer a relevant qualification**. The arrangements it made included the recognition and/or exemption of Indian exams for the purposes of gaining the Respondent's qualifications.
>
> 168. Under s.111 & 112 Equality Act 2010 the Tribunal concluded that the Respondent did instruct, or cause, or induce, or aid the Indian Institute to discriminate against the Claimant **in the arrangements that the Respondent made for deciding upon whom to confer a relevant qualification**.
>
> 169. The Tribunal found that the relevant instruction or inducement or help of the third party was a continuing act because, albeit that Liz Goodwin had originally issued the instruction, Dr Watkins knew about it at the time, and in 2013. At no time did the Respondent do anything to stop that instruction or understanding continuing. The act continues until the present day. [emphasis added]

26. Grounds 8 and 9 of the revised Notice of Appeal assert:

> (8) The ET misunderstood or misapplied the provisions of s.53(1) EqA by considering whether R acted in breach of s.53(1) instead of considering whether the IAI breached s.53(1)
>
> (9) Misapplication of s.111 and/or s.112 EqA

27. Ground 9, as well as asserting an erroneous approach to the application of sections111 and/or 112 EqA (I shall refer to as ground 9a), also asserts that the finding that there was an agreement between the claimant and the IAI under which there was an absolute prohibition on British Nationals joining the IAI was perverse (which I shall refer to as ground 9b and deal with later in this judgment).

The approach of the employment tribunal to sections 111 and 112 EQA in holding that the respondent directly or indirectly instructing, causing, inducing and or aiding the Indian Actuarial Institute not to admit British nationals as students

28. The employment tribunal conflated the provisions of sections 111 and 112 **EQA**. There are significant differences between the provisions that require consideration.

29. Section 111 **EQA** provides:

> 111 Instructing, causing or inducing contraventions
>
> (1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).
>
> (2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.
>
> (3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.
>
> (4) For the purposes of subsection (3), inducement may be direct or indirect.
>
> (5) Proceedings for a contravention of this section may be brought—
>
> (a) by B, if B is subjected to a detriment as a result of A's conduct;
>
> (b) by C, if C is subjected to a detriment as a result of A's conduct;
>
> (c) by the Commission.
>
> (6) For the purposes of subsection (5), it does not matter whether—
>
> (a) the basic contravention occurs;
>
> (b) any other proceedings are, or may be, brought in relation to A's conduct.
>
> (7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

30. Mr Jupp, in submissions, accepted that section 111 **EQA** could not apply to the claimant and accordingly this element of the judgment could not be sustained. There are two core reasons. For the purposes of section 111 **EQA** "A" is the respondent, "B" is the IAI and "C" is the claimant. The "basic contravention" would be that of a qualifications body discriminating against the claimant in a manner that falls within the provisions of section 53 **EQA** in respect of the conferring etc of a relevant qualification. Firstly, section 111(7) **EQA** limits the application of the section to circumstances in which the relationship between A and B is such that A is in a position to commit a basic contravention

in relation to B: i.e. the respondent must be able to commit a basic contravention in relation to the IAI by, for example, not conferring a relevant qualification on it. The respondent now accepts that is not the case and so section 111 **EQA** was not applicable. Secondly, the judgment and the reasoning is based on the basic contravention having been committed by the respondent, whereas it would have to have been committed by the IAI.

31. Section 112 **EQA** provides:

> 112 Aiding contraventions
>
> (1) A person (A) must not **knowingly help** another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention). [emphasis added]

32. For the purposes of section 112 **EQA** "A" is the respondent and "B" is the IAI. The second error made in respect of section 111 **EQA** also applies to the analysis of section 112 **EQA** because the employment tribunal treated the basic contravention as having been committed by the respondent, whereas it would have to have been committed by the IAI. Mr Jupp also accepted in his submissions that this reasoning in the judgment could not be upheld, but contended that the employment tribunal had made the factual finding that the IAI had committed a basic contravention by excluding British nationals from being members.

33. The claimant seeks a finding by the EAT that the IAI is in breach of section 53 **EQA**, presumably in the arrangements it makes for deciding upon whom to confer a relevant qualification, by refusing membership to UK nationals, and that the respondent knowingly helped it to do so, on the basis that there is only one possible correct answer: **Jafri v Lincoln College** [2014] EWCA Civ 449, [2014] ICR 920.

34. I consider that there are considerable problems with the approach that Mr Jupp suggests. It involves making a finding that a professional body in India is in breach of UK law in circumstances in which it is not a party to the proceedings and has had a very limited opportunity to submit evidence. There are significant issues about procedural fairness in considering complaints under section 111 or 112 **EQA** if the person alleged to have been guilty of the "basic contravention" is not a respondent

to the claim. In such circumstances it may be necessary to give some consideration as to whether the party alleged to have been guilty of the "basic contravention" should be permitted to participate in the proceedings as having a "legitimate interest" for the purposes of Rule 35 **Employment Tribunal Rules** 2013.

35. Insufficient consideration was given to the position of the IAI in the employment tribunal, largely because the parties do not appear to have given the issue much thought themselves. It was merely stated on behalf of the claimant in closing submissions "the IAI hold examinations in the UK it in that respect is bound by the EqA and s. 53 would apply to it". In the skeleton argument produced for the respondent it was said the claim fell outwith section 53 **EQA**.

36. There was also a lack of clarity as to precisely what the respondent was said to have done to knowingly help the IAI to discriminate. The various actions that might have been taken by the respondent were compendiously considered as "instructing, causing, inducing and or aiding". Aiding, the word used in the heading for section 112 **EQA**, could be taken to mean "help", the word used in the text of the provision itself. Precisely what the respondent did that amounts to helping is not clear, nor is it clear who at the respondent provided the help. Furthermore, the judgment referred to the respondent acting "directly or indirectly", whereas section 112 **EQA** does not include a concept of indirect helping.

37. Grounds 8 and 9a of the revised grounds succeed.

38. I consider it is likely that the claim under section 112 **EQA** will have to be remitted to the employment tribunal for determination. The respondent in this appeal has raised the fairly obvious issue of territorial jurisdiction. The claimant contends in a supplementary skeleton argument submitted by Mr Jupp, that the issue of territorial jurisdiction was not raised before the employment tribunal and it is too late to do so now. I consider that is also a matter that is likely to be appropriate for the employment tribunal to consider on remission, as will be the question of whether the IAI should be permitted to participate in the proceedings because it has a legitimate interest in them.

39. I agreed with the parties that they would have an opportunity to make further submissions

about disposal once they had the opportunity to consider my judgment.

The finding that the respondent and the IAI had an agreement under which there was an absolute prohibition on British Nationals joining the IAI – ground 9b

40. As I have explained above, I have significant concerns about the safety of the determination that there was an agreement between the respondent and the IAI that meant there is an absolute prohibition of a UK National becoming a member of the IAI because of the limited evidential basis for this finding, in particular the limited scope for the IAI to provide any evidence, in circumstances in which the IAI was not a party to the proceeding and the claimant asserts that the IAI acted unlawfully. This is an important point as the determination that there was an absolute prohibition of UK Nationals being members of the IAI, and that the claimant could not have joined the IAI as a result was of considerable, or fundamental, importance to the determination of the claims of direct and indirect discrimination that I shall now move on to consider. I will return to the safety of the determination of this factual issue later in the judgment.

Direct race discrimination

41. The employment tribunal held at paragraph 1 of the judgment:

> The Respondent directly discriminated against the Claimant, a British national because of race in respect of **the number of opportunities it gave him to pass examinations** to qualify as a Fellow of the Respondent, **compared to the number of opportunities it gave to Indian nationals**. [emphasis added]

42. The employment tribunal gave the following reasons for this determination:

> 131. The Claimant relies on **a hypothetical Indian student member of the Respondent**. He contends that that hypothetical Indian student is in materially same circumstances as the Claimant. The Respondent says the correct comparator is a hypothetical non- British student of the Respondent, who is in materially same circumstances as the Claimant, amongst other things, not being a student member of the IAI.
>
> 132. **The Claimant contended that he was entitled to identify his comparator. The Tribunal accepted that the Claimant was entitled to choose his comparator.** The Tribunal also considered that an Indian national student member of the Respondent was in the same material circumstances as the Claimant, who is also a student member of the Respondent.

133. **The Claimant contended that he was treated less favourably than the Indian member because the Indian member had the opportunity to join the Indian Actuarial Institute and sit exams which were recognised** by the Respondent through exemptions, whereas a UK national did not.

134. The Tribunal has found that the Indian Actuarial Institute examinations are treated by the Respondent as being directly equivalent to the Respondent examinations and that a pass in an IAI exam is treated as the equivalent of a pass in the Respondent's corresponding exam, by virtue of the automatic exemption given. Because the Respondent recognises the equivalent pass of the Indian Actuarial Institute examinations, anyone who sits both the Indian Actuarial Institute's and the Respondent's examinations has 4 opportunities to pass a relevant qualifying exam in one year.

135. **In order for the Claimant to succeed in a *James v Eastleigh BC* – type claim of direct discrimination, the reason for the treatment and the protected characteristic must exactly correspond. Alternatively, if the criterion applied by the decision maker is the protected characteristic itself, or a proxy for the protected characteristic, then the reason for the treatment is the protected characteristic and the discrimination is direct discrimination**, rather than indirect discrimination.

136. In the current case, by recognizing exams passed by Indian Actuarial Institute members, which are sat on 2 extra occasions each year, the Respondent provides additional opportunities to pass exams to members of the Indian Actuarial Institute. However, membership of the Indian Actuarial Institute was not available to UK nationals. UK nationals can never sit those exams. **There is an exact correspondence between the protected characteristic (non-UK nationality) and reason for the treatment (student membership of the Indian Actuarial Institute.)**

137. The Respondent contended that the Claimant's claim was not properly against it, but against the IAI, and that it was not the Respondent who treated the Claimant less favourably. However, the Tribunal has found that the Respondent automatically gives exemptions for the IAI exams. Indian Actuarial Institute exams are treated as direct equivalents and passing an exam effectively means passing the Respondent's exam. The Tribunal finds that the Respondent adopts the Indian exam results, effectively, as its own exam results. It thus provides 2 additional opportunities to pass its own examinations to Indian Actuarial Institute members. Whether or not the Respondent intends to discriminate, **it recognizes the IAI exams, from which the Claimant is excluded because of his nationality**. …

141. The Tribunal **therefore found that the Respondent treated the Claimant less favourably than Indian nationals when it gave exemptions for exams set by the IAI because the Claimant, who was a UK national and was barred from joining the IAI because of his nationality**, was unable to sit those exams and gain those exemptions. **He only had two opportunities to sit relevant exams in one year, when Indian nationals <u>potentially</u> had 4 opportunities.** [emphasis added]

43. Direct discrimination is defined by section 13 **EQA**:

> 13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

44. Section 23 **EQA** provides:

> 23 Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

45. The respondent challenges the direct discrimination decision on four, somewhat interrelated, revised grounds of appeal that assert that the employment tribunal:

> 1. Misapplied s.13 EqA and failed to identify treatment of C by R
>
> 2. Misapplied *James v Eastleigh Borough Council*
>
> 3. Misapplied s.23 EqA and failed to identify a comparator whose circumstances were not materially different to C's
>
> 4. Misapplied s.53(1)(a) [EqA] by failing to identify treatment by R in the arrangements it made for conferring a qualification

46. The employment tribunal identified the treatment that the respondent afforded to the claimant and his comparators as "the number of opportunities it gave to pass examinations". I do not accept that where the IAI, or other organisations that have IEE arrangements with the respondent, allow their students to undertake examinations, that is treatment afforded by the respondent. The respondent offers its students two opportunities per year to pass its examinations. That is the case for student members of whatever nationality. While the IAI also gives its student members two opportunities a year to pass its examinations, that is treatment afforded by the IAI, not the respondent. The fact that passing an IAI examination results in a student obtaining an IEE does not mean that it is the respondent that has permitted IAI students to take the examinations of the IAI.

47. Further, any difference of treatment had to be because of race. This was asserted to be a **James**

type of case in which the treatment is because of something other than race that is an exact proxy for race. In **Essop and others v Home Office (UK Border Agency) Naeem v Secretary of State for Justice** [2017] UKSC 27, [2017] I.C.R. 640 Baroness Hale stated at paragraph 17:

> *James v Eastleigh Borough Council* also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it.

48. The employment tribunal made a comparison between the claimant and an Indian national who is a student member of the respondent. The treatment was identified as being the number of opportunities to pass examinations. Even if that could be considered to be treatment by the respondent, there is no exact correspondence between membership or non-membership of the IAI and Indian nationality. Not all Indian student members of the respondent will be members of the IAI. There was nothing to suggest that IAI membership was limited to Indian nationals, even if UK nationals were excluded.

49. The employment tribunal gave a rather different analysis of the treatment at paragraph 141 of the reasons where it referred to the treatment being the respondent giving "exemptions for exams set by the IAI". That is not the treatment referred to in the judgment. In any event, there will be Indian student members of the respondent who have not joined the IAI, or who are student members of the IAI but have not taken and/or passed any examinations that would provide an IEE. There will also be UK Nationals who have obtained IEEs from bodies other than the IAI. Again, exact correspondence is not established between obtaining IEEs and nationality.

50. It is to be noted that the claimant has not joined any of the bodies, other than the IAI, with which the respondent has IEE arrangements and taken the opportunity to sit their examinations that might result in an IEE.

51. Grounds 1-3 of the revised grounds succeed because the employment tribunal misidentified the treatment afforded to the claimant by the respondent, erred in concluding there was **James** type exact equivalence and erred in its identification of a comparator. Because the employment tribunal

erred in its identification of the treatment afforded by the respondent to the claimant ground 4 falls away at present as there can only be a proper analysis of whether treatment afforded by the respondent to the claimant falls within section 53 **EQA** once the treatment has properly been identified.

52. As set out above, the parties shall be given an opportunity to make submissions on disposal. Were disposal to involve remission to the employment tribunal and the analysis on remission relies on the claimant establishing that there is a total bar on UK Nationals joining the IAI, that raises the question of the safety of the employment tribunal's determination that UK nationals are not permitted to join the IAI.

Indirect Race Discrimination

53. The employment tribunal held in its judgment that the respondent had subjected the claimant to indirect race discrimination by offering only 2 sittings of its examinations per annum, while granting exemptions to equivalent examinations set by the IAI. In the reasons, the employment tribunal considered three overlapping PCPs and set out the following analysis.

> 142. The Claimant relied on three PCPs:
>
> i. The rule or policy of the Respondent of offering two sittings of its exams per annum
>
> ii. The rule or policy that requires student members should pass examinations by the end of the transition period 31 December 2018 or face losing the benefit of the exam passes already obtained and also have to take additional exams under the new curriculum, curriculum 2019; and
>
> iii. The Respondent's exemption policy of exempting exams set by the IAI.
>
> 143. The Respondent accepted that it applied PCP (1), but did not accept that it applied PCP (2). The Tribunal found that the Respondent did apply a policy which required student members to pass examinations by 31 December 2018; that is, specifically, CT5 as well as CT1 and CT4 as well as CT6, in order to be treated as having passed CM1 and CS2 under curriculum 2019. While the Respondent contended that the Claimant did not lose the benefit of the exam exemptions he had already obtained, it was clear that he would have to pass an exam under curriculum 2019 which covered the material which had already been covered in the Claimant's exam passes at CT1 and CT6.
>
> 144. The Respondent contended that the third PCP could not be a PCP

because it did not apply to both the protected group and those who did not share the protected group; the protected group being UK nationals and those that did not share it at being Indian nationals. **The Tribunal found that the policy of applying exemptions to exams set by the IAI applied to all students of the Respondent who sought to become qualified, either as associate, or Fellow, members of the Respondent. Applying examination exemptions were part of the rules it made for determining upon whom to confer qualifications**, bundle 6 page 2163; "you must obtain exam passes with the IFOA by 31 December 2018 or have been granted exemptions by 1 February 2018".

145. A disadvantage caused by the interaction between two PCPs is unlawful *MOD v DeBique* 2010 IRLR 471 and *Essop and others v Home Office (UK Border Agency); Naem v Secretary of State for Justice* 2017 UKSC27 26.

146. **The Tribunal found that the rule or policy of the Respondent of only offering two sittings of its exam per annum and the PCP of exempting exams set by the IAI, did put the Claimant and UK nationals at a disadvantage because they only had the opportunity to sit the two sittings of the Respondent's exams per annum, whereas non- UK nationals and, in particular, Indian nationals, had the opportunity to sit two additional exams per annum**, which would be treated by the Respondent as qualifications.

147. The Respondent contended that there was no particular disadvantage to UK nationals, or to the Claimant, because a "scatter gun" approach to exams was not beneficial. Mr Bristow told the Tribunal that, in his view as an educationalist, it would be better for a student to sit the two exams provided by the Respondent a year, and, if they failed the first exam, to wait for the examiner's report and use it to inform a more successful attempt at the second exam.

148. The Indian Institute exams take place within a month of each of the Respondent's exams. The Claimant contended that it would be easier and beneficial for a candidate to revise for a particular exam, for example CT4, and then have two attempts within a short period of time to pass that exam, rather than waiting for another six months for a further opportunity when it would be more difficult to retain the knowledge gained from preparation for the first exam.

149. The Tribunal found that, as a matter of logic, having two opportunities to pass an exam which tests the same knowledge is of benefit and does give the candidate an additional chance to pass the relevant exam. It also reduces the chance of external factors detrimentally affecting a candidate's performance. If a candidate is ill on one day, or has other factors affecting their performance, they have a chance, a month later, to sit an exam testing the same knowledge, when those external factors might not be present.

150. Further, the individual exams are different; they will not examine all areas of the syllabus in exactly the same detail. A candidate might perform better on a particular exam which tests particular areas of a syllabus in greater

> detail, than in a different exam, which concentrates on other parts of the syllabus.
>
> 151. The Tribunal found that the disadvantage was exacerbated by application of PCP (2), in that the Claimant had a short two-year period in which to pass all the outstanding exams. The Claimant only had four opportunities within that two-year period to pass both CT3 and CT4, whereas an Indian national student member of the Respondent, who could also be an IAI member, had 8 opportunities to pass those outstanding exams.
>
> 152. So, **the Tribunal found that the PCPs did put the Claimant at a disadvantage compared to Indian nationals, in that he had fewer opportunities to pass the Respondent's exams before he lost the benefit of his CT1 and CT6 exams. There was a group disadvantage to UK nationals as well as an individual disadvantage to the Claimant, who had tried to join the IAI in 2017, and whose membership was rejected on the grounds of nationality**. [emphasis added]

54. The respondent challenges this determination on the following revised grounds:

> (5) The ET misapplied s.19(1) EqA when it found that R applied PCP3 to C and/or failed to consider the application of s.53(1) EqA at all
>
> (6) The ET misapplied s.19(2)(b) (EqA] in identifying those in the pool for assessing group disadvantage and in its finding that there was a particular disadvantage to UK nationals
>
> (7) The ET misapplied s.23 EqA and failed to identify a pool which contained individuals whose circumstances were not materially different to C's

55. Indirect discrimination is defined by section 19 **EQA**:

> 19 Indirect discrimination
>
> (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.

56. I noted in **Glover v Lacoste** [2023] EAT 4:

> There are a number of elements in a claim of indirect discrimination. So far as is relevant to this appeal it is necessary to consider:
>
> 1. general application of a PCP – ss 19(1) and 19(2)(a)
>
> 2. particular disadvantage to the group that shares the claimant's protected characteristic – s 19(2)(b)
>
> 3. disadvantage to the claimant – s 19(2)(c)
>
> 4. detriment to the claimant – s 39(2)(d)
>
> The concepts overlap to an extent. It will generally be the application of the PCP that causes the particular disadvantage to an employee and results in the detriment. That said, the separate concepts do have to be considered and properly analysed.

57. The approach that the employment tribunal adopted to the three interrelated PCPs was somewhat convoluted. Only two of the PCPs were referred to in the judgment, as opposed to the three PCPs relied on in the reasons. While I accept that, in a sense, it can be said that offering an exemption to passing an examination of the respondent to students who have an IEE because of having passed an examination with the IAI is a general policy it is, at best, a subset of the underlying policy of offering exemptions to all those who have an IEE, whether from the IAI or any other body that has IEE arrangements with the respondent.

58. The employment tribunal had to compare the treatment of the claimant and those who shared the protected characteristic of UK nationality with those who did not. It was not entirely clear which pool of student members of the respondent UK National members were being compared with. At paragraph 146 the employment tribunal referred to a comparison between UK nationals and "non-UK nationals and, in particular, Indian nationals". At paragraph 152 the employment tribunal stated that "the Tribunal found that the PCPs did put the Claimant at a disadvantage compared to Indian nationals". Reading the reasons overall I consider it is clear that the employment tribunal drew a comparison between UK nationals and Indian nationals. I do not consider that was the appropriate

pool of comparison. I consider that the appropriate comparison was between members of the respondent who are UK nationals and those with whom the claimant does not share that characteristic, i.e. all non-UK national members of the respondent, as required by section 19(2)(b) EQA. I also consider that, whatever the correct pools for comparison, the employment tribunal's reasoning was based on a false premise that UK nationals only had an opportunity to take equivalent examinations twice a year whereas those in the comparator group had the opportunity to take them four times a year. Even if it is correct that UK nationals could not join the IAI that did not mean that they only had the opportunity to take the examinations twice a year, because they could obtain IEEs from other organisations with which the respondent has IEE arrangements. Indian nationals could join the IAI, but so could other nationals. There would be Indian Nationals who had not joined the IAI so did not have additional opportunities to pass equivalent examinations. Non-Indian nationals could also obtain IEEs from other organisations than the IAI. There was no material relied on by the employment tribunal about how many Indian nationals or non-Indian nationals obtained IEEs from the IAI or any other bodies. I consider that the decision on indirect discrimination is unsafe and, in particular, revised ground 6 succeeds. I do not consider that the other revised grounds add significantly to that ground. I will consider the submissions on disposal that I have permitted the parties to make.

The cross appeal – indirect discrimination by requiring that, in order to be regarded as a fully qualified actuary of the respondent, a member of the respondent must be appointed as a Fellow of the respondent

59. The employment tribunal held that:

> 157. The Respondent did not accept that this was capable of being a PCP. The Respondent said that it was empty of meaningful content and was circular. **The Tribunal considered that the PCP was capable of being a PCP, but was not, in fact, applied by the Respondent. The Tribunal accepted the Respondent's evidence that it recognises two levels of qualification: Associate membership and Fellowship and that different levels of qualification are required to achieve these two different memberships.**
>
> 158. The Claimant's case to the Tribunal was that it was easier to attain Fellowship of the Respondent by becoming a fully qualified actuary in another European country, for example, Switzerland and then being granted Fellowship of the Respondent by mutual recognition, than it was to pass the

Respondent exams in order to become a Fellow. That argument appeared to rely on different PCPs than the PCP which the Claimant contended for. 159. The Tribunal **accepted the Respondent's argument that the PCP, as framed by the Claimant, is circular**, in that it says that, **in order to achieve the highest level of qualification with the Respondent, one has to achieve the highest level of qualification**. The Respondent contended that the formulation of the PCP by the Claimant in this way was an attempt to avoid the fact that there are two separate routes to fellowship of the Respondent which are mutually exclusive, one of which was applied to the Claimant, and one of which was not. On the one hand, there was a practice entailed in the Mutual Recognition Agreement route to Fellowship of the Respondent, which applied to those actuaries fully qualified with an overseas actuarial body with whom the Respondent has a Mutual Recognition Agreement. Those persons need to prove their overseas existing qualification and pass an aptitude test with the Respondent, or complete a year of work experience in the UK under the mentorship of a Fellow of the Respondent and be approved by the mentor at the end of the year. On the other hand, there is the Respondent's exam system route, through which a candidate must pass all 15 exams and/or gain exam exemptions, and complete the requisite work experience.

160. The Respondent contended that **the MRA PCP did not apply to the Claimant, because the Claimant had not achieved a primary full actuarial qualification with any actuarial body**, although it would be open to him to pursue such, including with the Swiss association. The Tribunal accepted this contention.

161. In any event, the Tribunal accepted the Respondent's evidence that its Mutual Recognition Agreements **entitle overseas actuaries only to be "FIA*", which was somewhat different to full Fellowship**. It does not entitle those people to the benefit of Mutual Recognition Agreements with other prestigious actuarial organisations in the US, for example. So the MRA route does not give access to the full qualification which the Claimant relied on, FIA* does not give access to fellowship of the US, Canadian or Australian actuarial institutes.

162. On the evidence that the Tribunal has heard, the Respondent's Associate qualification satisfies the minimum standard set out in the AAE syllabus. However, the Claimant does not himself have Associate status. **Even if there was a PCP which put Associate members of the Respondent at a particular disadvantage, compared to actuaries qualified in other EU jurisdictions, it would not put the Claimant at that disadvantage because he does not have that qualification**.

163. Furthermore, the Tribunal accepted the Respondent's argument that the Tribunal had **no evidence about the Swiss examination system.** It may well be that the Swiss actuarial qualifications are achieved primarily through University courses and that this would explain why the Claimant and his witnesses did not see their European equivalents working hard while employed by Zurich, because they had already done the relevant examinations at University. The Tribunal simply did not have adequate evidence about other European countries' examination processes to decide

whether they were less exacting than the Respondent's examinations for Associate or Fellowship qualification. This claim failed.

60. The determination of the employment tribunal is challenged on the following grounds:

1. It as an error of law to determine PCP was circular

2. Finding of FIA* qualification which differed from FIA qualification was perverse and unfair

3. The finding that the employment tribunal did not have adequate evidence on which to conclude that British / UK Nationals suffered a disadvantage because the Swiss exams/qualification process was easier than R's was perverse

4. The employment tribunal erred in holding that even if there was a PCP that placed Associates at a particular disadvantage it did not put the claimant at that disadvantage

61. The employment tribunal held that the PCP asserted by the claimant had not been applied by the respondent. That factual finding has not been appealed and so the cross-appeal must fail. Further, I can see no error of law in the employment tribunal concluding that the PCP adopted by the respondent was circular and that the FIA* qualification differed from FIA, even if that evidence came out at the employment tribunal hearing. Where evidence arises in the course of a hearing it is a matter for the case management discretion of the employment tribunal to decide whether it can be relied upon.

62. The employment tribunal was entitled to conclude that the claimant had not advanced evidence to establish that qualification in Switzerland was easier than in the UK and that because the claimant had not passed the exams necessary to obtain Associate status he had not been disadvantaged by any PCP that placed Associates at a disadvantage in seeking to obtain fellowship.

63. Accordingly the cross-appeal fails.

The finding that the respondent and the IAI had an agreement under which there was an absolute prohibition on British Nationals joining the IAI

64. This case may have to be remitted for redetermination, subject to any submission the parties have to make on disposal. That brings into focus my concerns about the safety of the factual finding that the respondent and the IAI had an agreement under which there was an absolute prohibition on

British Nationals joining the IAI. Should remission be appropriate, my provisional view is that revised grounds 9b and 11 should also be remitted for re-determination, with the employment tribunal undertaking case management including consideration of whether the IAI should be permitted to intervene if they seek to do so.

The remedy appeal and cross appeal

65. As the liability appeal has succeeded and the liability cross-appeal failed, I consider, subject to any submissions as to disposal, all remedy issues would have to be considered afresh were the claimant to succeed in any claims that he maintains.

Disposal

66. I have considered the parties submissions and replies in respect of disposal.

67. I consider that there is only one possible realistic answer to the claim of direct race discrimination: see **Jafri v Lincoln College** [2014] EWCA Civ 449, [2014] ICR 920. I found that the respondent did not subject the claimant to the treatment asserted in the direct discrimination claim and the employment tribunal erred in accepting that this was a **James** type case. I substitute a decision that the claimant was not subject to direct discrimination by the respondent in respect of the number of opportunities it gave him to pass examinations to qualify as a Fellow of the respondent.

68. I am not persuaded that there could only be one answer to the question of whether the claimant was subject to indirect race discrimination by the respondent. The fact that I found that the analysis was based on a false premise that UK nationals only had the opportunity to take examinations twice a year disregarding the fact that they could obtain IEE's from organisations other than the IAI and that the employment tribunal applied an incorrect pool for comparison does not mean that if these matters were correctly analysed there could only be one possible answer. This claim will be remitted. The extent to which the indirect discrimination claim should be limited by the pleaded case and manner in which the claim has been advanced will be a matter for consideration by the employment tribunal during case management for the remitted hearing.

69. The section 111 **EQA** claim is no longer pursued.

70. It is agreed that the section 112 **EQA** claim should be remitted. There is a dispute as to whether on remission the question of whether there was an agreement between the respondent and the IAI that UK nationals would not be permitted to join the IAI will be open for fresh consideration. I accept the respondent's submission that this finding was challenged in the appeal. I consider the finding of the employment tribunal on this issue is unsafe. The employment tribunal analysed the section 112 **EQA** complaint on a fundamentally flawed basis in that it treated the basic contravention as having been committed by the respondent. If it had appreciated that the basic contravention had to be committed by the IAI it would necessarily have had to consider how the issue could be dealt with in a manner that was fair to the IAI as well as the respondent. I consider this factual matter should be redetermined on remission. It will be for the employment tribunal to consider any application by the IAI to be joined in the proceedings and whether the issue of territorial jurisdiction can be raised.

71. The remission will be to a newly constituted employment tribunal. I have had regard to the principles set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. While I would not go as far as to find that this was a totally flawed decision, there were significant errors. I consider that the respondent would have a concern that the employment tribunal might unconsciously take a second bite because some of the findings, particularly in respect of the agreement with the IAI were forcefully made. The significant passage of time limits the extent to which there would be any saving by a remission to the same panel. There would be some prejudice to the respondent as their previous counsel may not be available and so new counsel would be ignorant of matters that the employment tribunal and the claimant's counsel would be able to recall from the previous hearing. While the eventual award to the claimant was not very large, the claim raised matters of some general importance about two regulatory bodies, the respondent and the IAI, so I consider that remission to a new employment tribunal is proportionate.

72. Accordingly:

72.1. Paragraph 1 of the judgment of the employment tribunal is set aside and a decision that the claimant was not subject to direct discrimination by the respondent in respect

of the number of opportunities it gave him to pass examinations to qualify as a Fellow of the respondent is substituted for that of the employment tribunal

72.2. Paragraph 2 of the judgment of the employment tribunal is set aside and the claim remitted to a differently constituted employment tribunal

72.3. The appeal in respect of paragraph 3 of the judgment of the employment tribunal is dismissed

72.4. Paragraph 4 of the judgment of the employment tribunal is set aside and the claim remitted to a differently constituted employment tribunal