EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr L Johnston	Telecom Service Centres Ltd trading as Webhelp UK Trading

Heard at: **Leeds by Teams** **On: 12 and 13 June 2023**

Before: **Employment Judge Davies**
Ms H Brown
Mr G Wareing

Appearances
For the Claimant: **In person**
For the Respondent: **Mr Maxwell solicitor**

JUDGMENT

The complaint of indirect discrimination because of race (nationality) is well-founded and succeeds.

REASONS

Introduction

1. This is a claim of indirect discrimination on the ground of nationality brought by the Claimant, Mr L Johnston, against the Respondent, Telecom Service Centres Ltd trading as Webhelp UK Trading. The Claimant represented himself and the Respondent was represented by Mr Maxwell, solicitor. There was an agreed file of documents. The Tribunal also admitted additional documents at the request of the Claimant by agreement. This included witness statements prepared by the two Respondent witnesses for the purpose of the Claimant's claim in the Northern Ireland Tribunal. Those were not relied on as the witnesses' sworn statements in the Leeds Tribunal, but were admitted so that the Claimant could ask the witnesses questions about them. The Claimant gave evidence on his own behalf. For the Respondent, Ms Roberts, a consultant within the recruitment team, and Mr McKenna, Director of People Services for UK, South Africa and India, gave evidence.

Issues

2. The Claimant describes his nationality as Northern Irish. In a judgment dated 24 May 2023, EJ Bright held that the Employment Tribunal in England had jurisdiction to hear the Claimant's claim. There is no dispute that the Respondent had a provision, criterion or practice ("PCP") of "Not employing homeworkers

who live in Northern Ireland"; that it applied that PCP to the Claimant; and that it did or would apply it to others who were not Northern Irish.

3. The issues for the Tribunal to determine were therefore:
   - 4.1 Did or would the PCP put Northern Irish people at a particular disadvantage when compared with people who are not Northern Irish?
   - 4.2 What is the appropriate pool for assessing that comparison? Is it, as the Respondent says, applicants or potential applicants for homeworker jobs with the Respondent resident in Northern Ireland? Or is it, as the Claimant says, applicants or potential applicants for homeworker jobs with the Respondent resident in the United Kingdom?
   - 4.3 Did the PCP put the Claimant at the disadvantage?
   - 4.4 Was the PCP a proportionate means of achieving a legitimate aim?
     The Respondent says its aims were:
     - 4.4.1 To ensure that its employees were afforded appropriate employment rights;
     - 4.4.2 Not to incur potential liability for the business by employing people in a statutory regime it had not employed in prior to the pandemic;
     - 4.4.3 To ensure operational efficiency; and
     - 4.4.4 To ensure that there was an appropriate level of technical and other support for employees.

     The Tribunal will decide:
     - 4.4.5 Were those legitimate aims?
     - 4.4.6 Was the PCP an appropriate and reasonably necessary way to achieve the aims?
     - 4.4.7 Could something less discriminatory have been done instead?
     - 4.4.8 How should the needs of the Claimant and the Respondent be balanced?

Findings of fact

4. The Respondent is Telecom Service Centres Ltd trading as Webhelp UK ("Webhelp UK"). It is a part of the global Webhelp group, which operates in more than 55 countries. The headquarters of the group are in France. The Webhelp group of companies provides outsourcing support for different companies on a campaign by campaign basis. It provides call centre and/or webchat advisors for the client.

5. Webhelp UK has operations in the UK, South Africa and India. In South Africa and India, it has separate companies that employ the workers there, which are subsidiaries of the global Webhelp group. However, the South African and Indian operations come under the Webhelp UK umbrella. Almost always, any particular campaign for a Webhelp UK client would be based in either the UK, South Africa or India, not spread between different countries. Typically, day to day roles such as advisors and junior managers would all be based in the relevant country. Some higher level of management with responsibility for the campaign would be based in the UK. Webhelp UK would receive legal advice and support from lawyers in the relevant country.

6. Mr McKenna is employed by Webhelp UK as the Director of People Services UK, South Africa and India. He is responsible for all HR operations, employee

relations, change and transition, people systems and HR shared services. He has oversight of the company's HR and Recruitment IS systems. He explained that the reason to "offshore" work to India or South Africa was because the cost of employing staff was lower than the cost in the UK.

7. The global Webhelp company has typically expanded into new countries by merging with or acquiring existing businesses there. Before doing so, work would be done to assess feasibility.

8. Webhelp UK has its headquarters in Scotland. Prior to the coronavirus pandemic, the UK based employees of Webhelp UK were recruited to work at particular sites. There were 12 to 14 sites in total, in Scotland, England and Wales. Employees working on campaigns did not work from home. The pandemic led to the introduction of homeworking. This, in turn, led to a number of sites being closed. There are now nine sites, in Scotland and England. Webhelp UK does not have a physical site in Northern Ireland and has never had one. Before the pandemic, it did not therefore employee workers in Northern Ireland.

9. Since the pandemic, Webhelp UK has continued to operate some homeworking. Some clients want staff to work from an office site, but others do not, so some work can be done by homeworkers.

10. Webhelp UK has therefore recruited homeworkers since the pandemic. Mr McKenna's evidence was that on average its advisers remain with the company only 11 months (and as little as 5 months on some campaigns). There is plainly a relatively high turnover of staff. His evidence was that the number of homeworkers recruited since the pandemic is in the hundreds. The standard homeworker contract of employment identifies Scottish law as the governing law of the contract.

11. Against that background, in or around January 2022, Webhelp UK advertised for a "Homeworking Customer Service Advisor" using the Indeed platform. The advert said that the role was for:

> Webhelp
> United Kingdom

12. The role was explicitly a remote role. The advert did not say that people who lived in Northern Ireland were excluded from applying. On the Webhelp global website, someone selecting "United Kingdom" in the relevant dropdown menu would be shown a map with the whole of the United Kingdom, including Northern Ireland, highlighted.

13. The Claimant applied. He lives in Northern Ireland and he describes himself as Northern Irish. He was told that his CV would be reviewed. He exchanged emails with an employee based in South Africa. That included an email from her telling him that the location of the role was "UK wide (permanent work from home)." There was no suggestion that people based in Northern Ireland were excluded.

14. The Claimant was invited to a telephone interview. That took place on 31 January 2022. Ms Roberts conducted it. When asking the Claimant a couple of ice-breaking questions, and then looking at his information, she discovered that he lived in Northern Ireland. Her understanding was that "company policy" was that they did not recruit people who lived in Northern Ireland and she told the Claimant that she would be unable to continue with the interview because of his home address. He was understandably unhappy, and questioned that. Ms Roberts apologised. She accepts that she told the Claimant something about the company's courier not delivering to Northern Ireland by way of explanation. Her evidence was that she did not know the reason why the company did not recruit candidates who live in Northern Ireland, as that is not something she is involved with. She was probably feeling under pressure and quite flustered when she mentioned couriers to the Claimant. The Tribunal accepted Ms Roberts's evidence – she knew that it was company policy not to recruit people who live in Northern Ireland, but she did not really know the reasons behind that.

15. The upshot, nonetheless, was that the Claimant was rejected because of the company policy that it did not recruit homeworkers who live in Northern Ireland.

16. Mr McKenna said in his witness statement that Webhelp UK had "never consciously excluded operating or employing people from Northern Ireland." It had not operated a site in Northern Ireland before the pandemic and had not recruited people living in Northern Ireland as a result. That practice had not changed since the pandemic; it had continued not to recruit people from Northern Ireland.

17. However, it was clear from the oral evidence that ordinarily when applicants' CVs are screened, anybody living in Northern Ireland would be rejected by the recruitment team. Ms Roberts was aware of this, and had herself occasionally been involved in screening CVs in different recruitment exercises; she had rejected applicants from Spain and South Africa. In his oral evidence Mr McKenna was asked how someone in the recruitment team would know to reject people living in Northern Ireland. He said that it was part of their training. It was clear to the Tribunal that this was not, as Mr Maxwell submitted, simply a continuation of the status quo. Previously, roles at particular physical sites had been advertised and employees recruited accordingly. Now, something different was being done. UK-wide homeworking roles were being advertised. It was obvious that a conscious decision *had* been taken when those roles were advertised to exclude people living in Northern Ireland, because the recruitment team were explicitly told to do just that.

18. Mr McKenna's evidence was that Indeed allowed companies to recruit to a particular location, e.g. Glasgow or Sheffield, or to recruit UK-wide. Instead of placing multiple adverts in each city across the UK for homeworking roles, they started to advertise UK-wide. He said that their "intention" was not to recruit from Northern Ireland or other locations, such as London. He was asked about excluding people based in London. He said, "We wouldn't advertise for them. People wouldn't apply." He was asked which of the two it was: did Webhelp UK impose restrictions, or was it that people in London would not apply? He said that there would be nothing to stop them applying, but it was highly unlikely to

happen, because the salary was too low. The Tribunal found that there was no company policy to exclude applicants living in other UK locations, apart from Northern Ireland. Recruiters were not given instructions to reject such applicants.

19. Mr McKenna was asked whose decision it was, when Webhelp UK started recruiting homeworkers, to exclude those living in Northern Ireland. He said that he did not know. It could have been a recruitment director. He had not had any part in the decision. The Tribunal was provided with a copy of an email sent by Ms Lloyd, a Director of People Solutions and Recruitment, to Ms Nicol, an HR People and Change Manager, in September 2021, simply saying:

> We want to explore the possibility of employing people in Northern Ireland. In theory this should be just the same as UK mainland but, the reality may be different.
>
> Please could you investigate this for us

20. The reply, sent the same day, provided an overview of the key differences from an employment law perspective. We return to that document below. The Tribunal did not hear evidence from Ms Lloyd, and Mr McKenna did not know what consideration had been given to the matter, by whom, what decision had been reached and on what basis. No documentary evidence of that was provided.

21. The underlying tone of Mr McKenna's evidence was therefore rather more an explanation of why Webhelp UK had not chosen to expand its operations into Northern Ireland, than an explanation of why and how it had decided to exclude Northern Ireland residents from its UK-wide advertisement for homeworkers. Nonetheless, he said in oral evidence that the same things would have been taken into account. Mr McKenna was also asked whether he wanted to say anything about how the potentially discriminatory impact of a decision excluding people living in Northern Ireland from UK-wide roles had been or would be balanced. He said that there would have to be a Board decision and a full feasibility study would precede it. That had not taken place.

22. That is the context in which the Tribunal considered Mr McKenna's evidence about the basis for excluding Northern Ireland residents from Webhelp UK's homeworker roles.

23. Mr McKenna said that it would not be possible to "offshore" work to Northern Ireland in the way Webhelp UK does to India or South Africa, because staff based in Northern Ireland would expect the same level of pay as the rest of the UK. He also said that they were getting sufficient, suitable applicants from the rest of the UK, so it was not necessary to consider recruiting people based in Northern Ireland. That evidence was not disputed, although it very much formed part of the explanation why Webhelp UK had not set up an operation in Northern Ireland, rather than a basis upon which it was justified in excluding Northern Ireland residents from its UK homeworker roles.

24. The first part of the explanation for excluding Northern Ireland residents related to IT support. In his witness statement, Mr McKenna said that Webhelp UK homeworkers are required to use Webhelp UK issued equipment, because they

need to access confidential customer data. The equipment is appropriately encrypted and secured. That means that any issues with IT equipment are resolved by Webhelp UK's IT team. Some can be resolved remotely, but sometimes equipment has to be delivered to a technician. Webhelp UK expects homeworkers to drive to their nearest site and drop the machine off to a technician who will repair it there and then, or provide a replacement. On occasion, a courier will be arranged to collect the equipment from the advisor's home and deliver it to their main IT support base in the Dearne Valley, Yorkshire. Mr McKenna said that if they employed people in Northern Ireland, they would not be able to return their equipment to site because there is no site in Northern Ireland. This would mean they would have to return equipment by courier, which would attract additional costs and take additional time. This would be a "significant" cost to the business. No costings, numbers or other supporting evidence were provided.

25. Mr McKenna's evidence was explored in cross-examination. He was asked how far homeworkers were expected to drive if they needed to return equipment to site. He said that it was roughly 25 miles. He was asked what proportion of homeworkers lived within 25 miles of a site. He said that it was the majority, because before the pandemic all workers were based at a site, but he did not know the numbers. He said that "in the hundreds" of homeworkers had been recruited since then. He did not know what proportion of them lived within 25 miles of a site. He did not know whether the recruitment team were selecting people who lived within 25 miles of an existing site when recruiting homeworkers. No evidence was presented to suggest that they were, and the Tribunal concluded that they were not. Mr McKenna was asked how many computers had had to be returned because they were not working since the start of the pandemic. He said that he did not know but that "it does happen." He agreed that they would be returned to Dearne Valley. He accepted that there would not be a difference in terms of having equipment collected and dropped off from Scotland or Northern Ireland. He accepted that the courier used may well have been DHL, and that, based on information obtained by the Claimant, DHL did not charge more for deliveries to or collections from Northern Ireland. Mr McKenna had not done any costings or other analysis to assess the impact of possible IT issues arising with Northern Ireland based homeworkers. He said that the cost was not merely the cost of couriering equipment but was the downtime during which the employee was unable to work. Mr McKenna did not know what proportion or percentage of homeworkers had IT equipment that could not be solved by remote assistance. He had not looked into it. He agreed that it would be relatively low. He simply said, "I am aware we do have equipment failures. It costs significant money, including the downtime."

26. Drawing that evidence together, the Tribunal noted in particular that: (1) the Respondent did not provide any concrete evidence or evidence-based analysis, for example based on its experience over the past two or three years, about the frequency of IT failures for homeworkers that required the equipment to be returned and replaced; (2) correspondingly, the Respondent did not provide any evidence-based assessment of the likely operational and financial impact of such IT issues arising in respect of Northern Ireland based homeworkers – the Tribunal simply had Mr McKenna's evidence that "it does happen" and his impressionistic answer that it is "relatively infrequent"; and (3) it appears that for

any homeworker working more than 25 miles from a Webhelp UK site, precisely the same arrangements would be in place for returning the equipment by courier to Dearne Valley and awaiting a replacement, with the same associated financial and operational costs.

27. The second part of Mr McKenna's evidence related to health and safety. He said in his witness statement that Webhelp UK conducts an online health and safety assessment to set people up for homeworking. Sometimes their responses flag up a concern or risk that requires a member of the Health and Safety team to attend their home in person. For a Northern Ireland based homeworker, that would give rise to an additional travel cost, because they would have to send a Health and Safety advisor by plane or ferry. Mr McKenna did not provide any evidence about the costs or other impact of that. In cross-examination, he was asked how often it was necessary to conduct such a home visit. He said, again, that it was "relatively infrequent". Eventually, he accepted that across Webhelp UK's entire homeworking workforce it was in "single or possibly double" digits. The Tribunal took that to mean that it had been necessary in a small handful of cases. Mr McKenna was also asked whether Webhelp UK had given consideration to using a local Northern Ireland health and safety advisor if required. He said, "No because we didn't employ anyone from Northern Ireland." Evidently no such consideration had been carried out in preparing for these Tribunal proceedings, and the Respondent did not present evidence to the Tribunal to show that it was not feasible or reasonable.

28. The final aspect of Mr McKenna's evidence about why Webhelp UK does not employ people based in Northern Ireland was that it does not have the expertise or knowledge to recruit people in Northern Ireland, because it does not have prior experience of doing so. None of Mr McKenna's team have knowledge of the specific differences in legislation to adequately support employees based in Northern Ireland and ensure that Webhelp UK is complying with all the different legislation. They would have to update all their policies and procedures to take into account the differences in employment legislation in Northern Ireland. They did not have familiarity with key areas such as equalities legislation. Mr McKenna was aware that there were differences, for example in relation to recruitment on religious grounds, but did not know the specifics or what the business would have to do to comply.

29. We have referred above to the document provided by Ms Nicol in September 2021, setting out the differences between employment law in England, Scotland and Wales, and in Northern Ireland. That is a ten-page document going through a whole range of legislation and identifying areas of difference. There is no doubt that there are substantive differences across a variety of employment rights. The Tribunal noted that the Webhelp UK HR team, who are not lawyers, were able to produce that paper within a matter of hours of the request being made. No doubt that is because it is very substantially a "cut and paste" of a document the Claimant identified on the website of "*Croner-i*." In any event, there are significant and substantive differences, and the Tribunal accepted the evidence that Webhelp UK would have to ensure that it met its legal obligations in respect of Northern Ireland based homeworkers. It would need to properly understand the differences, ensure that its policies and procedures complied with relevant law, and keep properly up-to-date. The Tribunal also accepted the

evidence that Webhelp UK did not at the time and does not currently have that expertise and experience in house. In cross-examination, Mr McKenna was asked whether consideration had been given to employing local expert lawyers. He said that it had not, “we would not employ lawyers because we do not employ people in Northern Ireland.” Again, it was clear that no consideration had been given to this in preparation for the Tribunal, and no evidence was presented to the Tribunal about the feasibility of acquiring appropriate in-house expertise or outsourcing the work locally, whether in terms of hours spent, availability of personnel or cost. Mr McKenna was asked whether anybody had done the costings and he said, “Not to my knowledge.”

30. That was the totality of the evidence presented by Webhelp UK by way of justification. The Tribunal was not given any evidence about Webhelp UK’s financial position; its budgets or resources for HR, IT, legal, health and safety, logistics, facilities or any other matter; the profitability of its contracts; or any analysis undertaken or decision reached at the time consideration was being given to employing people in Northern Ireland in September 2021. At the conclusion of his evidence, the Tribunal gave Mr McKenna the opportunity to add anything he wanted to say about the balancing exercise that would arise if the Tribunal found that Webhelp UK’s policy of not employing homeworkers who live in Northern Ireland was indirectly discriminatory against those of Northern Irish nationality. He said that this was not about nationality, but location. After the concept of indirect discrimination was again explained to him, he said that they would have to look at the cost of it and that a full feasibility study would have to be carried out.

31. The Claimant provided information from the Northern Ireland Statistics and Research Agency, based on the March 2021 census, which estimated the classification of usual residents of Northern Ireland on census day by their national identity. The number of usual residents was around 1.9 million. The NISRA estimated that roughly 32% of those usual residents were “British only”, 29% were “Irish only” and 20% were “Northern Irish only”. A little over a further 10% were “Northern Irish” plus either “Irish”, “British”, or “Irish and British”, only. People who were “English”, “Scottish” or “Welsh” only amounted, in each case, to less than 0.5%.

32. The Claimant gave evidence that these statistics should be viewed with some caution and that the proportion of people who are Northern Irish is, in reality, higher than 20%: there are historical, political, cultural and identity reasons why people might identify themselves in the census as having a particular nationality when for other purposes they might identify themselves as being Northern Irish, and there may be groups who tend not to complete the census at all. The Tribunal accepted that the NISRA statistics may not give a completely precise or accurate account of the proportion of people in Northern Ireland who identify as Northern Irish for those reasons. That is a complex and sensitive question. It is not one that this Tribunal is in a position to address, nor would we presume to do so. For the purposes of these proceedings, on the NISRA evidence before us, we find on the balance of probabilities that at least 20% of those ordinarily resident in Northern Ireland identify as being of Northern Irish nationality only, and at least 30% identify as being of Northern Irish nationality at least in part.

33. The Tribunal was not provided with statistics about the proportion of people in England, Wales and Scotland who identify as being of Northern Irish nationality. The Claimant invited us to take judicial notice of the fact that, as he put it, most people in England are “English”, most people in Scotland are “Scottish” and most people in Wales are “Welsh”. The Tribunal identified that the relevant issue is not whether most people in Northern Ireland are Northern Irish nor whether most people in England are English and so on. It is more relevant to consider whether a higher proportion of people in Northern Ireland are Northern Irish than the proportion of people in England, Wales and Scotland who are Northern Irish. We conclude that it is appropriate to take judicial notice of the fact that a significantly higher proportion of people in Northern Ireland are Northern Irish than the proportion of people in England, Wales and Scotland who are Northern Irish. It is so notorious and well-established to the knowledge of the Tribunal that it can be accepted without further enquiry. Put simply, the proportion of people in England, Wales and/or Scotland who identify as Northern Irish can only be substantially and significantly less than 20%. Not only is that well-established to the Tribunal’s own knowledge – one in five people in England, Wales and Scotland are not Northern Irish - but it must also be right as a matter of logic. The population of the United Kingdom is about 68 million. The population of Northern Ireland is just under 2 million, so the population of Great Britain is around 66 million. If 20% of that population identified as Northern Irish, it would amount to 13.2 million people, or around seven times the total current population of Northern Ireland itself. That is manifestly and substantially incorrect.

34. The Tribunal was not referred to an authoritative source – such as the England and Wales 2021 census data from the Office of National Statistics – and we do not take judicial notice based on reference to that source in those circumstances. Had we not taken judicial notice as set out above, we would have given the parties the opportunity to provide written submissions about whether we should take judicial notice of the relevant national identity statistics having considered the England and Wales 2021 census data.

Legal principles

35. Section 39(1) of the Equality Act 2010 makes it unlawful for an employer to discriminate against a person in the arrangements it makes for deciding to whom to offer employment or by not offering the person employment. Discrimination includes indirect discrimination. That is defined by s 19 Equality Act 2010 as follows:

> **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.

(3) The relevant protected characteristics are -
…
race;
…

36. By virtue of s 9 Equality Act 2010, race includes nationality and ethnic or national origins.

37. Section 23 Equality Act 2010 provides that on a comparison of cases for the purposes of s 19, there must be no material difference between the circumstances relating to each case. The burden of proof is governed by s 136 Equality Act 2010. It is well-established that in an indirect discrimination case, the Claimant must prove that the employer applied the PCP and that it put persons who share the protected characteristic, and the Claimant, at the particular disadvantage. The employer must then prove that the PCP was a proportionate means of achieving a legitimate aim.

38. By virtue of s 15 Equality Act 2006, the Tribunal must take into account the Equality and Human Rights Commission Code of Practice on Employment (2011) (the "EHRC Code") in any case in which it appears to the Tribunal to be relevant.

39. In this case, the first substantive dispute relates to whether the PCP put persons who share the protected characteristic at a particular disadvantage. The starting point in making that assessment is generally to identify the relevant "pool" for comparison (although that is not the only approach). The Tribunal identifies the pool and can then assess whether people within the pool who have the protected characteristic are put a particular disadvantage by the PCP compared with people within the pool who do not have the protected characteristic.

40. The pool should generally encompass all those affected by the PCP, including those advantaged by it and those disadvantaged by it. The EHRC Code (para 4.18) advises that it should consist of the group that the PCP affects (or would affect) positively or negatively, while excluding workers who are not affected by it, positively or negatively. The pool should flow logically from the PCP. It must be one that suitably tests the particular discrimination complained of. There may be more than one appropriate pool, in which case it is for the Tribunal to decide which to consider. It should select a pool that realistically and effectively tests the particular allegation. The pool should not be so drawn as to incorporate the disputed condition: *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699, EAT; *Allonby v Accrington and Rossendale College* [2001] ICR 1189, CA; *Grundy v British Airways plc* [2008] IRLR 74, CA; *Naeem v Secretary of State for Justice* [2017] ICR 640, SC.

41. In identifying the appropriate pool, the Tribunal must have regard to the requirement in s 23 Equality Act 2010 that there must be no material difference between the circumstances relating to those who share the protected characteristic and those who do not. The comparison must be between people in the same relevant circumstances. However, case law makes clear that this should not be allowed to produce absurd results by including in the pool only those affected by the PCP or those not affected by it. To do so would "drive a coach and horses" through the indirect discrimination provisions: *Spicer v Government of Spain* [2005] ICR 213, CA. The comparison requires the Tribunal to have regard to all relevant circumstances, which means those relevant to the adverse treatment of which the individual complains: *The Royal Parks Ltd v Boohene* [2023] EAT 69.

42. Case law suggests that in the case of a PCP applied to job applicants, the pool is likely to include all those who might be interested in applying for the job, or who could meet the eligibility criteria, were it not for the PCP. In a case where the PCP excluded those aged over 28 from applying for the role, the appropriate pool was those who were otherwise qualified for it. That made sense of the question whether a significantly smaller proportion of women than men were able to comply with the PCP. To have taken the whole national workforce would have been to empty the issue of reality and to have taken only those who were aged over 28 would have assumed the legitimacy of the very rule that was in issue: *University of Manchester v Jones* [1993] ICR 474, CA; *Grundy v British Airways plc* [2008] IRLR 74, CA; *Price v Civil Service Commission* [1978] ICR 27, EAT.

43. Under s 19 Equality Act 2010, it is no longer necessary to prove with precise statistical evidence that the proportion of the group with the protected characteristic within the pool who are disadvantaged by the PCP is considerably greater than the proportion of the group without the protected characteristic who are disadvantaged by it. The test of "particular disadvantage" was intended to do away with the need for statistical comparisons where no statistics might exist, and the complexities in identifying those who can comply, those who cannot, and how great the disparity had to be: *Chief Constable of West Yorkshire Police v Homer* [2012] ICR, 704, SC. The statistical approach can still be useful, but claimants may rely on other evidence and Tribunal will take judicial notice of certain matters that are well-known. Judicial notice may be taken of facts that are so notorious or well-established to the knowledge of the Tribunal that they may be accepted without further enquiry; and of matters that may be noticed after inquiry, such as by referring to works of reference or other reliable and acceptable sources. The party seeking judicial notice of a fact has the burden of proving it: ECHR Code paras 4.19-4.22; *Dobson v North Cumbria integrated Care NH Foundation Trust* [2021] ICR 1699, EAT.

44. If the Claimant proves that the PCP was applied, and caused both the "group" and the "individual" advantage, it is a defence for the employer to prove that the PCP is a proportionate means of achieving a legitimate aim. That is sometimes referred to as objective justification. The employer must show that it has a legitimate aim, and that the means of achieving it are both appropriate and reasonably necessary. Consideration should be given to whether there is non-discriminatory alternative. A balance must be struck between the discriminatory

effect and the need for the PCP. It is the PCP that must be justified, not its application to the individual: *Homer v Chief Constable of West Yorkshire Police* [2012] ICR 704, SC. The justification falls to be judged at the time the PCP was applied to the Claimant, although the employer may rely on considerations that were not in its contemplation at that time: *British Airways plc v Starmer*. In such a case, the justification will be subjected to keener scrutiny: *R (Elias) v Secretary of State for Defence* [2006] IRR 934, CA.

45. The EHRC Code (paras 4.25-4.32) advises that a legitimate aim should be legal, not discriminatory in itself, and must represent a real, objective consideration. Business needs and economic efficiency may be legitimate aims, but simply trying to reduce costs is not. The saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim. The essential question is whether the employer's aim can fairly be described as no more than a wish to save costs. If so, the defence will not succeed. But if not, it will be necessary to arrive at a fair characterisation of the aim taken as a whole and decide whether it is legitimate. The distinction may be subtle, but it is real: *Heskett v Secretary of State for Justice* [2021] ICR 110, CA. Safeguarding health, welfare and safety may be legitimate aims. Employers can decide how to allocate their finite resources, so that even if it is shown that a different allocation might have had less impact on the protected group, that does not necessarily defeat the legitimate aim: *HM Land Registry v Benson* [2012] ICR 627, EAT.

Application of the law to the facts

46. Applying those principles to the findings of fact set out above, the Tribunal reached the following conclusions.

47. As already noted, there was no dispute that Webhelp UK applied a PCP of not employing homeworkers who live in Northern Ireland, and that it applied that PCP to the Claimant and to others who are not Northern Irish.

48. The first disputed issue is whether the PCP puts, or would put, Northern Irish people at a particular disadvantage compared with people who are not Northern Irish. The Respondent said that this question should be determined by looking at a pool comprising applicants or potential applicants for its UK homeworker roles who live in Northern Ireland. The Claimant said that it should be determined by looking at a pool comprising applicants or potential applicants for its UK homeworker roles who live in the whole of the United Kingdom.

49. The Tribunal found that the appropriate pool was applicants or potential applicants for the UK homeworker roles who live in the whole of the United Kingdom. That pool appeared to us to be the one that realistically and effectively tests the particular allegation, namely that a requirement not to live in Northern Ireland indirectly discriminates against Northern Irish people. The group of applicants or potential applicants for the UK homeworker roles who live in the whole of the United Kingdom encompasses those that the PCP affects, or would affect, positively or negatively and excludes those who are not affected by it positively or negatively.

50. The Tribunal found that the pool proposed by the Respondent – applicants or potential applicants for the UK homeworker roles living in Northern Ireland - was effectively a pool that incorporated the disputed condition. To define the pool in that way would, as the Court of Appeal in *Spicer* put it, drive a coach and horses through the indirect discrimination provisions. It would define the pool so as to ensure that nobody could satisfy the PCP. The Tribunal found that applicants or potential applicants for the UK homeworker roles living in the United Kingdom as a whole are in the same relevant circumstances for the purposes of s 23. They are all workers potentially suitable for the role.

51. This approach is consistent with the case law, which suggests that in the case of a PCP applied to job applicants, the pool is likely to include all those interested in applying for the job, or who could meet the eligibility criteria but for the disputed PCP. It makes sense of the question whether a significantly smaller proportion of Northern Irish people are able to comply with the PCP. To include only those who live in Northern Ireland would assume the legitimacy of the very rule that was in issue.

52. The Respondent submitted that if the boundary were not drawn at those resident in Northern Ireland, then there was no principled basis for drawing it at the borders of the United Kingdom: these were homeworker roles and anybody, anywhere in the world could apply for them. The pool should therefore be all applicants or potential applicants for the UK homeworker roles resident anywhere in the world. The Tribunal rejected that contention. Such a pool would, in the words of Sedley LJ in *Grundy*, "empty the issue of reality." Further, there was an obvious and principled basis for drawing the boundary at the borders of the United Kingdom: the roles were advertised by the Respondent as "United Kingdom" roles on the Indeed platform. The Respondent chose to advertise them throughout the United Kingdom on that platform. An applicant going to the Webhelp website would see that it did not purport to exclude Northern Ireland from the UK on its website. Email correspondence sent to applicants confirmed that the roles were "UK-wide". Those factors pointed to a pool defined by reference to applicants or potential applicants resident in the United Kingdom. The possibility that people resident elsewhere in the world might apply for the roles does not necessitate a broader definition of the pool. That would not assist the Tribunal to realistically and effectively test the discrimination complained of.

53. The Tribunal therefore found that the comparison for the purposes of s 19 should be between Northern Irish applicants or potential applicants for the roles resident anywhere in the United Kingdom, and non-Northern Irish applicants or potential applicants for the roles resident anywhere in the United Kingdom.

54. As explained above, the Tribunal's conclusions were that at least 20% of those ordinarily resident in Northern Ireland identify as being of Northern Irish nationality only, and at least 30% identify as being of Northern Irish nationality at least in part. The population of Northern Ireland is just under 2 million. The population of the United Kingdom is around 68 million. A very substantially smaller proportion of the population of Great Britain than 20% is Northern Irish. Precise statistics have not been provided to the Tribunal and it is not possible to

carry out precise statistical calculations. However, that is not necessary in order to assess whether a PCP puts a particular group at a particular disadvantage.

55. The Tribunal performed some broad-brush calculations. Taking the population as a whole (i.e. not limiting it to the economically active, or those applying or potentially applying for the Webhelp UK homeworker role), on the Tribunal's findings around 400,000 residents of Northern Ireland identify as being Northern Irish only and a further 200,000 identify as being Northern Irish at least in part. Assuming as many as 2% of people resident in Great Britain identified as Northern Irish, that would be a further 1.32 million people. The proportion of Northern Irish (only) people in the pool who do not satisfy the PCP would in those circumstances be 400,000/1.72 million (23%). The proportion of Northern Irish (only or in part) people who do not satisfy the PCP would be 600,000/1.92 million (31%).

56. The number of non-Northern Irish people resident in Northern Ireland is about 1.6 million (including those who partly identify as Northern Irish) or 1.4 million (not including such people). Making the same 2% assumption as above, the number of non-Northern Irish people living in Great Britain would be 66 million – 1.32 million = 64.68 million. The number of non-Northern Irish people in the pool would be 66.08 million or 66.28 million. The proportion of non-Northern Irish people in the pool who do not satisfy the PCP would therefore be 1.6 million/66.28 million or 1.4 million/66.08 million. That is around 2.5%.

57. These are broad-brush figures based on a generous estimate of the number of people who identify as Northern Irish resident in Great Britain. They do not seek to distinguish between the economically active or those who might apply for the relevant role. But the contrast between the figures is stark: 23% (or 31%) v around 2.5%. The Tribunal was satisfied, on the basis of those rough calculations, that even allowing for some shifts in numbers or proportions if it were possible to identify with more precision the category of possible applicants for the role, the difference between the two proportions would still be substantial. Those estimates are consistent with instinct and, perhaps, common sense. On the evidence before us, the Tribunal were therefore quite satisfied that a requirement not to live in Northern Ireland put people in the pool who identify as Northern Irish at a particular disadvantage compared with people who do not. It was not disputed that, if there was such group disadvantage, the Claimant was put to the particular disadvantage himself.

58. The second issue was therefore whether the PCP was a proportionate means of achieving a legitimate aim. The Respondent said that its aims were:
    58.1 Ensuring that its employees were afforded appropriate employment rights and not incurring potential liability for the business by employing individuals in a statutory regime that it had not previously employed people in; and
    58.2 Ensuring operational efficiency and ensuring there was an appropriate level of technical and other support for employees.

59. The Tribunal accepted that these were the Respondent's aims and concluded that they were legitimate. They represent real, objective considerations. They are not merely about saving costs but about business needs and economic

efficiency, as well as, to an extent, safeguarding the rights and wellbeing of the employees.

60. However, the Tribunal was not satisfied, on the material before us, that the PCP was an appropriate and reasonably necessary way to achieve those aims. The burden is on the Respondent to show that the PCP was appropriate and reasonably necessary, and that the balance should be struck in the Respondent's favour. The Tribunal found that the Respondent had not discharged that burden in this case. That does not mean that such a PCP could never be justified; only that the evidence presented by the Respondent to this Tribunal did not satisfy us in this case.

61. As set out in detail in the findings of fact above, Mr McKenna's evidence dealt with certain discrete elements. The first related to IT support and the financial and operational impact of a Northern Ireland based homeworker needing IT support, particularly if their equipment could not be fixed remotely. As explained above, the Respondent did not provide any concrete evidence or evidence-based analysis about the frequency of IT failures for homeworkers that required the equipment to be returned and replaced; (2) it did not provide any evidence-based assessment of the likely operational and financial impact of such IT issues arising in respect of Northern Ireland based homeworkers – the Tribunal simply had Mr McKenna's evidence that "it does happen" and his impressionistic answer that it is "relatively infrequent"; and (3) it appears that for any homeworker working more than 25 miles from a Webhelp UK site, precisely the same arrangements would be in place for returning the equipment by courier to Dearne Valley and awaiting a replacement, with the same associated financial and operational costs. That did not demonstrate that it was appropriate or reasonably necessary to exclude Northern Ireland residents to ensure operational efficiency nor to ensure that there was an appropriate level of technical and other support for employees. There was no exploration of non-discriminatory or less discriminatory alternatives – such as couriering equipment back to the Dearne Valley in the same way as a homeworker resident in England, Scotland or Wales and based more than 25 miles from a site would have to do. Given that there was apparently no practical difference between a Northern Ireland resident and a resident of somewhere remote in England, Scotland or Wales, it was difficult to see why the needs of the Respondent should weigh more heavily than those of the individual, when balancing the discriminatory effect of the PCP on Northern Ireland residents.

62. The next element relied on by Mr McKenna was the occasional need to send a health and safety advisor to see a homeworker in their own home. However, as explained above, again the evidence presented simply did not come close to demonstrating that excluding Northern Ireland residents was an appropriate and reasonably necessary way to ensure operational efficiency, support for employees or health and safety. This was clearly something that arose very infrequently – a handful of occasions over two or three years – and the Tribunal was presented with no evidence to show that addressing this in some other way, such as by using a local health and safety advisor or by sending its own advisor to Northern Ireland on the rare occasion that this might occur – was not feasible or appropriate. The Respondent had not considered this at the time or in preparation for the Tribunal hearing and it did not present evidence

demonstrating that the discriminatory PCP was appropriate or reasonably necessary in this respect.

63. As set out above, the last element about which Mr McKenna gave evidence was Webhelp UK's lack of expertise or knowledge of local employment legislation and practices. As explained, the Tribunal accepted that there are significant and substantive differences between the law in Northern Ireland and the law in England and Wales, and Scotland. The Tribunal accepted that Webhelp UK would have to ensure that it met its legal obligations in respect of Northern Ireland based homeworkers, and as such would need to properly understand the differences, ensure that its policies and procedures complied with relevant law, and keep properly up-to-date. The Tribunal also accepted that Webhelp UK did not at the time and does not currently have that expertise and experience in house.

64. However, what was lacking was any evidence to support the contention that excluding Northern Ireland residents altogether was appropriate and reasonably necessary to ensure that they were afforded their legal employment rights and that the Respondent did not incur liabilities by employing people in a jurisdiction it had not previously employed people in. The Respondent had not considered engaging local lawyers at the time nor in preparation for the Tribunal. No evidence was presented about the feasibility of acquiring appropriate in-house expertise or outsourcing the work locally, whether in terms of hours spent, availability of personnel or cost.

65. Overall, as explained above, the Tribunal was not given any evidence about Webhelp UK's financial position; its budgets or resources for HR, IT, legal, health and safety, logistics, facilities or any other matter; the profitability of its contracts; any analysis undertaken or decision reached at the time consideration was being given to employing people in Northern Ireland in September 2021, or indeed since.

66. That falls short of what is required to show that the PCP is an appropriate and reasonably necessary way of achieving either of the Respondent's aims. There are less discriminatory steps that could in principle be taken and the Respondent has not shown that they could not. It has not shown that its needs outweigh the discriminatory effect of the PCP when the appropriate balancing exercise is carried out.

67. For the avoidance of doubt, the Tribunal is not saying that the Respondent must have an operation in Northern Ireland. The Tribunal's finding is that the Respondent has taken a conscious decision to exclude from its UK homeworkers people resident in Northern Ireland. That decision puts Northern Irish people at a particular disadvantage and the Respondent is therefore required to justify it. On the evidence before the Tribunal, it has failed to do so.

Employment Judge Davies
3 July 2023