

Neutral Citation Number: [2026] EAT 144

Case No: EA-2025-000281-RN-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 September 2026

Before :

THE HONOURABLE MR JUSTICE MANSFIELD

Between :

JK

Appellant

-and-

LM

Respondent

Tom Kirk (appearing pro bono through Advocate) for the Appellant
Claire Palmer (instructed by the Government Legal Department) for the Respondent

Hearing date: 4 June 2026

JUDGMENT

SUMMARY

Discrimination; practice and procedure: strike out, deposit orders, national security

The Claimant, a national of a foreign state, brought claims of direct and indirect nationality and/or national origin discrimination arising from the Respondent's refusal to grant him security clearance. An independent Security Vetting Appeals Panel ("SVAP") subsequently recommended that refusal of clearance be maintained on national security grounds. The Employment Tribunal refused to strike out the claims as having no reasonable prospect of success but made a deposit order on the basis that they had little reasonable prospect of success. The Claimant appealed against the deposit order and the Respondent cross-appealed against the refusal to strike out.

The cross-appeal was dismissed. Reading the Employment Tribunal's reasons as a whole, it had addressed the Respondent's case under section 192 Equality Act 2010 and had assessed the prospects of the national security proportionality defence.

The appeal was also dismissed. The Employment Tribunal had not outsourced its assessment to SVAP: it had formed its own view while being entitled to take account of the specialist panel's findings on national security. Nor was there any inconsistency in recognising that SVAP may not have applied precisely the same proportionality test as an Employment Tribunal while treating its factual findings and conclusions as highly relevant. Given the substantial national security considerations, and the limited impact of refusal of clearance on the Claimant, the Employment Tribunal was entitled to conclude that the claims had little reasonable prospect of success.

THE HONOURABLE MR JUSTICE MANSFIELD:

Introduction

1. This appeal concerns a claim for discrimination in a decision to refuse security vetting clearance. As a result, there have been certain restrictions on open justice which this Appeal Tribunal, and the Employment Tribunal, have regarded as necessary. First, the parties' names have been anonymised. Second, the hearing of the appeal was conducted in private, as was the hearing in the Employment Tribunal. Third, the draft of this judgment was sent to the relevant Minister in accordance with rule 31A Employment Appeal Tribunal Rules 1993, the parties having agreed that it was necessary to do so. Fourth, after I circulated a draft of this judgment to the parties, I received a request from the Claimant for certain information to be omitted from my reasons, to protect the anonymity which has been ordered. I was sympathetic to the Claimant's concern, and have omitted various details from the judgment to minimise the risk of anonymity being compromised.
2. This is an open judgment. There is no confidential judgment or confidential annex. I have been able to give reasons for my decision without the need to include material that can only be dealt with in a confidential way. The parties, of course, understand the context and know the detail of documents to which I refer. The Employment Tribunal also gave open reasons, with no confidential annex.
3. The Appellant ("the Claimant", as he was below) is a national of a foreign state ("the State"). He has lived in the UK for some years and has indefinite leave to remain. I was told he is applying to be a British citizen. He was (and was still at the time of the hearing before me) employed by a service provider ("the Contractor"). His services were supplied to the Respondent, which is a public body. After some time, the Contractor applied for security clearance on the Claimant's behalf. This would have allowed the Claimant to perform somewhat different work. Clearance was refused. The result was that he continued to be employed by the Contractor, and to provide his services to the Respondent, but was not able to carry out the additional type of work.

4. The Claimant brought a claim in the Employment Tribunal, against the Respondent, alleging that the refusal of clearance was directly and indirectly discriminatory, on grounds that he was a national of the State.

5. The claim came before Employment Judge Brown, sitting in the Central London Employment Tribunal, on a preliminary hearing. The Judge made two orders. She refused the Respondent's application to strike out the claim as having no reasonable prospect of success; but she made a deposit order on the basis that the claim had little reasonable prospect of success. Both sides now appeal. The Claimant appeals against the deposit order. The Respondent cross-appeals against the refusal to strike out the claim.

Background Facts

6. After the Claimant had been providing services for some time, the Contractor applied for security clearance on the Claimant's behalf. Clearance would have allowed the Claimant wider access to the Respondent's systems and would have allowed him access to personal data of third parties.

7. The Respondent refused security clearance and an internal appeal was refused.

8. The Claimant presented a claim to the Employment Tribunal. He alleged direct and indirect discrimination. He relied on the protected characteristic of being a national of the State.

9. In his claim for direct discrimination, the Claimant recognised that section 192 Equality Act 2010 would be in play. That provides that a person does not contravene the Act by doing, for the purpose of safeguarding national security, any thing that is proportionate to do for that purpose. The Claimant alleged that the Respondent would be unable to justify their treatment of him for the purposes of s.192. His case, in summary, was that:

- i) Although the role needed security clearance, in fact it entailed very little access to personal or sensitive data.
- ii) He had been given inconsistent and consistently changing reasons for why security clearance had been denied. He set out 10 different formulations. This has been referred to as “the shifting sands argument”.
- iii) He was told that as he was a national of the State the Respondent was unsure of his loyalties.

10. The alternative claim for indirect discrimination alleged a PCP that the Respondent would not give security clearance to someone whose national origin was of the State, or with family in the State. The application of that PCP could not be justified.

11. After the claim was presented, but before the preliminary hearing, the Claimant’s appeal against the refusal of clearance went to the Security Vetting Appeals Panel (“SVAP”).

12. SVAP is an independent advisory body which provides a means of challenging a decision to refuse or withdraw national security clearance once an internal appeal has been dismissed. It sits as a panel of three, chaired by a senior retired member of the judiciary. It has an advisory role only. It cannot award compensation. An explanation of its functions is set out in **Various v Security Services** [2022] UKIP Trib 3 per Singh LJ.

13. SVAP heard the appeal and recommended that the Respondent’s decision to refuse clearance should be maintained. Its conclusions were set out over 51 pages. Given that this judgment is a public document, I will refer to its conclusions only in the most general terms. I have however considered the full document. The Judge also had it, as do the parties.

14. SVAP decided that the original decision to refuse clearance was unsatisfactory, and it considered the question of clearance afresh. It decided that the decision to refuse security clearance was justified, taking into account a number of issues which I have considered, but to which I do not need to refer in this judgment. Therefore, for reasons of national security, the Claimant should not be granted security clearance. SVAP set out a view on whether the refusal of clearance was discriminatory. If it was, it held that it was proportionate.

The Judge's Reasons

15. The Respondent applied to strike the claim out as having no reasonable prospect of success. In the alternative, it applied for a deposit order. The Judge dismissed the strike out application but made a deposit order. She directed that there would be a further case management hearing to decide the amount of the deposit, and to give directions for the further conduct of the case.

16. The Judge's reasons are admirably succinct. After a brief summary of the background, she directed herself as to the relevant legal principles. She first addressed ss.13, 19 and 192 Equality Act 2010 and then the principles relevant to strike out under rule 37(1) Employment Tribunal Rules 2013 and deposit orders under rule 39 of the same Rules.

17. The Judge's reasoning on strike out is set out at paragraphs 20-26. She rejected the Respondent's argument that the effect of the SVAP decision was that there was no reasonable prospect of success.

18. First, (paragraph 21) she rejected the Respondent's argument that the SVAP decision gave rise to a res judicata. There is no cross-appeal against that finding.

19. Second, she considered that the SVAP decision was based on different grounds to the decisions challenged in the claim; the SVAP decision did not prevent the earlier decisions being tainted by discrimination.

20. Third, she drew attention to three aspects of the SVAP decision that differed from the exercise to be carried out by the Employment Tribunal.

- i) It was not clear that SVAP had applied the shifting burden of proof under the Equality Act.
- ii) It was not clear that it had applied the test for indirect discrimination.
- iii) It was not clear that it had applied a proportionality assessment of the kind required in **Hardy & Hansons plc v Lax** [2005] IRLR 726.

21. The Judge therefore concluded that it could not be said that there was no reasonable prospect of success in the claim.

22. The Judge then said (paragraph 27):

However, given that the further appeal panel reviewed all the available material, was chaired by a retired judge of the Higher [*sic*] Court and did decide that the original decisions to refuse security clearance were both justified and not tainted by discrimination, I considered that there was little reasonable prospect of the claimant succeeding in his claims.

23. Her reasoning for this conclusion has three elements.

- i) Even if there was any discrimination, s.192 provides a potential justification defence.
- ii) As to the first limb of that defence, there was little reasonable prospect of the Tribunal deciding that the refusal of vetting was not carried out for the purposes of national security.
- iii) As to the second limb, proportionality, the Judge said the following (paragraphs 30-31):

30. I agreed with the Respondent that, where the further appeal panel has made a decision that the original decisions were justified, that security vetting should be refused, and that, even if the vetting decisions were tainted by discrimination, they were proportionate and justified in the interests of national security under s192 EqA 2010, there is little reasonable prospect of the Tribunal deciding that the 2 decisions in question were not proportionate under s192 EqA. That is because there is little reasonable prospect of the Tribunal coming to a different conclusion than the detailed assessment of those decisions carried out by the further appeal panel which had all the relevant documents available to it.

31. This is particularly so where the Claimant has not been dismissed as a result of the refusal of vetting, but simply is unable to work in areas where security clearance is required. Any discriminatory effect will require less justification.

24. Accordingly, the Judge made a deposit order.

The Grounds of Appeal and Cross-Appeal

25. The Claimant has two grounds of appeal.

i) Ground 1: the Judge failed to carry out her own assessment of whether there were more than little reasonable prospects of success in the claim, relying instead on the findings of SVAP.

ii) Ground 2: the Judge erred in relying on SVAP's findings while failing to consider or apply its own conclusion that it was not clear that SVAP had conducted its own proportionality assessment.

26. The Respondent cross-appeals on the single ground that the Judge failed to address the Respondent's argument that there was no reasonable prospect of success given the s.192 defence.

The Legal Framework

27. There is no dispute as to the basic legal framework of the claims under ss.13 and 19 Equality Act 2010, and no suggestion that the Judge misdirected herself as to that. As I have explained in my

summary of the Judge's reasons, she correctly directed herself as to s.192 Equality Act 2010. That provides:

A person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose.

28. Therefore, even if there were prima facie discrimination, whether direct or indirect, there would be no unlawful discrimination if:

i) The refusal of security clearance was for the purpose of safeguarding national security;

ii) The refusal was proportionate for that purpose.

29. The parties agree (at least for the purposes of the application before the Judge and this appeal) that the test of proportionality for the purposes of s.192 is that set out in **Hardy & Hansons**; as it is for an indirect discrimination claim.

30. Under rule 38(1)(a) Employment Tribunal Rules, a Tribunal may strike out a claim on the grounds that it has no reasonable prospect of success. Under rule 40, a Tribunal may make a deposit order if it considers any specific allegation or argument in a claim has little reasonable prospect of success.

31. The law as to deposit orders and strike out orders is settled and uncontroversial. In **Cox v Adecco Group** [2021] ICR 1307, HHJ Tayler set out nine elements which a Tribunal should take into account when dealing with a strike out application. In **Amber v West Yorkshire Fire and Rescue Service** [2025] ICT 228 HHJ Beard held that the principles in Cox were equally applicable to deposit order applications. I have had regard to those principles. While the test of "little reasonable prospect of success" is not as strict as the test of "no reasonable prospect of success", the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts

essential to the claim or response: **Van Rensburg v Royal Borough of Kingston-Upon-Thames and others** UKEAT/0096/07.

32. The Respondent acknowledges that SVAP has no jurisdiction to determine discrimination claims, and that SVAP's views on the discrimination issue should be treated with caution. On the other hand, the Claimant accepts that recommendations of SVAP can be taken into account by an Employment Tribunal in deciding whether an employer has acted proportionately: see **Various v Security Service**, at paragraph 33 and the **Tailored Review of SVAP** cited therein.

The Cross Appeal

33. It is convenient to address the cross-appeal first.

34. The Respondent's argument is that its strike out application was advanced on two separate points. First, the res judicata point. Second, given s.192, there was no reasonable prospects of a Tribunal finding that the proportionality test was not satisfied. The Judge did not address this standalone s.192 argument.

35. I reject that submission:

i) It is plain that the Judge did not simply consider the res judicata argument. She went on at paragraphs 22-25 to consider the question of whether the claim, on its merits, had no reasonable prospect of success. In those paragraphs she considered the evidential value of the SVAP decision.

ii) In carrying out that assessment, she expressly had regard to the question of whether SVAP had carried out a **Hardy & Hansons** proportionality assessment.

iii) She also had regard to the question of whether SVAP had applied the test under s.19. That section includes a justification test, part of which entails a proportionality assessment.

iv) The Judge plainly had s.192 in mind, as she referred to it in her legal directions at paragraph 15, and in the deposit order section at paragraph 28.

v) It is clear that the Judge had well in mind the question of proportionality in addressing the question of no reasonable prospect of success at paragraphs 22-25.

vi) Reading this short decision as a whole, it is clear that the Judge took the view that the prospects of the proportionality defence were not so great that there was no reasonable prospect of success, but sufficiently strong that there was little reasonable prospect of success. I will return to that assessment in relation to the Claimant's appeal. At this stage, it is sufficient to say that the Judge did make an assessment of the prospects of success of the s.192 defence. The cross-appeal is put on the basis that the Judge failed to address or determine the prospects of the s.192 defence. That is an incorrect reading of the reasons. The cross-appeal fails.

Ground 1 of the Appeal

36. In Ground 1, the Claimant argues that the Judge impermissibly outsourced its assessment of the prospects of the claim to SVAP, relying exclusively or excessively on its conclusions. The Judge failed to conduct its own analysis of whether there were more than little reasonable prospects of success. It is said that the Judge failed to engage with the Claimant's case (particularly the shifting sands of the reasons for the refusal) and failed to explain what SVAP's conclusions were and why she agreed with them.

37. The Respondent argues:

- i) The decision of SVAP that the Claimant should not be given security clearance, on grounds of national security, was firmly within its expertise and remit. That decision, on the facts, was unsurprising and obvious. The fact that the Judge agreed with SVAP's reasons does not mean that she exclusively or excessively relied on them.
- ii) The Judge was entitled to take account of SVAP's decision in deciding whether the Respondent had acted proportionately – per **Various v Security Service**.
- iii) The Judge was entitled to attach significant weight to SVAP's independent decision that the Claimant should not be given security clearance on grounds of national security, and its view, which reflected the Government's view. The Government's view, and SVAP's view, of the risk to national security should be treated with considerable deference by the Tribunal. Even if the decision were to be *prima facie* discriminatory, the Judge was entitled to have regard to SVAP's clearly stated reasons on proportionality.
- iv) The Judge did not exclusively or excessively defer to SVAP's decisions as she recognised the differences in approach and shortcomings of that decision in rejecting the strike out application.

38. The answer to Ground 1 is a short one. It is clear from her reasons that the Judge did not “outsource” the assessment of the merits to SVAP; she did not rely exclusively on its conclusions. She formed her own assessment of the merits, taking into account the material available to her, including the SVAP decision.

39. The Judge found at paragraph 21 that *res judicata* did not arise from SVAP's decision. She set out a number of respects in which SVAP's decision differed from the exercise to be carried out by the Tribunal. It is clear from paragraph 30 that the Judge considered the prospect of the Tribunal coming to a different conclusion. That necessarily entails a recognition that the Tribunal would have

to reach its own conclusion – the question was how likely it was to be a different one. There can be no question of the Tribunal exclusively relying on SVAP’s conclusions instead of making its own assessment.

40. In assessing whether there was “little reasonable prospect” of this claim succeeding, the question is how likely it was that a Tribunal would come to a different conclusion to the specialist body on the question of proportionality.

41. The Judge cannot be criticised for her reasons, or failure to engage with the Claimant’s argument. The question of proportionality is an objective one. Whatever the “shifting sands” of the reasons given to the Claimant, the question was whether the refusal of clearance was objectively justified on grounds of national security. On the one hand, the Judge bore in mind the conclusions SVAP reached as to national security matters within its specialist expertise. On the other, she bore in mind that the effect of refusal on the Claimant was minor: he was not dismissed, just limited in the areas in which he could work. That is clear. While the Judge noted that SVAP may not have carried out the same **Hardy & Hansons** proportionality assessment that a Tribunal was required to carry out, the factual material in its decision was plainly relevant. A more detailed explanation of the national security factors in SVAP’s decision was neither necessary nor appropriate in open reasons for her decision.

42. Accordingly, Ground 1 fails.

Discussion: Ground 2 of the Appeal

43. The Claimant argues that the Judge erred in relation to the deposit order by failing to consider or apply her own earlier finding which doubted whether SVAP had applied the EqA tests correctly. The Judge found that it was not clear that SVAP had carried out a proportionality assessment akin to that required by **Hardy & Hansons**. Having made that finding, it was illogical of the Judge to have

gone on to rely on SVAP's findings in assessing the prospects of the proportionality test being satisfied.

44. The Respondent argues:

- i) SVAP plainly carried out a proportionality assessment, albeit the Judge held that it was not clear that it had carried out an assessment akin to that in **Hardy & Hansons**.
- ii) As per the arguments in Ground 1, the Judge did not simply rely on SVAP's decision. She formed her own assessment.
- iii) The Judge had regard to the totality of SVAP's reasons and decision, as she was entitled to do, and formed her own assessment of the likelihood of a Tribunal reaching a different conclusion on the proportionality question.

45. Reading the Judge's decision as a whole, it is plain that she did not err.

46. I reject the argument that she failed to consider or apply her own findings as to the test applied by SVAP. The Judge would obviously have had that point in mind when she considered the deposit order. The reasoning on both strike out and deposit take a little over two pages. In reality the Judge is likely to have considered both applications together in deciding where the merits of the claim fell. She decided that the prospects of success were not so bad that there was no reasonable prospect of success, but sufficiently bad that there was little reasonable prospect of success. That is a matter of assessment for the Judge taking into account all the material before her. I see no reason to find that in reaching the conclusion on the deposit order she closed her mind to the points made in relation to the strike out.

47. There is nothing illogical or erroneous about the Judge’s approach. SVAP made detailed findings in a lengthy decision. They addressed the national security risks associated with the grant of security clearance. SVAP reached a conclusion that refusal was a proportionate response. Even if SVAP did not apply the same test as a Tribunal would apply, it was open to the Judge to have regard to the facts and matters in SVAP’s decision and to hold that, in the light of the national security views of a specialist body, there was little reasonable prospect of a Tribunal coming to a different conclusion applying the correct test. In this case, the decision under challenge was a decision to refuse security clearance by a person who was not the Claimant’s employer, and which would not affect his continued employment. The decision under scrutiny was binary – to grant or refuse clearance. The national security reasons were bound to be of significant weight. Given the minor impact on the Claimant (as the Judge was entitled to find) a **Hardy & Hansons** compliant proportionality assessment was unlikely to be wide-ranging. While the Judge was entitled to find that there was not “no reasonable prospect” of the Tribunal rejecting the proportionality defence, it is entirely unsurprising that she found there was little reasonable prospect of a Tribunal doing so.

48. Accordingly, the appeal on Ground 2 fails.

Conclusion

49. Both the appeal and the cross-appeal are dismissed.