Appeal No. UKEAT/0273/13/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 11 & 12 February 2014
Judgment handed down on 25 June 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

DALER-ROWNEY LTD APPELLANT

THE COMMISSIONER OF HER MAJESTY'S REVENUE & CUSTOMS RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS CLAIRE DARWIN (of Counsel) Instructed by: Shoosmith LLP Apex Plaza Forbury Road Reading Berkshire RG1 1SA
For the Respondent	MR ADAM TOLLEY (of Counsel) Instructed by: HM Revenue & Customs Legal Department Bush House Strand London WC2B 4BD

SUMMARY

RACE DISCRIMINATION; INDIRECT

NATIONAL MINIMUM WAGE

An employer appealed a Notice requiring it to make payments of arrears of wages to 26 students, on the basis they had not received the national minimum wage ("NMW"), and a further penalty. It contended that the students fell within an exemption from the NMW, provided for by regulation 12(8) of the NMW Regulations:

> "**A worker who is undertaking a higher education course and before the course ends is required, as part of that course to attend a period of work experience not exceeding one year does not qualify for the National Minimum Wage in respect of work done for his employer as part of that course".**

A higher education course was so defined as to relate only to courses undertaken within the UK, and thus disproportionately excluded EU and foreign students who were not taking such courses from having as favourable an opportunity of gaining work experience. The ET decided that this was (indirectly) discriminatory, but justified as a proportionate means of preventing abuse of the NMW system, which was a legitimate aim. It was held entitled on appeal to reach this conclusion, and several other grounds of appeal were also rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. For reasons given on 8th January 2013, Employment Judge Barrowclough dismissed the appeal of Daler-Rowney Limited against a notice of underpayment in respect of National Minimum Wage. It appeals again, to this court.

2. The **National Minimum Wage Act 1998** provides for its enforcement by Sections 17–19. Section 19 permits an officer (appointed under Section 13) to serve a notice requiring an employer to pay any shortfall between the wages a worker actually received and those which, upon a proper application of the Act, he should have had to that worker within 28 days. Provision is made for an employer served with such a notice to appeal against it to an Employment Tribunal. An appeal made in respect of a payment said to be due to a worker must by Section 19C be made on the ground either that no sum was due to him, or the amount specified as due was incorrect.

3. Separate provisions provide that the notice of underpayment may also require the employer to pay a financial penalty; and by Section 19C there is an appeal against that, too.

4. Employment Judge Barrowclough's determination concerned a notice of underpayment which required the employer to pay £53,685.40, plus a penalty of £5,000, in respect of underpayments to 26 individuals who had worked for Daler-Rowney.

5. A central question in the appeal was the scope of Regulation 12(8) of the **National Minimum Wage Regulations 1999**, which were made under the **1998 Act**. Regulation 12 identifies workers who do not qualify to be paid the National Minimum Wage. One such class of worker is identified in paragraph 8:-

> **"A worker who is undertaking a higher education course and before the course ends is required, as part of that course to attend a period of work experience not exceeding one year does not qualify for the National Minimum Wage in respect of work done for his employer as part of that course."**

6. This paragraph requires identification of the meaning of two phrases – "higher education course" and "a period of work experience", and the determination of a number of facts: (a) where work is done by such a worker for an employer, that the "exempt" work factually occurs before the course ends, (b) that there is a requirement to attend a period of work experience, (c) that work experience has to be part of the course, and (d) the period of work experience must not last for longer than a year. The exemption does not cover all work done for the employer but only that done as part of the course: this may therefore demand identification (e) of whether the work actually done was, or was not, "part of the course".

7. The Respondent ("HMRC") argued that a "higher education course" had to be one undertaken within the United Kingdom. The Appellant disagreed. It argued that a course meriting that description which was being undertaken in any part of the world (but at least within the European Union) fell into that category.

8. The Judge held, at paragraph 18, that in the cases of 21 of the 26 workers there was insufficient evidence to prove that they were required as part of their courses to undertake a period of work experience before those courses ended, and/or that the work experience which was undertaken was part of the course being studied. That left 5 cases. As to those, the critical question was whether a "higher education course" within the meaning of regulation 12 (8) had to be one undertaken within the UK.

9. He concluded that as a matter of domestic construction, it had. First, Regulation 12(9) as originally drafted identified that for the purposes of Regulation 12(8) a higher education course

meant a "course of a description referred to in Schedule 6 **Education Reform Act 1988**". (The definition of "higher education course" in regulation 2 is now the same, with additional provisions covering its meaning in respect of Scotland and Northern Ireland. It was common ground that the repeal of Regulation 12(9) with effect from 1st October 2011 did not alter or impact upon the issues before the Tribunal). Schedule 6 was clearly drafted with only courses in England and Wales in mind; given the statutory definition, "higher education course" had a purely domestic frame of reference. Second, paragraphs 13 to 16 of Regulation 13 provided specifically that workers participating in respectively the Leonardo da Vinci, the Erasmus, and the Comenius programmes were exempt from provisions securing them the benefit of the national minimum wage. If the definition of "higher education course" was as the Appellants argued it would have been capable of covering such programmes without the need for specific reference to them by name. Since such a reference was thought necessary, this implied that other courses in European Universities or institutions of tertiary study were not within the scope of the exemption. Third, regulation 12(9B) had limited the meaning of "further education course" (to which Regulation 9 applied) to English institutions, and it was thus consistent to interpret "higher education course" as equally being limited to domestic institutions; and fourth, Parliament should be taken to intend an Act to extend to each territory of the UK but not outside it.

10. The Employment Judge thought that the consequence of his conclusion as to the meaning of "higher education course" was potentially to give rise to indirect discrimination since the requirement of studying at a UK higher education institution was more easily satisfied by UK nationals than by others, and it put those others at a particular disadvantage. This was subject to objective justification. The Judge concluded (at paragraph 40):

> **"I have no difficulty in finding that the aim of [the restriction of the exception in Regulation 12 (8) to courses of higher education institutions in the UK] is to prevent abuse of the Regulations by the creation of potential or actual loopholes, whereby workers from outside the UK could be exploited and local business competitors simultaneously undercut. That is self-evidently a legitimate aim."**

11. The means adopted were proportionate because (paragraph 41):

> **"…Mr Tolley [counsel for the Respondent] is right in saying that there is at the moment no sensible formula or test whereby only appropriate institutions can be identified and included in the exception and the rest excluded; and that it is currently not possible to properly assess all potentially eligible institutions within the EU. The same argument applies in relation to the "equivalence" of courses at non-UK institutions to UK higher education courses. Plainly, steps are being taken which should ultimately result in harmonisation and mutual recognition of different member states' qualifications; but the fact remains that only 5 out of 27 member states have so far complied with the Bologna Process, for example…. I accept that, as presently constituted, the team of [officers]… does not have the capacity or resources to obviate the need for the restriction of the regulation 12(8) exception; I also accept that the restriction represents a legitimate social aim capable of justification so that cost and resources are legitimate concerns. Finally, I cannot see any other or lesser means whereby this legitimate aim could be achieved, and no workable alternative scheme was put forward by the Appellant; and the authorities relied upon do not really assist me, since they turn on their own facts."**

12. Finally, the Judge rejected the argument that domestic legislation should be construed as far as possible to accord with relevant EU legislation, under the **Marleasing** [1990] ECR I-4135 principle or, alternatively, the regulations should be disapplied to the extent to which they were incompatible with EU law. The Judge rejected this since the indirect discrimination involved in restricting the Regulation 12 (8) exemption to those undertaking a higher education course within the UK was not incompatible with EU law.

The Appeal to the Employment Appeal Tribunal

13. The Appellant argues that the Judge was wrong to hold that the indirect discrimination which the Regulation created was justified: in particular, it maintains that Article 45 (3) of the **Treaty for the European Union** ("TFEU") is such that discrimination is only permissible on grounds of public policy, public security or public health, none of which were applicable, and in

any event was precluded by Regulation 492/2011 of 5th April 2011, Article 3 of which proscribes provisions which have the effect of keeping nationals of other Member States away from the employment offered. Second, if not justified, the effect of **Marleasing** at paragraph 8, and **Litster v Forth Dry Dock Engineering Co Ltd** [1990] 1 AC 546, at 559, bound him to hold that he should interpret Regulation 12 (8) to remove the discrimination, which he could do by adopting a meaning of "higher education course" which achieved this; third, the Judge failed to determine three issues of EU law – whether HMRC's interpretation and application of the Regulations was compliant with Articles 18 and 45 of TFEU and Regulation 1612/68; whether it was an obstacle to the access of workers from one Member State to employment in another Member State (relying on the **Bosman** Ruling [1995] ECR I-4921), and whether it infringed Articles 15 (2) and 21 (2) of the EU **Charter of Fundamental Rights** and/or Articles 2 and 14 of the **Race Equality Directive: Directive 2000/43/EC**. Fourth, the Judge was wrong to conclude that the Appellant had not been "sufficiently disadvantaged" in order to pursue a complaint of indirect discrimination.

14. The Notice of Appeal argued that the judgment upheld as a legitimate aim that which was premised on a discriminatory view of the practices of some of the (probably newer) Members of the European Union – in effect treating some as second-class states in which it could spuriously be claimed that higher education courses were being undertaken, for the purpose of enabling cheap labour from those states to be allowed in the UK - and that the Judge was wrong in his approach to justification, because he applied the legal approach applicable under domestic law rather than adopting the higher threshold applicable to important rights enshrined in the TFEU. As to proportionality, he had failed to consider alternative means of achieving the same aim, without the discriminatory effects, which had been advanced by the Appellant. He erred in holding that the Appellant had to prove in relation to each individual that they were undertaking a higher education course, were required as part of that course and before it ended

to attend a period of work experience not exceeding a year, and that the work done by that individual was part of the course: the Appellant contended that the purpose of the words "in respect of work done for his employer as part of that course" was intended to ensure that the exemption from the National Minimum Wage did not apply to work undertaken for other employers at the same time, such as would be the case if the student in question had a part-time job with another employer (eg working in a supermarket) in addition to his work placement. He erred in thinking there was insufficient evidence to prove that 21 of the 26 students were required as part of their courses to undertake the work experience, since there was ample evidence, or, alternatively failed to give sufficient reasons for concluding that there was not.

15. Finally, he was wrong to hold that the Appellant's Counsel (Ms Darwin, who appeared on the Appeal as she had below) did not take issue with or dispute the circumstances of the 26 individuals. She had been asked specifically by the Judge not to address him in closing submissions on the detail of the documents about those students, nor to cross-examine about them, on the understanding that he would remind himself of the documentary evidence about them. She did in fact contest HMRC's view of the evidence, as should have been obvious to him.

16. The Respondents in answer argued that the points in respect of Article 45(3) TFEU and Article 3 of Regulation 492/2011 were new points which had not been argued before the Judge, so they could not be taken on appeal, and - save for accepting that the Employment Judge had misunderstood the Appellant's case in two respects, namely that the Appellant had accepted that it had to prove that work done by an individual was part of the course of higher education they claimed to be following, and wrong to suggest that the Appellant did not dispute HMRC's summary of the circumstances of the 26 individuals referred to in the notice – disputed each of the other grounds, and argued the Judge was right.

Discussion

17. Article 45 of TFEU provides under the heading "Free Movement of Persons, Services and Capital" (Title IV), Chapter 1 of which is headed "Workers", as follows:-

> **"1 Freedom of movement for workers shall be secured within the Union.**
>
> **2 Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.**
>
> **3 It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:**
> **(a) to accept offers of employment actually made;**
> **(b) to move freely within the territory of Member States for this purpose;**
> **(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;**
> **(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission…"**

The Judge held (paragraph 30) that the effect of the exemption from the national minimum wage contained in regulation 12 (8) made it easier for those who were subject to the exemption to obtain work experience. To that extent, foreign nationals, who would be less likely to be undertaking a course of higher education within the UK, would be disadvantaged when seeking such experience within the UK. There was no cross-appeal against this.

18. Regulation 492/211, which in the second recital repeats the words of Article 45 (2) and in its ninth recital recognises that links exist between freedom of movement for workers, employment and vocational training, provides by article 3 materially as follows:

> **"1 Under this Regulation, provisions laid down by law, regulation, administrative action or administrative practices of a Member State shall not apply:**
> **(a) where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals or (b) where, though applicable irrespective of nationality, their exclusive or principal aim**

or effect is to keep nationals of other Member States away from the employment offered…"

The ECJ held in **Ugliola** [1969] ECR 363, (at paragraph 6, judgment) that the predecessor to Article 45, which was expressed in the same terms, did not allow Member States to make exceptions to the equality of treatment and protection required by the Treaty for workers by indirect discrimination in favour of their own nationals alone based upon obligations for military service: paragraph 3 was subject to no reservations other than those concerning public policy, public security and public health. In its familiar style, the Court repeated the same observations in **Marsman v Rosskamp** [1972] ECR 1243, at paragraph 4.

19. The focus thus is on public policy justification – neither public security nor public health could apply. Ms Darwin argued that there had to be pressing reasons of public interest to justify a discriminatory measure: the justification had to be exceptional. She relied on **Commission of the European Communities v Kingdom of Spain** (case C-503/03 [2006] ECR I-01097). That case did not concern access to employment which was the nature of the discrimination in the present case (Ms Darwin in her submissions referred to discrimination in remuneration: but since the effect of ensuring the minimum wage is to provide a minimum monetary reward which is greater for students undertaking higher education courses outside the UK than paid to those studying within the UK whose employment is covered by the exemption, this is where foreign nationals were at an advantage – the discrimination which the Judge identified was not in remuneration, but in gaining the employment in the first place, because an employer offering work experience was always likely to offer it to those who would come more cheaply). **Commission v Spain** concerned free movement of persons. Spain refused to permit members of the families of citizens of the European Union to enter its territory, although those citizens were working there. To justify this refusal on the grounds of public policy was held to require a genuine and sufficiently serious threat affecting one of the fundamental interests of

society. Appropriate evidence of the expediency and proportionality of the restrictive measure adopted by the State and precise evidence enabling the arguments of the State to be substantiated were needed: **Commission v Luxembourg** [2008] ECR I-4323, at paragraph 51. This need for evidence to support arguments for justification, and to permit an analysis of the appropriateness and proportionality of the measure adopted by the State, was further endorsed in **Caves Krier Freres Sarl v Directeur de l'Administration de l'emploi** (C-379/11, judgment 13th December 2012, paragraphs 48-49), relying on **Bressol and Others** [2010] ECR I-2735, paragraph 71.

20. The entitlement of Daler-Rowney to raise an argument relying upon Article 45(3) TFEU and Aticle 3 of Regulation 492/2011 raises what is necessarily a preliminary point. Mr Tolley argues that as the foregoing paragraph demonstrates, a Tribunal would need to consider evidence supporting the justification. HMRC did not produce that evidence for the point was not in issue. It would not be legitimate to grant permission for this entirely new point to be raised now, particularly since it could not be said it was a pure point of law which was capable of determination upon the evidence as it stood.

21. If required to justify the provision to the extent that it interfered with the free movement of workers he would in any event argue that the Judge was right to conclude at paragraph 40 that the aim of the restriction in Regulation 12.8 was

> **"…to prevent abuse of the Regulations by the creation of potential or actual loop holes, whereby workers from outside the UK could be exploited and local business competitors simultaneously undercut."**

Further, so far as Regulation 492/2011 was concerned there was no evidence that the exclusive or principal aim or effect of the Regulations was to keep nationals of other Member States away from the employment in question. There was no evidence at all as to its effect.

22. As to whether the point was taken below, I note that in the Written Reasons reference was made to Article 45. Article 45 as such was therefore before the Tribunal. However, this was in relation to the question whether Daler-Rowney (being an employer of workers) had standing to complain of a breach of Article 45 in relation to the free movement of workers. The argument before the Tribunal was that to interpret Regulation 12(8) as HMRC sought to do was to infringe Daler-Rowney's Article 45 rights, so that it could legitimately complain of discrimination which adversely affected it, albeit that the persons primarily discriminated against were students seeking work-experience. The Tribunal accepted that submission. Rather than advancing the argument that in order for the discriminatory effect of Regulation 12(8) to be justified there had to be a legitimate public policy aim which it sought to achieve, and evidence which met the standard of **Commission v Spain** in doing so, as is now argued, the final written submissions on behalf of the company submitted that the proper approach to justification was that adopted by the Supreme Court in the context of age in **Homer v Chief Constable of West Yorkshire Police** [2012] UKSC 15 which was referred to as "the leading case on justification". The closest it came to the present argument was that it was also argued (by reference to the principle in **Rutili v Ministre de l'Interieur** [1975] ECR 1219, para. 26) that the concept of public policy (which was engaged here by the nature of the justification relied on by HMRC) was to be interpreted strictly where the effect was to derogate from fundamental principles such as the freedom of movement of workers, so that it could not simply be left for determination by an individual state.

23. It is tempting in a case said to raise points of important general principle to permit arguments to be heard on appeal which have not been run below. The principles are, however, those set out in **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719 C.A. The Appeal Tribunal had thought that it was in the interests of justice for a Claimant to raise an argument on appeal which she had not raised below. The Court of Appeal allowed the

employer's appeal against that decision. In his review of the cases, Brooke LJ noted that although there was nothing in the language of the statute to exclude consideration of the new point of law, it would, per **Kumchyk v Derby City Council** [1978] ICR 1116, be unjust to do so, unless there were special circumstances. In the absence of such circumstances it would not satisfy the rule merely to show that evidence relevant to the point was before the Tribunal or findings relevant to it made by the Tribunal. It would be necessary to show that the evidence before the Tribunal by way of evidence in chief or cross-examination of witnesses would not have been significantly different and that no other additional witnesses could usefully have been called (citing observations of Ralph Gibson LJ in **Hellyer Brothers v McLeod** [1987] IRLR 232, at 248). In his judgment Laws LJ encapsulated the reasoning: it is a general principle of law that it is a party's duty to bring forward the whole of his case at the proper time. A new point ought only to be permitted to be raised in exceptional circumstances. If the new issue went to jurisdiction (which the present one does not) he thought that would be capable of being an exceptional circumstance, but even then this would only be if the issue raised was a discrete one of pure hard edged law requiring no or no further factual enquiry.

24. In the present case, though it may be thought of public importance for the legal point to be decided, the authorities themselves show that further factual investigation and further factual evaluation by the specialist Tribunal would be required. I do not see that the point is an obvious 'knock-out' point. Though it relates to European obligations to which the State is subject, and to which Tribunals generally should scrupulously give proper effect, the proceedings are adversarial; the parties were skilfully represented; there was sufficient evidence to deal with justification on the basis on which the Judge attempted to deal with it (though none in respect of Regulation 492/2011, the appeal in respect of which must therefore necessarily fail) and I do not think that the current circumstances can properly be regarded as so exceptional as to come within the class of cases recognised as such within the decision of the

Court of Appeal in **Glennie**, and the subsequent review of the relevant case-law by HHJ McMullen QC giving judgment for the Employment Appeal Tribunal in **Secretary of State for Health v Rance and Others** [2007] IRLR 665. Accordingly, I decline to allow the point to be taken.

25. In case I should be wrong, I shall deal below with the argument in respect of Article 45 (3). I have already dealt with that which arises under the Regulation where I accept Mr Tolley's argument.

26. The policy in issue was that identified in paragraph 40 of the Reasons (supra). The rationale for implementing a national minimum wage (the desirability of which is plainly a question of public policy) is that without it many workers would be in danger of being paid less, without the individual or collective means of ensuring they had a sufficient income from work to enjoy a reasonable standard of life, because many employers would seek to ensure their own competitiveness by keeping the wages of these workers low. It would not be sensible to introduce a minimum wage at a set rate where all, or virtually all, workers were in practice paid more, for it would have no effect. The idea therefore presupposes that without the rates introduced as minima, employers would often seek to (and would) pay less. The mimima have therefore to be applied rigorously across the board, for unless exceptions to their general applicability were tightly controlled the system generally would lose much of its intended social and beneficial effect. There is thus only limited scope for very particular exceptions, which must be capable of easy policing. A general policy which seeks to ensure the applicability of the minimum rates, necessarily limiting exceptions to the generality of application to easily identified categories of worker, without a significant risk of creating a breach in the protective walls of minimum pay rates, is essential to this. Though anticipating, here, a conclusion which I shall repeat below, the aim identified by the Employment Judge is intrinsic to the legislation,

is an aim of public policy, and is entirely legitimate. It is not permissible, in my view, to examine the aim of the exception in Regulation 12(8) in isolation from that of the effective implementation of a national minimum wage.

27. Though much of the appeal focussed on whether the aim the Judge identified came within the class of those permitted by article 45(3), the decision below was reached by a legal route which rested on **Homer,** as the Appellant had urged him to adopt (setting out at paragraph 28 in its closing written submissions 6 principles which it said derived from **Homer** and were applicable): to identify a legitimate aim (which the Judge did in his paragraph 40), and then ask whether the means adopted to achieve that aim were proportionate to the discriminatory effect they produced for the affected class – i.e. whether they were appropriate and necessary to that end.

28. The Judge accepted that the aim was legitimate. Ground 5 of the Notice of Appeal argues that it was not since it was itself discriminatory: it was suggested that it was premised on a discriminatory view of some of the newer Member States in the European Union. I do not accept this. The aim he identified was, in the terms in which he described it, self-evidently legitimate. The fact that the Judge when identifying it referred to some evidence upon which he might have relied to come to the opposite conclusion does not render the conclusion invalid. The aim itself recognises that inherent in a minimum wage system is the potential for abuse. The Low Pay Commission identified the aim as proper in its report of February 2000. The difficulties of defining what fell inside or outside higher education, for the purposes of ensuring true comparability between students from different backgrounds and cultures, and the potential for the creation of loop holes persuaded the Government at the time that it could not change the treatment of students on courses outside the UK. The Judge relied upon that material. It was not inappropriate to do so.

29. The starting point, therefore, in dealing with the argument that the methods chosen, though discriminatory, were justified is that they pursued a legitimate aim. That aim was a social policy aim, unrelated to discrimination on the prohibited ground.

30. It is trite law that in choosing measures capable of achieving the aims of its social and economic policy, a Member State has a broad margin of discretion, though it must not frustrate the implementation of a fundamental principle of EU Law (per Baroness Hale, in **Humphreys v Revenue and Customs Commissions** [2012] UKSC 18, [2012] 1 WLR 1545, paragraph 21; **R v Secretary of State for Employment, ex parte Seymour-Smith** [1999] ECR I-623, [1999] 2 AC 554). The particular problems thrown up by the minimum wage legislation were considered by Kenneth Parker J in **R (Cordant Group plc) v Secretary of State for Business** [2010] EWHC 3442 (Admin), who at paragraph 23, illustrating the reasons why such a margin was to be recognised in the case of the National Minimum Wage said:-

> **"First, the Secretary of State is exercising a broad discretionary power in a social, economic and (at least to some extent) political context. He has to balance a number of complex, and perhaps conflicting, social and economic variables in order to determine what he believes is the fair, effective and efficient solution to the central issue in question. It is almost inevitable that some economic operators, especially if their own commercial and financial interests may be adversely affected by the chosen proposals, will be opposed to change, or will put forward other options that they allege would secure the relevant regulatory objectives, but at a lower cost to themselves and others. However, it is trite law that this court must be cautious in interfering with such an exercise of discretionary power, unless there are solid legal reasons for doing so, and must not allow itself to become an umpire of a social and economic controversy that has been settled by due political process."**

31. Though the Appellant argued that the Judge's approach to justification was to apply too low a threshold, since he approached justification by applying the test contained in Section 19 (2) (d) of the **Equality Act 2010** (paragraph 33, Judgment) rather than the more demanding test which it argued was to be derived from European case law, there are three reasons for

acquitting him of this. First, the approach he took to justification was that urged upon him by Daler-Rowney at the hearing, expressly relying on principles derived from **Homer** as "the leading case on justification", which he applied. Second, **Homer** itself dealt extensively with European authority. The approach it set out fully reflected the Supreme Court's view of European jurisprudence. Any idea that there is a stark and decisive difference of approach between the domestic jurisdiction and the European when it comes to the approach to be taken to justification is to be rejected. Third, insofar as the approach now argued for depends upon the cases decided by specific reference to Article 45 (3) that is not now open to Daler-Rowney to pursue, for the reasons given above.

32. Ms Darwin argued that the means chosen to secure the legitimate aim were neither necessary nor appropriate: if they had been at the time that the National Minimum Wage Regulations were first introduced, they had ceased to be so in more modern times not least because improved technology (in particular the Internet) meant that it was a great deal easier to check the status and standing of academic institutions outside the UK or, at least, those within the EU. It had been accepted in evidence by Mr Cottam (called on behalf of HMRC) that the situation in the late 1990s was quite different from that in 2012. She complained that the Judge had failed to weigh the need or the necessity of the particular measure chosen against the seriousness of the detriment to the disadvantaged group, which she identified as being both the students and the Appellant. (I comment here that the disadvantaged group factually in the present case could not be the students who had been in employment with Daler-Rowney, since they had not only had their work experience, but were now to be the recipients of sums of money additional to those that Daler-Rowney had thus far paid them: a disadvantage to students as a group could only be a potential one, in respect of unidentified students in the future, for whom it would be impermissible to describe them as limited to one nationality or indeed to EU citizenship. I note that in argument Ms Darwin herself described the appeal as "forward

looking"). She argued that the Judge's conclusion was perverse, since there had been no evidence that the exception in Regulation 12 (8) had been abused, nor was there any evidence of potential abuse.

33. The Judge dealt with these arguments at paragraphs 34 to 39 of his Judgment. The Judge had in mind that the United Kingdom was a signatory to the "Bolgna Process". That was a protocol which enables interested parties to establish equivalence between higher education courses in different countries of the EU. However, it was as yet incomplete, so that equivalence could not yet satisfactorily be established without too great a risk of a loophole in the protection afforded workers generally by the existence of a minimum wage. At paragraph 40 he both identified the legitimate aim, and dealt with the argument that there was no evidence of potential abuse. I have already held him entitled to come to the first conclusion. He was also plainly right to deal with the supposed absence of evidence of abuse as he did. Logically, where a system exists to prevent abuse it cannot be an argument against the system that whilst it is in place there is no such abuse. That is its function. If it works, there should be no evidence of abuse, for the workings of the system should have removed it. It is then illogical to point to the absence of any evidence of abuse, and conclude because of its absence that the system is not needed, and that there was no need for it in the first place. To ask what the position would be if the system were removed is to ask a hypothetical question in respect of which necessarily it would be difficult, if not impossible, to adduce evidence. It becomes a question of judgment, rather than direct evidence. The Judge noted that the risk was recognised and accepted by authoritative sources as being real. He thought that sufficient, and I agree in this particular context: the whole policy rationale for introducing a minimum wage is that, without it, many employers would simply seek to pay their workers less, and regard it as necessary to do so to preserve their own trade or profit. Were it not for an enforceable minimum wage other

employers in the same field might pay their workers less, so as to undercut more generous employers, and gain some of their market share.

34. The nub of the Judge's decision as to justification was at paragraph 41:

> **"The issue of 'proportionate means' is not so straight forward. I see considerable force in Ms Dawson's submission that, whatever may have been the case in 1999, technological advances since then have made it a great deal easier to obtain information about and to investigate (up to a point) non-UK institutions, particularly within the EU; and that it is not unreasonable to expect a Government department to be able to do so. Equally, it would be wrong to apply standards, in terms of course records, assessments and 'robustness' to non-UK institutions which are not applied domestically. However, I think Mr Tolley is right in saying that there is at the moment no sensible formula or test whereby only appropriate institutions can be identified and included in the exception, and the rest excluded; and that it is currently not possible to properly assess all potentially eligible institutions within the EU. The same argument applies in relation to the 'equivalence' of courses at non-UK institutions to UK higher education courses. Plainly steps are being taken which should ultimately result in harmonisation and mutual recognition of different member states' qualifications; but the fact remains that only 5 out of 27 member states have so far complied with the Bologna Process, for example. In years to come it may well be that protocols will be agreed whereby both academic institutions and qualifications within all EU member states can be easily and definitively compared and cross referenced with UK equivalents; but the evidence before me suggested that time is still some way off; and it is, with respect to Ms Darwin, no answer to say that a degree course at the University of Heidelberg or Paris is obviously on a par (if not superior, in apparently some disciplines) with an undergraduate course at a domestic university. I accept that, as presently constituted, the team of which Mr Cottam is a member within the Labour Markets Directorate at B.I.S does not have the capacity or resources to obviate the need for the restriction of the Regulation 12(8) exception; but I also accept that the restriction represents a legitimate social aim capable of justification, so that cost and resources are legitimate concerns. Finally, I cannot see any other or lesser means whereby this legitimate aim could be achieved, and no workable alternative scheme was put forward by the Appellant; and the authorities relied upon do not really assist me, since they turn on their own facts. Overall I am satisfied that the means adopted by the Respondent are proportionate."**

35. The Judge's approach in determining what was proportional was thus to take into account the difficulties of an alternative scheme. This gave rise to the challenge in the Notice of Appeal that he had not confined himself to matters which were strictly proportionate, and that he had failed to consider whether the Respondent could compile a list of higher education institutions and qualifications which could fall within the exception, could compile a list of institutions

which it was satisfied were not bogus and were therefore bona fide or reputable, or could limit the exception to those education institutions which participated in the Erasmus scheme, and thereby erred when he suggested that no workable alternative scheme had been put forward. Moreover, the means chosen were based upon the UK's inability to provide the resources to define courses which were equivalent to higher education courses taken within the UK. Considerations of an administrative nature could not justify derogation by a Member State from the rules of Community Law (Ms Darwin relied for this on **Commission v Germany** [1986] ECR 3755, paragraph 64; and **Terhoeve** [1999] ECR I-345, paragraph 45.) She submitted that the Judge should have taken into account that the United Kingdom, in the context of access to training, was obliged to have systems in place in order to evaluate whether non-UK courses were broadly equivalent to courses taken within the United Kingdom, and had to be able to consider and take into account training in other Member States (she relied for this on **Peşla** [2009] IECR 11677, paragraphs 36 – 41; **Theresa Fernandez de Bobadilla v Museo National del Prado** [1999] ECR I-4773, paragraphs 31-32; **Conseil Nationale de l'Ordre des Architectes v Dreessen** [2002] All ER (EC) 423, at paragraph 31).

36. Mr Tolley's retort to these points was that where there is a permitted objective such as avoiding the abuse of the system and the consequent exploitation of workers, it was permissible to consider factors of costs and the resources available to HMRC in achieving that objective as one of a number of legitimate aims. For this he relied on **Fuchs v Land Hessen** [2012] ICR 93, and **Woodcock v Cumbria Primary Care Trust** [2012] ICR 1126. In the former the European Court of Justice said at paragraph 73:-

> **"…in the context of the adoption of measures relating to retirement, EU Law does not preclude the Member States from taking account of budgetary considerations at the same time as political social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination.**
>
> **74. In that regard, while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the**

> **measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim…."**

In the latter the Court of Appeal considered an argument that the saving or avoidance of costs alone could not be a legitimate aim, but could only be so if linked to a non-cost factor. As to that, Rimer LJ commented (paragraph 66):-

> **"There is, it seems to me, some degree of artificiality about such an approach to the question of justification. As Elias J observed in Redcar and Cleveland Borough Council v Bainbridge [2008] ICR 249 paragraph 91:**
>
> > **"Almost every decision taken by an employer is going to have regard to costs". Regulation 3(1) [of the Employment Equality (Age) Regulations 2006] however, says nothing of the extent to which considerations of cost may feature in the justification exercise. It provides merely what would otherwise be discriminatory treatment may be justified if it was "a proportionate means of achieving a legitimate aim". The relevant question must therefore be whether the treatment complained of was such a means. Accepting, as I make clear I do, that the guidance of the Court of Justice is that an employer cannot justify discriminatory treatment "solely" because the elimination of such treatment would involve increased costs, that guidance cannot mean more than that the saving or avoidance of costs will not, without more amount to the achieving of a "legitimate aim". That is entirely unsurprising. To adopt a simple example given by Mr Short, it is hardly open to an employer to claim to be entitled to justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B. Such treatment of A could not, without more, be a "legitimate aim"…."**

He submits that the suggestion that there were viable alternatives to the exception, were not supported by evidence. In effect, here, it was being said by Ms Darwin that the Judge had reached a perverse conclusion.

37. It is plain from the judgment that the Judge was exercised by the question of whether the means chosen to achieve the legitimate aim were proportionate. He set out the evidence with some care. He came to a conclusion which was one of assessment. Though I accept that the world has moved on since the date of the introduction of the regulations, I cannot see that the Judge was bound to reach the conclusion that the means chosen were neither necessary nor appropriate, and to reject as insufficient the Respondent's contention that they were, it being for the Respondent to prove. In short, he came to a conclusion which was properly open to him.

Despite, therefore, the attractiveness and erudition with which Ms Darwin advanced her argument that the Judge was wrong to reach the conclusion he did that the discriminatory effect was justified, I reject it. I accept Mr Tolley's characterisation of Ms Darwin's argument as amounting to a charge of perversity. The simple answer to it is that it was supported by evidence, and was not perverse.

38. The Appellant submitted that if the Notice were held to be unjustifiably discriminatory in respect of the 5 affected students, it must necessarily fall in respect of all. This argument (made on paper in paragraph 60 of the Appellant's skeleton argument) relies upon the discriminatory effect in respect of the remaining 20. I reject it for two reasons. First, in the light of the conclusions I have just expressed, it is not unjustifiably discriminatory. Second, even if it were, that discrimination would relate to access to employment, and not to remuneration – the argument here displays the same mischaracterisation as I have earlier commented on. To set aside the Notice as discriminatory against the students to whom it relates assumes that they were discriminated ***against***. If the relevant discrimination in fact was not against them, but against those who were from the UK, favouring the French students employed by the Appellant and named in the Notice, they could have no justiciable complaint of disadvantage. Viewed as a question of remuneration (as para.60 seeks to view it) this is so: the effect of the Notice is to ensure that the French students are paid more, and to permit UK students to be paid less. If viewed as a matter of access to employment (which was the discriminatory effect identified by the Judge), the Notice cannot disadvantage them: they already have had the work placements in respect of which the Notice was raised.

39. In any event, the Appellant submitted that of the 20 students for whom the material question was whether they satisfied the evidential requirements identified in Regulation 12(8) all did. This could not, of course, be so once Regulation 12(8) was to be interpreted as referring

to a higher education course as defined by Regulation 2(1). If this definition were ineffective because it was inherently discriminatory, as argued, it would not have affected the validity of the Notice against Daler-Rowney save insofar as that validity depended upon the national origin of the workers concerned. If otherwise valid, it would stand.

40. Therefore, even if, contrary to the conclusions of the Judge and my own conclusions on the main points in this appeal, it were permissible to regard the French institutions of higher learning which 14 of the 20 relevant students had admittedly attended as providing courses which could come within Regulation 12(8), the Judge would have held that the Notice was valid save in 5 cases. An analysis of the evidence by the Respondent was placed before the Tribunal in the form of a chart. This showed that in all but 5 of the cases, it was said by HMRC that there was no evidence that the work of those students had been done as part of the course. In 15 of the remaining cases, it was also said there was no evidence that the course was such as to impose a requirement to undertake work experience as a part of it: and in four further cases there was said to be doubt as to whether that was the case.

41. It was wrongly thought by the Judge to be uncontroversial that the Regulation required the Appellant to prove these matters in relation to each individual. However, if he had addressed the dispute he would inevitably have come to the same conclusion as he assumed was agreed.

42. Section 19 of the **National Minimum Wage Act 1998** provides for an appeal against a Notice on the ground that no sum as alleged within it was due. Accordingly, it is for the Appellant to make out the case that the individual concerned falls within an exception to the general principle that all workers of the same age should be paid at least the standard minimum wage applicable to them. The burden is in principle on the Appellant to show this. This

position of general principle is underscored by Section 28(1) **National Minimum Wage Act 1998** which provides that:

> **"Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established"**

43. The Appellant argues that it is sufficient to show that the worker concerned was working for the employer providing him with work experience, and did not need to go further to show that the actual work being done was part of that work experience. The words "as part of that course" immediately following "in respect of work done for his employer" in the exemption were intended merely to clarify that the student could not work for another employer and fall within the exemption.

44. I reject this construction. To accept it would be to hold the words "as part of that course" redundant, for the words "in respect of work done for his employer" would achieve exactly the same effect. It would permit an employer to exploit as cheap labour those who came into its service for a wholly different purpose, as where the employer invited students otherwise on work experience (say, for purpose of illustration, in the office) to work on (say) the production night-shift. The exemption would not be tightly drawn as it needs to be to have effect in protecting vulnerable workers and conscientious competitors from exploitation and undercutting. Unless the link between work done and course undertaken is established evidentially, the general presumption provided for by Section 28 and implicit in Section 19 must apply.

45. The quality of the evidence to be produced need only be sufficient to satisfy a judge on the balance of probability that the work actually done fell within the scope of the course. A general rather than finely detailed enquiry is likely to be all that is needed. But I cannot accept,

as the Appellant submits, that it can safely be assumed that the work of a student undergoing a course of higher education who comes to an employer for work experience is actually within the scope of that work experience. HMRC contended that the work done had to be shown sufficiently to be relevant to the course of higher study being undertaken: I agree that this is necessary. The Appellant sought to establish it by asking the Judge to infer that the students would not have come to work for it if they had not been permitted to do so by the institution at which they were studying, and felt obliged to do so as part of that study. This called for speculative inferences to be drawn by the Judge. Though he wrongly approached his determination by thinking there was no dispute as to HMRC's summary (in chart form) of the individual circumstances of each of the students, there was no specific evidence in respect of the students mentioned above, and the Appellant relied only on these inferences. Mr. Tolley argued below that that was an insufficient basis. The judge plainly did not find it sufficient. Nor do I: that fact that a person who is a student at an institution of higher education is found working for a commercial undertaking does not compel the conclusion that he was doing so at the requirement of that institution, nor that the work done was not only related to the course of study but a mandatory part of it. Many students work in many jobs without these being true. The inference argued for by the Appellant cannot safely be drawn.

Conclusions

46. The Judge was correct to conclude that the exemption to the National Minimum Wage provided for by regulation 12(8) was indirectly discriminatory in effect, by providing more favourable access to employment opportunities for UK students than for non-UK students, by reason of the definition of "higher education institution". He was entitled to conclude that the discriminatory effects were justified as being in pursuit of a legitimate aim, appropriate and necessary to achieve it, and to take account of resources and cost in determining whether the means of achieving the aim were proportionate. Ground 1 of the Notice of Appeal thus fails.

Accordingly, so does Ground 2: no question arises here of applying the interpretative effect to EU obligations called for under the **Marleasing** principle. There were eight other grounds of appeal. As to those, one by one: Ground 3 (that the Judge failed to determine issues of EU law) fails for the reasons given above; Ground 4 (that the Judge at paragraph 44 found that the Appellant had not sufficiently been disadvantaged to pursue a complaint of jurisdiction) is misplaced – he did find that it had sufficient standing to bring the claim. What may really be complained of by this ground was regarded by him in any event as an *additional* ground for determining as he did. He held that the discriminatory effect upon the Appellant was not as great upon it as it was upon the students. This must be right, as demonstrated by the fact that the argument before me focussed almost entirely upon the position of the students and the disadvantage caused to them: but even if it were not, would not invalidate the reasoning of the Judge in determining that Regulation 12(8) was justified, for he expressly regarded this not as an intrinsic but rather as an additional part of his reasoning. Ground 5, that the Judge accepted as legitimate aims which were tainted by discrimination I have rejected for the reasons set out above. Ground 6 – that the Judge took the wrong approach to justification – is answered by the fact he took the **Homer** approach as it was submitted he should. Ground 7, that the Judge failed to consider alternative means of achieving the legitimate aim, is rolled up in my rejection of the first ground. Further, and separately, even if the effect had been discriminatory, the consequence could not have been that the Notice was to be set aside. Without any distinction on the grounds of nationality, it is to be assumed (by section 28 **National Minimum Wage Act 1998**) that any worker is to be paid at least the national minimum wage appropriate for his age. If the exception fell, this would be the default position. If it did not, the Judge would be right to conclude that the Appellant had not established (save in the case of 5 workers) that the work done came within the exemption, for compliance with its requirements could not be assumed without more specific proof than was available. Ground 8 is thus rejected, too, as is Ground 9 (sufficiency of reasons): it is clear why the Appellant lost. Ground 10 (that the Judge erred in

thinking that the Appellant did not take issue with the factual circumstances of some of the students) was correct as to its premise, but has no consequence for the appeal since the result was correct in any event.

47. I would observe, further, that the appeal was formally against a Notice. For the reasons given above, the individual students had suffered no disadvantage, either in remuneration (assuming the Notice to be valid) or access to employment: they could not have complained therefore of actionable discrimination against them. The Appellant itself faced the alleged prejudice of having to pay the students the sums it would have had to pay any other worker of the same age, and the same sums as other similarly placed employers in the UK would have had to pay, a prejudice it would wish to avoid for the future. Its claim was understandably therefore said by Ms Darwin in the course of her submissions to be "forward looking" – in effect this was advanced as a public law claim against the legality of the Regulation, whereas the appeal before the tribunal and onward appeal before me come within a jurisdiction which is limited to considering an appeal against the notice itself. No formal objection was taken on this basis (nor could it have been given that the Notice might have failed as far as sums due to 5 students were concerned if regulation 12(8) were to be construed such that their universities were to count on an equal footing with UK institutions of higher education) and I heard full argument: but any future consideration of this case should bear in mind that it was not one heard and determined as a public law claim before the administrative court, but in respect of the validity of a notice produced within a particular statutory regime.

48. Although Ms Darwin advanced her submissions with considerable skill and erudition, I reject them, and dismiss the appeal on every ground.