EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 29th November 2012
Judgment handed down on 1st May 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR B BEYNON

MR P GAMMON MBE

UKEAT/0022/12/RN

MS P ONU — APPELLANT

1) MR O AKWIWU
2) MS E AKWIWU — RESPONDENTS

UKEAT/0283/12/RN

1) MR O AKWIWU
2) MS E AKWIWU — APPELLANTS

MS P ONU — RESPONDENT

JUDGMENT

APPEARANCES

For Ms P Onu	MR JAMES ROBOTTOM (of Counsel) Instructed by: Anti-Trafficking and Labour Exploitation Unit Islington Law Centre 232 Hornesy Rd London N7 7LL
For Mr O Akwiwu & Ms E Akwiwu	MR JAKE DUTTON (Solicitor-Advocate) Instructed by: Waldegraves Ealing House 33 Hanger Lane London W5 3HJ

SUMMARY

RACE DISCRIMINATION
Direct
Indirect
Post Employment

UNLAWFUL DEDUCTION FROM WAGES

NATIONAL MINIMUM WAGE

WORKING TIME REGULATIONS

The Claimant was a Nigerian woman who had been employed as a domestic servant for Nigerian employers, having obtained a migrant domestic workers' visa to enable her to do so. She succeeded on her claim for direct race discrimination, on the basis that the burden of proof shifted and no sufficient explanation was offered by her employers, following **Mehmet v Aduma**. Held that was an error: the case was wrongly decided, and was no precedent for the circumstances here. The burden of proof did not shift without something more than a difference of race and disparity of treatment. The fact of needing a migrant worker visa was a background circumstance, not a cause of the mistreatment: this was not a case such as **James v Eastleigh**, or **JFS**, where an inevitably discriminatory criterion had been applied.

Indirect discrimination could not be established on the basis of the PCP contended for below; harassment failed for the same reasons as did the claim of direct discrimination. Victimisation arising out of events some months after the employment ended was alleged. A defence that the Equality Act could not be interpreted so as to confer jurisdiction on a Tribunal to hear a complaint of victimisation arising after the relationship of employer/employee had ended was rejected. **Jessemey** was not followed. The Tribunal's dismissal of the claim on the basis that a threat issued in response to the claimant taking proceedings (which included claims under the

Equality Act, but also other claims) had expressly to refer to the Equality Act or identify such a claim specifically, was reversed.

The employers also appealed on the basis that claims for payment of the Minimum Wage and in respect of the Working Time Directive were excluded because the claimant was treated as a family member. This was rejected, given the findings of fact.

Permission to appeal in this case and the linked appeal of **Taiwo** was granted.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. The Claimant, when a migrant domestic worker, was exploited and treated badly by the Respondents. She complained to Watford Employment Tribunal (Employment Judge Ryan, Mr. Walsh, Ms. Sood) that she had been unfairly dismissed, discriminated against directly, and subject to harassment on the grounds of race, had been given no itemised pay statements, nor statement of terms and conditions of employment, had not been paid the National Minimum Wage and was entitled to the unpaid amounts as unlawful deductions from her wages, and was not given either 24 hours rest in any 7 day period of work nor afforded annual leave in accordance with the Working Time Regulations.

2. The Tribunal found in her favour on those claims for reasons promulgated in writing on 16th January 2012. It dismissed claims that she had been indirectly discriminated against on grounds of race, and had been victimised after the conclusion of her employment because she had taken proceedings against the Akwiwus.

3. This appeal raises a challenge by her employers, Mr. and Mrs. Akwiwu, to the finding in respect of discrimination; and both a contingent cross-appeal by the Claimant against the Tribunal's dismissal of her alternative case that if not direct the discrimination had been indirect, and a cross-appeal in any event to its conclusion that she was not victimised against on the ground of having made an employment tribunal claim which included a complaint of such discrimination.

4. The same constitution of this Tribunal has, before giving judgment, heard argument in the appeal of **Taiwo v Olaigbe** against a decision of a Tribunal at South London which held, in very

similar circumstances, that there had not been such discrimination. We had hoped to hand down the judgments in the two cases on the same date since we understand that a number of cases (there are some twenty cases handled by the solicitor for the Appellant alone) wait for their resolution upon the conclusions reached by this Appeal Tribunal. The argument in each has, however, been heard separately and considered separately, though many of the principles to which we shall refer are common to both cases. In the event, this judgment was held back for further oral argument.

5. The solicitor for Onu is the same as for Taiwo, so has heard the argument in each case; and Mr. Dutton who has appeared for the Akwiwus to advance their appeal is as we understand it aware of the arguments in that case – we have, moreover, in the course of the argument been able to put to both advocates any points arising from that, earlier, appeal which merited their consideration and answer.

The Facts

6. The Claimant is Nigerian. She had lived in a village there. Whilst in Nigeria she went to work for the Respondents as a domestic worker in Lagos, on 20 February 2007. The Akwiwus then had one child, but Mrs. Akwiwu was pregnant. Their second child was born whilst they were in the UK, prematurely. She required ongoing medical attention here. They applied for a domestic worker visa for the claimant. On 29 July 2008 she came to the UK and began work here. On four or five occasions she returned with the family to Lagos, and then came back again to London. She last returned on about 25th. April 2010. Whilst in London, her passport was held by the Akwiwus. On 28 June 2010, a day after Mrs Akwiwu had been angry and threatening toward her, she retrieved her passport, took some of her possessions, and walked from Hendon to Shepherd's Bush (having no money for the trip) to find a Mrs. Bankay, a Jehovah's witness and

former social work manager who had shown friendship to her. She never thereafter returned to work for the Akwiwus.

7. Though the Tribunal was faced with diametrically opposed factual accounts, neither of which it accepted in full, it accepted much which the claimant averred. In summary, she worked on average for 84 hours per week, without weekly rest breaks. She had responsibility (though not the sole responsibility) for the Akwiwus' older daughter, and was required to cook, clean, launder and iron. She had substantial responsibility for the home. On occasion she had to stay with the younger daughter in hospital. The Respondents took away her passport into their custody. She was paid just £50 per month during the first year of her employment in the UK, and £100 per month (in the UK) and N15,000 (in Nigeria) from 2009, rising to £150 and N35,000 from January 2010. She did not eat with the Respondents socially, though took meals with the children. She did not have appropriate and separate accommodation: at best she shared a room with the younger daughter in her cot. She was not registered with a GP.

8. Generally, she was subject to threats and abuse from the Respondents, though not to such a level as to deter her from returning from Nigeria to the UK on the 4 or 5 occasions on which she did so during the two years of her employment here.

9. Relationships grew sour after the Claimant told the Respondents in December 2009 that she no longer wished to continue in employment with them: at this, Mrs. Akwiwu became very angry. Matters came finally to a head in late June 2010, when the Claimant was verbally abused by Mrs. Akwiwu after a friend of the latter had phoned to report that her own domestic servant was leaving her, and suggested that the Claimant had incited her to do so. That led to such antagonism that the next day (28th. June) the Claimant left.

10. The victimisation claim related to events over 6 months later. It was said to the tribunal that Mr. Akwiwu had spoken by telephone to the Claimant's sister in Nigeria to say that the Claimant had sued him and that "if she thought things would end there she was wrong", and that "the Claimant would suffer for it"; then (only shortly after) he phoned again to the effect that there would be no trouble for her or her sister, so she (the sister) should get her (the Claimant) to stop.

The Tribunal Decision

11. There were appeals and cross-appeals. On the appeal by the Akwiwus (which was first in time) the only matters in dispute before us were the applicability of the National Minimum Wage Regulations, and as to the conclusions reached in respect of unlawful discrimination and harassment. For the Claimant, the issues were the Tribunal's conclusion as to victimisation, and an appeal against the dismissal of the claim for indirect racial discrimination, contingent upon our conclusions as to the Akwiwus' appeal on the question of direct discrimination. We shall set out the conclusions of the Tribunal only in respect of those matters.

(1) National Minimum Wage

12. The Akwiwus argued that the Claimant came within the "family exemption" provided for by Regulation 2 (2) (a) of the National Minimum Wage Regulations. Those Regulations provide so far as material:

> **"(2) In these Regulations "work" does not include work (of whatever description) relating to the employer's family household done by a worker where the conditions in sub-paragraphs (a) or (b) are satisfied.**

(a) The conditions to be satisfied under this sub-paragraph are –

(i) that the worker resides in the family home of the employer for whom he works;
(ii) the worker is not a member of that family but is treated as such, in particular as regards to the provision of accommodation and meals and the sharing of tasks and leisure activities;
(iii) that the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, in respect of the provision of the living accommodation or meals; and
(iv) that had the work been done by a member of the employer's family, it would not be treated as being performed under a worker's contract or as being work because the conditions in sub-paragraph (b) would be satisfied.

(b) The conditions to be satisfied under this sub-paragraph are –
(i) that the worker is a member of the employer's family
(ii) that the worker resides in the family home of the employer
(iii) the worker shares in the tasks and activities of the family,

and that the work is done in that context."

13. The Tribunal found that the conditions in regulations 2(2)(a)(i), (iii) and (iv) were satisfied. However, it concluded that the claimant was not treated as if a member of the family, as provided for by Regulation 2(2)(a)(ii). That was because (paragraph 130) she did not share meals with the family in a way that was likely to be the case had she been a member of the family. Nor was there the more equal sharing of the household tasks which there would have been had she been treated as a member of the family. At paragraph 131 it took into account the threats, abuse and retention of the passport: all ways in which a member of the family would not have been treated.

(2) Direct Discrimination

14. The Claimant had relied upon the decision in **Mehmet v Aduma** (the decision of the Appeal Tribunal presided over by HHJ Reid QC, of 30th May 2007). At paragraph 119 the Tribunal said this:

"In the Tribunal's judgment, so far as ascertaining whether the Claimant was treated less favourably in the respects alleged as compared to a hypothetical

> **comparator, the approach of the Employment Appeal Tribunal in Mehmet must be followed as correct. It was not suggested here that Mr and Mrs Akwiwu had antagonism specifically towards the Claimant because she was Nigerian but that, because she was Nigerian, they treated her as a migrant worker and as she was a migrant worker in subjecting her to the detriment we have found the Respondents treated her less favourably than they would have treated someone who was not a migrant worker. Accordingly, that was treatment which could, according to the principles in Igen v Wong [2005] IRLR 258 and Madrassy v Nomura International plc [2007] IRLR 246 be treatment on racial grounds and requires from the Respondents a non-discriminatory explanation."**

15. Accordingly, thus far the Tribunal had regarded itself as bound to hold that the burden of proof had shifted, because it felt bound to regard **Mehmet** as correct.

16. The Tribunal went on at paragraph 120 to reject the explanation for the disadvantageous treatment given by the Respondents:

> **"… that this was a Nigerian contract performed in accordance with Nigerian law and that the Claimant was paid more than the national minimum wage in Nigeria and that there was no intention to discriminate by the Respondents who did not contemplate that what they were doing was unlawful in Nigeria even if that were the case"**

17. The Tribunal concluded (paragraph 121):

> **"In the Tribunal's judgment this explanation, even if it were made out on its facts, could not possibly discharge the burden of truth. The questions are: What was the reason for the treatment? Was it in no way whatsoever on the grounds of race? In the circumstances the employers in this case have fallen far short of proving that the treatment was in no way on the grounds of race. The reality is that they treated the Claimant precisely in the way in which they did because of her status as a migrant worker which was clearly linked to the Claimant's race. The burden of proof having passed under Section 54A the Respondents failed to demonstrate any reason for the treatment that was in no way associated with race. In those circumstances the Claimant's case of direct race discrimination in those respects was made out and it was treatment which continued throughout the entirety of her employment with the Respondents in the United Kingdom."**

(3) Indirect Discrimination

18. This was raised as an alternative: since it was to be pursued only if the claim of direct discrimination failed no separate adjudication was made upon it and it was dismissed.

(4) Harrassment

19. The decision on harassment was expressly based on "the same reasoning as before" (paragraph 124). It therefore depended critically upon the findings made in respect of direct discrimination and must stand or fall together with that.

(5) Victimisation

20. The Tribunal's reasoning is contained at paragraph 134:

> **"Turning to the allegations made in the second complaint of victimisation… the Tribunal found that this was not made out. The reason for that lies in the imprecision in (the Claimant's sister's evidence). Taking the evidence of the Claimant at its highest, that suggests that it was the commencement of proceedings that caused the first Respondent to issue the threats in the first telephone call. However, those proceedings were not solely proceedings about discrimination related matters. They were proceedings, as we have found, about a number of other claims as well. In the absence of any specific reference to race discrimination matters in the telephone calls, and on the evidence of (the Claimant's sister) taken at its highest, there was no such reference, the Claimant has not established that the reason for the threats was because she had commenced proceedings for breach of the Race Relations Act 1976. In those circumstances that claim cannot be upheld."**

The Appeal

(1) National Minimum Wage

21. Mr Dutton argued that Regulation 2(2)(a)(ii) when using the words "is treated as such" referred merely to an entitlement to use basic household facilities without charge and an obligation to carry out domestic chores. It could not mean that the employers treated the domestic worker with love or affection equivalent to that which they would show to a member of the family. The underlying relationship was one of domestic worker and employer: being treated like a member of the family for the purposes of the Regulation would not require proof, for

instance, that the employer provided for the schooling of the employee, presents on birthdays or religious festivals, was leaving her an inheritance and the like.

22. Since the decision of the Employment Tribunal there had been appellate guidance. The Employment Appeal Tribunal had decided the case of **Julio v Jose and Others** [2012] IRLR 180, and the Court of Appeal had determined **Nambalat v Chamsi-Pasha** [2012] EWCA Civ 1249: the latter was a determination of the appeals of two of the Claimants whose cases had been considered in the **Julio** decision.

23. Since **Nambalat** is the higher authority, we shall concentrate on that.

24. Ms Nambalat and Ms Udin were foreign live-in domestic workers employed in the Respondents' households. In the case of Nambalat, the Appeal Tribunal upheld a decision that her work fell within the exemption in Regulation 2, because she had been treated as a member of the family; in the case of Udin, which had initially come before a different Tribunal, an opposite result had been reached: that Tribunal had applied the exemption from the National Minimum Wage for which Regulation 2(2)(a) provides. In that case, the Appeal Tribunal had upheld an appeal.

25. The decisions, but not the entirety of the reasoning, of the Appeal Tribunal were upheld by the Court of Appeal. The central statements of principle appear in the judgment of Pill LJ with which Black LJ and Bean J agreed. At paragraph 36, he said:

> **"As the EAT stated the test requires an overall approach to family membership, accommodation being only one of several relevant factors. How accommodation is allocated is likely to throw light on the general issue.**

37. The test is whether, in the provision and allocation of accommodation, the worker was treated as a member of the family and not whether a particular standard of accommodation was provided. The majority of the Tribunal erred in law, in my view in requiring that the accommodation provided for the worker was of a particular standard. To consider how an actual daughter in her late thirties would have been treated was entirely speculative…"

26. Under the heading "General Considerations" he turned to consider the requirements of Regulation 2(2)(a)(ii) and said:

"For condition (a)(ii) to be satisfied, the worker must be treated as a member of the family. That is the central requirement. The condition requires that, when considering whether the worker is treated as a member of the family, particular regard must be had to "the provision of accommodation and meals and the sharing of tasks and leisure activities". In these cases… the issue is whether the "sharing of tasks" was compatible with the Appellants being treated as a member of the relevant family.

41. I cannot accept the extreme propositions put by either side. I do not accept the submission that Ms Azib (Counsel for the Respondent) put forward that because a wife in demanding employment may be the wife in most need of domestic help, the requirements of the Regulation should be construed so as to achieve an exemption. I do not consider that the use of the word "task" in sub-paragraph (a)(ii) as distinct from the word "work", with which Regulation 2(2) begins, has the significance for which the Respondent contends. Regulation 2(2) is concerned with whether types of work are excluded from the "work" contemplated by the Regulations. The word "tasks" is a word commonly used to describe domestic duties in the "family household". Its use does not, in my judgment, lead to the conclusion that the sub-paragraph can be concerned only with chores within the home, undertaken by family members, which fall outside the scope of the paid duties of the worker. An overall view is required and a judgment made as to whether the worker is treated as a member of the family.

42. Nor do I accept, on the other hand, that there must be a broad equivalence of the work done in the house as between the worker and family members. A person receiving free accommodation and meals may be expected to perform more household duties for the family than other family members. What matters is whether the work is done in the context in which the worker is treated as a member of the family. The way in which household tasks are shared is, as the Regulation recognises, an important indicator of whether the worker is treated as a member of the family. The way in which accommodation is allocated, meals taken and leisure activities organised are other indicators. It is for the Tribunal to decide whether, on the evidence, it is established that the worker is being treated as a member of the family and not as a domestic servant."

27. In examining whether the Employment Tribunal was in error of law in the application of that approach, Pill LJ said materially, at paragraph 47:-

> **"As already stated, it is the lawfulness of the decisions of the Employment Tribunals which need to be considered. However, the EAT's approach at paragraph 46… was appropriate as was the statement at paragraph 45 that "the issue is whether the worker is integrated into the family". If, however, in the last sentence of paragraph 45 the EAT was expressing the view that, in assessing whether a worker is treated as a member of the family, the extent of the work done by the worker under the contract of employment can be ignored when making the required overall assessment, I respectfully disagree. There comes a point where the demands upon the worker are so onerous and extensive as to be inconsistent with the worker being treated as a member of the family. It cannot be argued that condition (a)(ii) be satisfied upon the ground that such few tasks that are left outside the employment are shared between members of the family. That would be an abuse of the NMW exemption. …**
> **48. In each case it is for the Employment Tribunal to assess, having regard in particular to the factors stated in (a)(ii) whether the worker is treated as a member of the family. The Tribunal must keep in mind that it is for the employer to establish that the conditions in Reg 2(2) are satisfied and that onerous duties may be inconsistent with treatment as a member of the family. Tribunals will need to be astute when assessing when an exemption designed for the mutual benefit of employer and worker is, or is not, being used as a device for obtaining cheap domestic labour."**

28. Mr Dutton complains that the view expressed in paragraph 47 of Pill LJ's judgment should not be taken to overrule the principle expressed in the last sentence of paragraph 45 of the Appeal Tribunal judgment, with which Pill LJ expressly disagreed. The proposition set out there was "What work the worker does under his or her contract of employment is not relevant for the purposes of considering whether the (Regulation 2(2)(a)(ii)) condition is satisfied".

29. We accept that the expression of the view by the Court of Appeal was not necessary for its decision, which was that the Appeal Tribunal had come to the right result, even if it did not entirely agree with the reasoning. Accordingly, strictly viewed, what was said was obiter. However, we reject the submission that the sentence we have set out from paragraph 45 of the Appeal Tribunal's decision in **Julio** should be applied as Mr Dutton would argue in the present

case. We do so for three reasons. First, the sentence must be seen in context, and not taken in isolation as Mr Dutton's argument seeks to do. In context, paragraph 45 is a rejection of arguments being made to the Appeal Tribunal by counsel for the domestic worker. He had been arguing that in deciding what tasks were shared, the work which the Claimant was employed to do should have been taken into account. Mr Dutton seeks to extrapolate from this that if the work which a worker is contracted to do is irrelevant then it must follow that her hours of work are also irrelevant, and that what is relevant are the tasks performed by the family as a family unit. We do not accept that this follows from the rejection, seen in context, which the single sentence represents. Secondly, if we are wrong on that, we would conclude, this time as a matter of ratio, that the obiter view strongly expressed by the Court of Appeal is plainly right. We do not accept that the expression of view by the Employment Appeal Tribunal is correct. We prefer to and do follow the views of the Court of Appeal.

30. Thirdly, the test the Court of Appeal was expressing as ratio is whether the worker concerned is integrated into the family. We take that, together with the other paragraphs we have set out, as being the guidance which should be followed in a case such as this.

31. Mr Dutton argued that the Tribunal should have made findings as to the habits of the family in question. It looked for equivalence of treatment between the Claimant, and the family, where this was an error: see **Nambalat** at paragraph 42. The finding that the Claimant did not eat socially with the family was unsound, since at paragraph 82 it had recognised that the kitchen was not big enough for the whole family to eat in it. Accordingly, either a member of the family or the Claimant would have to eat with the children, since they necessarily had to eat separately. No findings were made as to the nature of the social activities. Although the Tribunal was

required, as it acknowledged in paragraph 129, to consider the provision of accommodation, meals the sharing of tasks and leisure activities, it made no sufficiently detailed findings.

32. We reject those criticisms. A Tribunal does not have to set out each and every fact upon which it relies. As Pill LJ observed, what matters is the overall assessment which a Tribunal has to make. Although it did not have the advantage of the consideration given first by **Julio** and then by **Nambalat**, there can be no criticism here of the test which the Tribunal applied. It looked to see whether the Claimant was treated as a member of the family. It decided she was not. The reason why it decided as it did related to accommodation, to the sharing of meals, or rather, the taking of meals apart from the adults in the family, and matters such as the employers' threats and abuse toward her and their retention of her passport which clearly demonstrated to it (and to us) that the Claimant was not treated as if a member of the family. None of those matters relied impermissibly upon the Claimant having to do the work she was contracted to do as a domestic worker. Adopting the approach which the Appeal Tribunal adopted in **Julio**, at paragraph 45, affirmed by the Court of Appeal per Pill LJ, the answer which the Tribunal clearly gave to the central factual question – was the Claimant integrated into the family unit? – was no. This was a finding of fact. It was not perverse. It must stand, and the appeal on this ground be dismissed.

(2) Direct Race Discrimination and (4) Harassment

33. Mr Dutton submitted that in **Amesty International v Ahmed** [2009] ICR 1450, the Appeal Tribunal (Underhill P presiding) drew a distinction between cases of direct discrimination where discrimination was inherent in the act itself (which it termed "criterion" cases) and those where it was not, but where the act was rendered discriminatory (whether consciously or subconsciously)

by the mental processes of the discriminator. The latter involved seeking the reason why a person was treated less favourably than others in a comparable situation. The distinction emerged not only from that case but from **R (E) v Governing Body of JFS** [2009] UKSC 15. What has to be shown in a "reason for" case is that the less favourable treatment was on racial grounds, not that it was racially motivated. As Mr Dutton put it: "it is relevant why the Claimant was treated less favourably (that must be on racial grounds) but irrelevant why the Claimant was treated less favourably on racial grounds". In other words the reason for the act is critical: not the motive for it. Thirdly, he contended that the mere fact that race played some part, even a major one, in the events leading up to the act complained of did not of itself mean that any less favourable treatment was on racial grounds. In **Martin v Lancehawk Ltd** [2004] All ER (D) 400 the Employment Appeal Tribunal presided over by Rimer J considered a case in which a male manger had dismissed a female employee because their affair had broken down. If she had not been female, the dismissal would not have occurred. But for her gender, she would not have been dismissed. Nonetheless, gender was not the reason for the dismissal. The breakdown of the relationship was. At paragraph 12, the Appeal Tribunal said this: -

> **"It seemed to us that the critical issue… was whether (the male manager) dismissed Mrs Martin "on the ground of her sex", an issue requiring a consideration of *why* he dismissed her. As we have said, we interpret the Tribunal as having found that the dismissal was because of the breakdown of the relationship. That, therefore, was the reason for the dismissal not because she was a woman. We accept that, but for her sex there would have been no affair in the first place. It could, however, equally be said that there would have been no such affair "but for" the facts (for example) that she was her parents' daughter, or that she had taken up the employment at Lancehawk. But it did not appear to us to follow that reasons such as those could fairly be regarded as providing the reason for her dismissal."**

Thus, he argued, the proper enquiry was into the real or, as it had been put in **Seide v Gillette Industries Ltd** [1980] IRLR 427, per Slynn J for the Appeal Tribunal, the "activating" cause of the detrimental treatment. Here, the cause of the mistreatment of the Claimant was not that she was a migrant worker, nor that she required a migrant worker visa, nor was it that she was

Nigerian. The need to possess a visa was part of the background circumstances, but, as in **Lancehawk**, was just that: a background circumstance, and not the reason for the discrimination. The present matter was, he emphasised, not a "criterion" case, but a "reason for" case.

34. The fact that the Tribunal had found that possession of a migrant worker visa was clearly linked to the treatment which the Claimant received acknowledged that national origin played some part in the events which led up to the acts alleged to be discrimination. There was, however, no material immediacy linking that with the acts complained of.

35. He submitted that **Mehmet v Aduma** was wrongly decided: in that case, the Claimant's race might have given the opportunity for what happened; it was something that played some part in the chain of events which led to the result. It was part of the background circumstances, not an activating cause of the treatment of which complaint was made.

36. The harassment claim, Mr Dutton contended, fell by the same reasoning, since it had expressly adopted that same reasoning.

37. Mr Robottom submitted that the present case was indeed a "criterion" case; that **Mehmet v Aduma** should be followed; that the individual acts or detriments directed towards the Claimant were inherently discriminatory since an English or non-migrant worker comparator would simply not have been subject to the same treatment. Thus the Claimant's national origin was the reason for her treatment. He expressly disavowed any submission that the mental processes of the Akwiwus were such that they harboured racist thoughts towards the Claimant – "that would have been absurd given their shared ethnicity and nationality".

38. If, in the alternative, we were to find that this case was a "mental processes" or "reason for" case it was irrelevant that there was no racially discriminatory motive – he reminded us that at paragraph 34 of the judgment in **Ahmed v Amnesty International** the Appeal Tribunal had recognised that even in a 'mental processes' case

> **"It is important to bear in mind that the subject of the enquiry is the ground of, or reason for, the putative discriminator's action not his motive."**

39. He recognised, too, that the harassment claim stood or fell by the same logic: it depended, as did the claim of direct discrimination upon whether there were racial grounds for the treatment.

Discussion

40. As will be apparent from our reasoning in the **Taiwo** case, we accept Mr Dutton's arguments.

41. Here, the Tribunal did not come to any conclusion in fact as to what was the reason for the treatment and that it was on racial grounds. Rather, it applied the case of **Mehmet v Aduma** in order to determine that the burden of proof should pass to the Akwiwus. Since it did not accept the explanation then put forward, it held that racial discrimination was made out.

42. As to **Mehmet v Aduma,** Mr Aduma was a student, employed as a night manager at his employer's hotel. The employer arranged his affairs so as to avoid paying tax where possible, and arranged the terms of the Claimant's employment to avoid the need to pay him the minimum wage. The allegation that Mr Aduma had been discriminated against on ground of his race by

being employed at less than the national minimum wage was held established. The critical reasoning for this was set out at paragraph 9 of the Appeal Tribunal's judgment:

> **"…there was no discrimination on the ground of the employee's Nigerian race as such. But … it was quite clear that the employer employed the employee 'because, as a Nigerian student he was vulnerable and could be treated less well because of his inferior employment situation, only having limited rights to be employed'… the relevance of the employee's race was that he came from a country (Nigeria) which did not have automatic rights to work in the United Kingdom and so could be less favourably treated with impunity. It was not because the employer had any antagonism to people from Nigeria, but because of the opportunity which the employee's race gave him to avoid employment legislation. … The Tribunal accordingly found that this situation 'could' constitute discrimination. In accordance with Section 54A of the Act (Shifting of the Burden of Proof) the Tribunal went on to consider and reject the explanation offered by the employer that the employee was a trainee and should therefore be paid a lower sum of money until he had acquired appropriate skills. It accordingly found the Claimant was discriminated against in the terms of the employment offered to him."**

Building upon its finding of discrimination on those grounds the Tribunal also found acts of discrimination in persuading Mr Aduma not to apply for a National Insurance number and in dismissing him.

43. The Appeal Tribunal's conclusion was reached expressly upon the particular facts of the case. The case had nothing to do with the employee's immigration status – stripped to its essentials, it was that a Nigerian was paid less than the minimum wage in circumstances in which the Tribunal assumed that, although he had not complied with the law in respect of the Claimant, there was no evidence to suggest that the employer would do anything other than abide by his legal obligations in respect of any other employee of whatever other race. Thus a British or British-based person would not have been underpaid though the Claimant, a Nigerian, was. The second string to the Tribunal's reasoning had been that less favourable treatment was demonstrated by considering the way in which a British person hypothetically would have been treated. There was thus less favourable treatment, and a difference in race. That appears to have been sufficient for it to regard the burden of truth as having shifted to the employer. Since, the

burden having shifted, the employer did not satisfactorily explain why the Claimant was less favourably treated, the Tribunal found there had been discrimination, and the Appeal Tribunal held it was entitled to do so.

44. It is plain from the judgment that the Appeal Tribunal was not taken to **Madarassy v Nomura** [2007] ICR 867, which was decided some two months before the appeal hearing. This made it crystal clear that in applying **Igen v Wong** (which was referred to):

> **'the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not without more sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination' (paragraph 56 per Mummery LJ).**

So as far as disclosed by the Appeal Tribunal's judgment, therefore, the first instance Tribunal in **Mehmet v Aduma** should not have regarded the onus of proof as shifting to the employer. The conclusion of the Appeal Tribunal, which was that the Employment Tribunal had reached a conclusion as to race discrimination to which it was entitled to come, must therefore be regarded as flawed. It was reached per incuriam. It did not apply the **Igen** and **Madarassy** approach correctly.

45. Further and separately given that the factual circumstances relied on in the Tribunal in that case were not specifically linked to the particular immigration status of the Claimant, it is of no direct assistance to a case in which it is argued that exploitation occurs because of the victim's need to have a visa which is controlled by his employer and that such visa status is effectively part and parcel of the nationality of the Claimant.

46. In short **Mehmet v Aduma** stood for no principle which the Tribunal whose decision is appealed to us was relevantly bound to follow. It was wrong to consider itself bound by that

decision, though since it was Employment Appeal authority we can understand why it did. Free of that authority, the question was simply whether the burden of proof should have passed. Here it was accepted that there was no obvious reason why Nigerians should have discriminated against a Nigerian because she was of that nationality. No comparator was identified, since the submission was simply that this was a "criterion" case: the fact she was a migrant domestic worker proved it. The central sentence in paragraph 119 of its decision is:

> "**It was not suggested here that Mr and Mrs Akwiwu had antagonism specifically towards the Claimant because she was Nigerian but that, because she was Nigerian, they treated her as a migrant worker and as she was a migrant worker in subjecting her to the detriment we have found the Respondents treated her less favourably than they would have treated someone who was not a migrant worker"**

That passage is not easy to follow. The cause of the treatment is said to be linked to her migrant worker status, but it is not clearly stated that she was treated as she was "because of" her migrant worker status – it is making the rather more general point that migrant workers are more likely to be exploited by payment of low wages than are indigenous workers. The finding (literally) was that the Akwiwus treated her as a migrant worker because she was Nigerian: but that in itself would create no disadvantage compared with those who were not migrant workers. More would be needed. So the Tribunal held that the race of the claimant was a cause of something which in itself was not disadvantageous, but which was a stepping-stone on the way to something which was. The Tribunal, given its reference to **Madarassy** and **Igen v Wong,** did not approach this as a criterion case. It had arguably found a difference in race (migrant, as compared with non-migrant), and less favourable treatment of the migrant compared with the non-migrant. In accordance with paragraph 56 of **Madarassy** this gave rise to the possibility of discrimination, but without more a Tribunal could not say that there had been. Accordingly, the burden of proof should not have passed on this basis.

47. Whether, therefore, read as a whole the Tribunal were relying on **Mehmet** (as we think is the better reading of it) or whether it was considering the shifting of the burden of proof in reliance purely on **Igen v Wong** and **Madarassy** it erred. The decision is not rescued evidentially by the inadequacy of the explanation actually proffered, since that amounted to no more than a denial of discrimination.

48. The Tribunal thus committed an error of law material to its decision. The question on this appeal thus became whether in any event it was plainly and obviously right in the result. For essentially the same reasons we expressed in respect of the **Taiwo** appeal, we have concluded it was not. In summary: what was complained of consisted of treatment falling short of appropriate UK standards. No part of the treatment itself was inherently bound up with the race of the victim. It was, however, strongly associated with the subordinate position of the Claimant and the relative economic benefits of her work in the UK compared with the poverty of her situation in a Nigerian village. Thus we can understand why the Tribunal did not conclude that the race of the Claimant had anything directly to do with the treatment, and why it could only reach the conclusion it did by its passing of the burden of proof. In saying, as the Tribunal did, that:

> **"The reality is that they treated the Claimant precisely in the way in which they did because of her status as a migrant worker which was clearly linked to the Claimant's race"**

it was identifying migrant worker status as a background factor rather than immediate cause of the discrimination. Close association, described by the word "linked", falls short of cause and effect. It might indicate the possibility of a claim for indirect discrimination, if it could be shown that those in the group (migrant workers) were disadvantaged by the application of a PCP which applied both to it and to the comparison group (non-migrant workers), but it is an insufficient basis for a finding of discrimination on either a "reasons for" or a "criterion" basis.

49. What we said about vulnerability in the **Taiwo** decision applies here: although the Tribunal here did not use the word to describe the claimant's relationship to the Akwiwus, the factual findings are to broadly the same effect, and in his skeleton argument Mr. Robottom himself argues that "the labour of migrant workers is being exploited due to their vulnerable position in the UK". This claimant had similarly poor socio-economic background circumstances to those of Ms. Taiwo; had no developed support network; had, no doubt for a combination of educational and financial reasons and because of the imbalance of power in the relationship between the Respondents and the Claimant, come repeatedly to the UK and ceded control of her passport (upon which she would depend for alternative work) to her employers. If therefore, she was treated as she was because of these factors, the fact that she was subject to immigration control (as no British national would be) would be a background circumstance, contributing to her vulnerability, but not a reason in itself for the treatment - except on a theoretical philosophical basis which would bear little relationship to the reasons for applying a rule of causation which determines liability in a statutory tort. To argue that without having a visa, she would not be lawfully in the UK, and would not therefore have been subject to exploitation here, such that the one is the cause of the other, is no different in principle from arguing that the cause of a dismissal after the breakdown of a sexual relationship between employer and employee is the sex of the employee: but **Martin v Lancehawk** demonstrates the error in such reasoning.

50. The features which enabled exploitation are not indissociably linked with migrant status. The fact that migrant status was one of the matters which contributed to the ability of the Akwiwus to mistreat the Claimant, since it gave the employers another advantage over her which they could exploit, but that were other factors too, renders it that which Lord Hope would (per **Patmalniece)** describe as a composite: by comparison with others who suffered difficulties with

education, income, and possibly language. Those like the claimant were more likely to be put at a disadvantage because they had the added disadvantage that their immigration status might also be manipulated to secure their compliance with inferior terms and conditions of employment. Formal equality of treatment rather than substantive equality of result is what is being contended for under this ground of appeal: yet it is the latter to which, if anything, the disadvantages which immigration status created for the claimant relate: a matter we shall discuss further below, when we discuss indirect discrimination.

51. There was no separate consideration of harassment. That claim therefore fails.

(3) Indirect Discrimination

52. The Tribunal did not resolve this. The contingent cross-appeal thus falls to be considered.

53. Section 19 of the **Equality Act 2010** defines indirect discrimination as, so far as material as follows:

> **"(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 person with whom (B) does not share it,**
> > **(c) it puts, or would, (B) at that disadvantage, and**
> > **(d) (A) cannot show it to be a proportionate means of achieving a legitimate aim."**

.

54. The way in which the claim had been put in the ET1 was to assert that the PCP was the "mistreatment of migrant domestic workers". Mr. Dutton argued that this could not be a PCP.

Nor could any other PCP which might apply readily be identified.

55. We cannot accept such a PCP as contended for. The reason is that the definition of this PCP inevitably answers the question to be posed: it is entirely circular. Where the issue is whether mistreatment has been caused to a person because of the application of a PCP, it is pointless to argue that the PCP is "mistreating" the person. Equally, the PCP will only apply to those who are migrant workers: it is not on the face of it a neutral criterion which disadvantages some of those to whom it applies disproportionately when compared to others to whom it also applies. There is no room for one racial group to whom the PCP applies to be disproportionately adversely affected compared to another racial group, for the very definition states that each is mistreated. It commits the error of assuming that because treatment is obnoxious it is also discriminatory.

56. Since no other PCP was contended for, it would not be right to remit this case to the Tribunal to determine whether it should permit an amendment to the claim, long after the date for filing a claim had passed. The claim as advanced was untenable. No other claim was made.

57. Since other cases may turn on the conclusions in this, we should make it clear that this is not to say, however, that depending on the findings of fact a PCP might well have been identified which inevitably would have a disproportionate adverse effect on those of one racial group. This would be consistent with evidence such as that apparently given in this case in an answer to cross-examination, to the effect that an English person would not be treated as was the claimant in that case. This evidence must be treated with reserve as evidence of fact, since on analysis it is almost certainly a statement of opinion or impression, and probably amounts to comment given in answer to a question inviting it, the question being dressed up as though it were a

legitimate enquiry into fact: but nonetheless it is at least indicative of an understanding that although exploitation of the vulnerable may occur amongst those who are British it is likely to be easier to exploit the vulnerabilities of those who are not British. We suspect that it is not beyond the wit of a lawyer to identify a PCP which may factually have been applied, applicable to all, but disadvantaging some, and amongst those it disadvantaged, in particular the domestic migrant worker in question.

(5) Victimisation

58. The Claimant argued that the Tribunal had erred in concluding that the victimisation proceedings could not succeed since they were not solely proceedings about discrimination matters, and in the telephone calls there was no specific reference to race discrimination nor to the fact that she had started proceedings for breach of the Race Relations Act 1976. In order to bring her claim, the provisions of Section 27 of the Equality Act 2010 had to be satisfied. They provide:-

> **"27. Victimisation**
>
> **(1) A person (A) victimises another person (B) if (A) subjects (B) to a detriment because –**
> **(a) (B) does a protected act or**
> **(b) (A) believes that (B) has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that (A) or another person has contravened this Act."**

The Claimant raised, however, the question whether the victimisation claim could proceed because the relationship had ended. Mr Dutton argued that this could not be the case.

Accordingly, it is necessary to determine this issue of statutory construction and application first.

59. This involves difficult questions of construction, which have already troubled Employment Tribunals, which have reached different decisions on the matter, and which have in one case (**Rowstock Ltd & Davis v Jessemey** (5th. March 2013, UKEAT/0112/12, a decision of Mr. Recorder Luba QC, Mr.Beynon, and Mr. Yeboah - **"Jessemey"**) given rise to a decision in the Appeal Tribunal which the Tribunal recognised had the effect (if it was correct) of identifying a lacuna in the statutory scheme of protection from discrimination, harassment and victimisation which the UK is required by EU legislation to implement.

60. The central difficulty is that the Equality Act 2010 does not expressly provide that victimisation of a former employee by her erstwhile employer is compensable, whereas it does provide specifically that both discrimination and harassment occurring after termination of the employment relationship are, and it would seem all too easy for Parliament to have added a similar provision in respect of victimisation post-dating the termination of an employment to give rise to a claim if that is what it had intended. Yet that is what European Directives would require it to do; it is what the House of Lords recognised was provided by the predecessor statutes (here the Race Relations Act) by its decision in **Rhys-Harper v Relaxion Group** [2003] IRLR 484 HL; it is what the Code of Guidance to the Equality Act asserts the effect of the Act is; and although the Act is not expressly a consolidating statute, there is no Parliamentary material which suggests that the legislature considered for one moment that the effect of what is was doing might be to provide for such a dramatic shift in the law.

61. This question involves the interpretation of a statute. Where, as here, the parties accept that there are European obligations to provide a remedy for post-termination victimisation to which the law must pay regard, this must be approached in two stages: first to enquire what the meaning of the statute is, if construed as a domestic statute, and if that construction would not accord with the European obligation to ask whether it might be possible nonetheless to interpret it to do so, even if that might involve writing words into or omitting them from the legislation.

Domestic Construction, if approached as a purely domestic statute

62. To determine the meaning of a statute, regard should be had to its overall scheme. The scheme of the Equality Act is first to set out "key concepts" in Part 2. This involves defining each of eight separate protected characteristics as defined separately in Sections 5 – 12. Chapter 2 within Part 2 is headed "Prohibited Conduct". "Discrimination" is defined and dealt with within that chapter. This extends to a duty to make adjustments in respect of the disabilities of a person. Under the sub-heading "Other Prohibited Conduct", therefore distinguishing it from discrimination as such, the last two Sections of Chapter 2 deal respectively with harassment (Section 26) and victimisation (Section 27), the latter being set out above in its material terms.

63. Part 2, consistent with the general description of "key concepts", thus consists of definitions. It does not render conduct which meets those definitions unlawful. What makes discrimination, harassment, and victimisation at work unlawful is provided for by Part 5, headed "Work". Within that Part, both discrimination and victimisation (though not harassment) are dealt with in Section 39, under the heading "Employees and applicants" which provides by Subsections (1) and (2) for a prohibition on discrimination by an employer, the first

in respect of applicants for employment, the second in respect of those who are employees. In identical terms, save for the use of the word "victimise" instead of "discriminate" it goes on to provide:

> **"(3) An employer (A) must not victimise a person (B) –**
> **(a) in the arrangements A makes for deciding whom to offer employment**
> **(b) as to the terms on which A offers B employment;**
> **(c) by not offering B employment**
>
> **(4) An employer (A) must not victimise an employee of A's (B) –**
> **(a) as to B's terms of employment;**
> **(b) in the way A affords B, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit facility or service;**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment"**

64. Section 40 deals with harassment. The occasions on which liability will arise are different from those described in Subsections 39(1) and (2) for discrimination and (3) and (4) for victimisation:

> **"An employer (A) must not, in relation to employment by A, harass a person (B)-**
> **(a) who is an employee of A's;**
> **(b) who has applied to A for employment"**

65. Part 8 of the Act is entitled "Prohibited Conduct: Ancillary". It thus is intended plainly to relate back to the prohibited conduct set out in chapter 2 of part 2, which was definitional. Section 108, within that Part, is headed "Relationships that have ended". It provides so far as is material:

> **"(1) A person (A) must not discriminate against another (B) if –**
> **(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and,**
> **(b) conduct of a description constituting the discrimination would cover if it occurred during the relationship, contravene this Act.**
>
> **(2) A person (A) must not harass another another (B) if –**
> **(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and**

(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.

(3) It does not matter whether the relationship ends before or after the commencement of this section…

(6) For the purposes of part 9 (Enforcement) a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.

(7) But conduct is not a contravention of this section insofar as it also amounts to victimisation of B by A."

66. Under Part 9, Chapter 3, by Section 120 an Employment Tribunal has jurisdiction to determine a complaint relating to a contravention of Part 5, and a contravention of Section 108 that relates to Part 5. Accordingly, a contravention of Section 108 is one for which there is liability.

67. The scheme of the Act is thus to treat relationships which have ended in a dedicated Section.

68. The argument for the Akwiwus is that a Tribunal only has jurisdiction to consider a complaint if statute provides a right in respect of that complaint. The existence of a section dedicated to relationships that have ended, in another Part of the Act, shows that claims of post-termination discrimination, and harassment, do not naturally fall within Part 5. It might be thought that Part 5 relates, therefore, only to current or prospective employment.

69. It follows that unless Section 108 makes provision for victimisation claims to be pursued after the employment relationship has ended, such claims are outside the jurisdiction of an employment tribunal: such a tribunal, being entirely a creature of statute, may consider only those claims which statute provides for it to consider.

70. Section 108 does not specifically provide that a Tribunal may hear such a claim. It specifically mentions only "discrimination" and "harassment" as claims which may be brought after the end of the relationship of employer/employee. It does not include "victimisation" as such a claim. This argues against the Tribunal being empowered to do so.

71. At the conclusion of the initial hearing, we were impressed by the submissions of Mr. Dutton to the effect that express mention is made of victimisation claims, only to exclude them from consideration – see Subsection (7). This Subsection shows that the draftsman had victimisation in mind when he drafted Section 108. That supports the conclusion that its omission from a list of those matters which might be litigated after the end of the relationship of employer/employee was deliberate.

72. In the light of Subsection (7), Mr. Robottom appeared then to accept that if the Act were to be construed purely as a domestic statute, it made no provision for a claim of victimisation suffered by a former employee at the hands of her former employer.

73. We were troubled by both the exact meaning and purpose of Subsection (7), which neither submission satisfactorily explained; and by the U-turn which the law would then have taken to set its face against the UK's European obligations to remedy post-termination victimisation without any obvious indication, in any contemporaneous material of which we were aware, that Parliament considered that was what it might be doing.

74. Accordingly, we first invited further submissions in writing as to whether the law generally, though not necessarily in the Equality Act itself provided a remedy for conduct which fell within

the scope of victimisation (for if it did so, then it might be easier to regard European obligations as met, albeit not within the scope of the Equality Act taken on its own). Then, having considered further the proper interpretation of Subsection (7) (which we thought might be key), we invited yet further submissions on its proper construction. The parties asked that they be delivered orally, and we heard them.

75. The proper force of Subsection (7) is not entirely easy to discern. What it does not do is expressly exclude victimisation from being a permissible head of claim in respect of relationships that have ended. Nor does it include it, as it does with discrimination and harassment in Subsections (1) and (2).

76. However, there is no sensible purpose for Subsection 108 (7) if there is no right to sue for victimisation after the relevant relationship has ended. That is because there would be no need to include Subsection (7) at all – there being no right to sue, conduct amounting to contravention of Section 108 would, if it was victimisation, never give rise to a claim for compensation.

77. By contrast, Subsection 108 (7) does make sense if the draftsman had assumed that victimisation occurring post termination could be subject of a claim. In such a case, the same facts might give rise to a claim of discrimination, or of harassment, but also a claim of victimisation. Or the compensation sought for the act of discrimination and/or harassment might include matters which were compensable under a victimisation claim.

78. If, in such a situation, there was a complete overlap between that which constituted harassment, and that which constituted victimisation, then the effect of Subsection (7) in the absence of any right to sue for victimisation separately would be to extinguish entirely the claim

for harassment. This would be inconsistent with the purpose of the legislation which is to recognise that both discrimination and harassment are reprehensible and may require to be compensated. Yet, in the postulated case, discrimination or harassment or both would be just as reprehensible, but would cease to compensable because the actions also amounted to victimisation which would itself attract no compensation because (so it would be argued) victimisation would give rise post termination to no claim at all!

79. To illustrate the point, let us say that a claim for harassment (H) is worth £30,000 because it relates to three acts, each of which is worth (£10,000). The effect of Subsection 108 (7) is that if one of those acts is ***also*** an act of victimisation (V), the claim for (H) could only be for £20,000, because one of the acts which would otherwise have been compensated would be taken out of consideration altogether. (The Subsection ***does not*** provide that insofar as the act is victimisation it is not a contravention: it only bites on acts which would otherwise be a contravention). This is understandable if (V) may itself be separately sued for, for the Subsection then would inhibit double recovery. However, there seems no good reason why a claim for (H) should be reduced for something (V) which could not separately give rise to a claim for compensation, for this would be to reduce compensation for one wrong because in addition to it further reprehensible conduct had occurred, yet eliminate any possibility of gaining compensation for some of the wrong which had been done, and which it was the legislative purpose to condemn. It would be perverse to hold that the worse the conduct might be described as being (consisting now of two wrongs – (H) and (V) - arguably being done, rather than one alone (H)), the less the compensation overall should be.

80. Next, since what is being considered is conduct in respect of relationships which have ended, it is difficult to see why that conduct should "also" amount to victimisation if

victimisation were not litigable post termination. The word "also" is of significance. It indicates that conduct can amount to victimisation in respect of a relationship which has ended.

81. None of these consequences would follow if, by contrast, the draftsman assumed that post termination (V) was provided for elsewhere within the statutes. Then the effect of Subsection 108 (7) would be to prevent double recovery for one and the same act – if a person claimed (D) or (H), but also claimed (V) he would gain no more money to the extent that (D) and (H) overlapped with (V).

82. Mr Dutton accepted that if the word "also" had the meaning of "as well as", then the apparent assumption of the draftsman was that post termination victimisation was a claim provided for by the statute.

83. As we have said, this provision is not explicit. However, nor was it explicit when the House of Lords determined in **Rhys-Harper v Relaxion Group** that victimisation under Section 6 **Sex Discrimination Act 1975**, Section 4 of the **Disability Discrimination Act 1995**, or Section 4 of the **Race Relations Act 1976** could give rise to a claim if it occurred post termination. It did so by giving a meaning to the words "employer" and "employee" which extended to "ex-employer" and "ex-employee". The terms "employer" and "employee" appear in Subsection 39 (4) in respect of victimisation by subjecting the employee "to any other detriment" (39) (D). Since the draftsman must be taken to have been aware of relevant decisions of the House of Lords this might afford a route to adopting the same interpretation here, and regarding that Section as actually providing that post-termination victimisation could give rise to a claim.

84. Mr Dutton attacks this approach by arguing, first, that in Subsection 108 (7) the word "also" should not be understood in the sense of "as well as" but in the sense of "furthermore". In that sense, the purpose and force of Subsection 108 (7) might be more clearly expressed if the wording were "Furthermore, conduct which amounts to victimisation is not a contravention of this Section". This would be an interpretation which expressly excludes victimisation from being compensable post termination.

85. Next, he points out that if the words "employer", "employee" and "employment" are to be understood in respect of one Subsection of Section 39, they must be understood in the same sense in other Subsections. He argues that if the draftsmen had thought that those terms (following the decision in **Rhys-Harper v Relaxion Group** [2003] IRLR 484 HL,) included ex-employers and ex-employees, then there would be no need to have any reference in Subsection 108 (1) or (2) which expressly permitted a claim for post termination discrimination or harassment. Both could be sued for. The fact that they were mentioned expressly in Section 108 would mean that "employer" and "employee" did not have that meaning in Subsections 39 (1) and (2), and it would be very surprising if in Section 40 (harassment) the expressions were used in any different sense. Accordingly, he submits the proper interpretation is such that Subsection 108 (7) excludes post termination victimisation from any right to sue.

86. We cannot accept Mr Dutton's submissions as having the effect he proposes. First, we do not read the word "also" as if it were the word "furthermore" at the outset of Subsection 7. It is not the more natural reading of the word "also". It would give the Subsection no purpose, since on this approach there would be no basis within the Act for thinking that victimisation after the end of the relevant relationship could be sued for (save for the interpretation of "employer" in Section 39 referring only to current or prospective employees) because Section 108 expressly

dealt with those who had been employees. Moreover, the Subsection would then be one inserted as if for the avoidance of doubt. If so, it could have been much more clearly and simply put. There would have been no need for the word "furthermore", or "also", nor the words "insofar as". Those four words have effect only in respect of claims in relation to discrimination or harassment, rendering them less a contravention than they otherwise would have been because there is also victimisation. As we have indicated, this makes no legislative sense unless the statutory assumption is that victimisation itself may be compensated.

87. The argument by reference to Section 39 is one of greater difficulty. However, it must be addressed by reference to the Act itself. Subsection 83 (2) defines "employment" as "employment under a contract of employment, contract of apprenticeship or a contract personally to do any work". Subsection 83 (4) provides "a reference to an employer or an employee, or to employing or being employed, is to be read with Subsection (2)". Mr Robottom argues that the principles in **Rhys-Harper** apply, and determine the scope of these words. The words "employer" and "employee" were defined similarly under the **Disability Discrimination Act 1995** Section 68. It meant:

> **"employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions are to be construed accordingly."**

The definition in Section 78 of the **Race Relations Act 1976** was materially identical.

88. What was considered centrally in **Rhys-Harper** was not, however, that definition in itself but the phrases "employed by him" in Subsection 4 (2) of the **Race Relations Act 1976**, and "whom he employs" in Subsection 4 (2) of the **Disability Discrimination Act 1995** (see paragraph 89). Since "related expressions are to be construed accordingly" it is difficult to see

that there is any material difference in meaning between "employed" in the phrase "employed by him" and "employer", though it appears to have been argued in that case that those phrases by introducing the present tense restricted an otherwise wider meaning to that of current employment. This was the approach which had been taken in **Post Office v Adekeye [1997] ICR 110, CA**, which was overruled in **Rhys-Harper.** In differing from it, Lord Nicholls observed that the obligation not to discriminate could not sensibly be confined to the precise duration of the period of employment under the contract of employment – in many respects, that relationship gave rise to rights and expectations outside the duration of such a period, and could be said to be continuing for that purpose. Thus, he said (at paragraph 37):

> "**To my mind the natural and proper interpretation of section 6(2) of the Sex Discrimination Act and the corresponding provisions in the other two Acts in this context is that once two persons enter into the relationship of employer and employee, the employee is intended to be protected against discrimination by the employer in respect of all the benefits arising from that relationship. The statutory provisions are concerned with the manner in which the employer conducts himself, vis-à-vis the employee, with regard to all the benefits arising from his employment, whether as a matter of strict legal entitlement or not. This being the purpose, it would make no sense to draw an arbitrary line at the precise moment when the contract of employment ends, protecting the employee against discrimination in respect of all benefits up to that point but in respect of none thereafter."**

89. Lord Hobhouse's reasoning, as he expressly recognised, substantially accorded with that of Lord Nicholls (see para. 165). So did that of Lord Rodger (see para. 221).

90. It is unnecessary, since the majority agreed not only in the result but also in this essential reasoning, to consider the views of the other two members of the House. However, for completeness: Lord Scott too in approaching the construction to be given as matter of domestic law would have given a purposive interpretation to "employer" so as to comprehend the ex-employer (para. 197), but (at para. 204) "..save for cases where the relationship between

employer and employee is still continuing notwithstanding the termination of the employment the conclusions of the Court of appeal in Adekeye were correct and should be followed….". Only Lord Hope would have found it necessary in order to resolve the appeal in favour of the (ex)-employees to appeal to the interpretative obligations inherent in considering the effect in English law of European directives.

91. The current case is all the stronger for the fact that Parliament has eschewed the phrase which led to the differences of interpretation as between the Court of Appeal and the House of Lords. No longer do the phrases "employed by him" or "whom he employs" with their suggestion of the present tense apply. The legislation thus is all the more open to the interpretation which Lord Nicholls with the concurrence of Lords Hobhouse and Rodger would have given to it without recourse to European considerations.

92. As against this, what is to be made of Mr. Dutton's point that the fact that if "employer" and "employee" were to be construed in the sense which appealed to the House of Lords when considering Section 39 of the **Equality Act**, the legislation itself suggests in Section 108 that discrimination and harassment require special consideration under the heading "Relationships that have ended"? First, we do not consider that the existence of Section 108 colours the meaning of "employer" and related expressions in Section 39 so as to limit them to current employment. Rather, Subsections 108 (1) and (2) have a function in closely defining the circumstances in which discrimination and harassment must occur if they are to give rise to a claim where there is no longer a subsisting employment relationship. Other situations are excluded: it is not enough to found a claim that one player in the scene in which discrimination is alleged to have occurred was once the employee of another actor in the scene who was once the employer. Mr. Robottom submits, with considerable force, that Parliament here was expressing

clearly the limitation which **Rhys-Harper** had indicated – the need for a close connection between the act complained of and the employment relationship which had or did exist – and was specifying the circumstances in which this would occur more closely. Victimisation is separately defined. It is perfectly reasonable to assume that Parliament did not feel it necessary to prescribe more closely the circumstances in which, after the termination of actual employment, a former employer might victimise a former employee: after all, all the protected acts referred to in Section 27 are defined by reference to the Equality Act.

93. Further and separately, we would observe (though tentatively, since we have heard no argument on this specific point) that the thrust of the reasoning in **Rhys-Harper** is that the relationship of employer-employee may continue even if the employee no longer performs any work under the contract of employment: yet Section 108 is heading "Relationships that have ended", and it may be moot whether the Section deals with continuing relationships of the sort referred to in the House of Lords decision. No definition is given to the head note to the Section, and the extent to which it may influence construction may be arguable.

94. We have to consider, too, that our approach to Subsection 108 (7) ascribes it the function of avoiding double recovery. Mr. Dutton points out that if one and the same act constitutes both direct discrimination and harassment any overlap between them is not restricted. He argues that this is inconsistent with a general policy aiming to prevent over-compensation; why, he asks, should s. 108(7) not simply provide that to the extent that any of Direct discrimination, harassment, and victimisation overlap there is no additional claim?

95. This has given us some hesitation, though the answer may lie in the very different nature of direct discrimination and harassment as defined in the Equality Act. If it does leave a lacuna,

however, it is far less a gap than would be left were Mr. Dutton's interpretation of s.108(7) to be accepted.

96. Accordingly, applying domestic canons of construction, we reject a construction of Subsection 108 (7) which has the effect that victimisation cannot be sued for where the employee no longer works for the employer under the contract of employment.

97. We have been referred to the **Equality and Human Rights Commission Code of Practice on Employment (2011)**. It has been produced by the Commission pursuant to its powers under the Equality Act 2006, as a statutory code. It has been approved by the Secretary of State and laid before Parliament, but does not impose legal obligations, nor purport to be an authoritative statement of the law. Mr Robottom made play of the fact that under the heading "Relationships that have ended" at paragraph 10.62 of this Code, it says: "If the conduct or treatment which an individual receives after a relationship has ended amounts to victimisation, this will be covered by the victimisation provisions (see paragraphs 9.2 – 9.15)". When one turns to paragraph 9.2, as instructed, it can be seen to refer to Subsection 27 (1) of the 2010 Act, and says: "the Act prohibits victimisation."

98. Whereas Mr Robottom relies on this Code as supporting the interpretation he advances of the Act, Mr Dutton rightly observes that Section 27 does not prohibit victimisation. It defines it. It does not make it unlawful in employment. That is the purpose of Section 39, not Section 27.

99. We do not find it necessary to refer to the Code as an interpretative aid, but are comforted by noting that our conclusion as to the law – that the definition in Section 39 encompasses victimisation whether employment under the contract of employment is continuing or whether it

has ceased – is prohibited by the Act and Section 108 does not have any sufficient contrary effect.

100. Nor have we found it necessary to support our reasoning by reference to the European obligation. However, this does again strengthen the conclusion we have reached.

101. Mr Robottom argued that Counsel Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment reads:

> **"The effective implementation of the principle of equality requires adequate, judicial protection against victimisation."**

102. Article 9 of the Directive reads:

> **"Victimisation**
> **Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment."**

103. In **Coote v Granada Hospitality Ltd** (C-185/97) [1999] ICR 100, the judgment of the ECJ reads (at paragraphs 24 -25):

> **"The principle of effective judicial control laid down in Article 6 of the Directive would be deprived of an essential part of its effectiveness if the protection which it provides did not cover measures which, as in the main proceedings in this case, an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment. Fear of such measures, where no legal remedy is available against them, might deter workers who considered themselves the victims of discrimination from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise the implementation of the aim pursued by the Directive.**
>
> **In those circumstances it is not possible to accept the United Kingdom Government's argument that measures taken by an employer against an employee as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment do not fall within the scope of the Directive if they are taken after the employment relationship has ended."**

104. The arguments are well set out in the decision of the Appeal Tribunal presided over by Mr Recorder Luba QC, of **Rowstock Ltd v Jessemey** (5th March 2013): see, in particular, paragraphs 18, 28 for an acceptance that a "strict interpretation" of Subsection 108 (7) would mean that the UK Government was in breach of relevant EU directives, which, coupled with the proposition often named after **Marleasing SA v La Comercial Internacional de Alimentacion SA.** [1990] EUECJ C-106/89**,** and recognised in **Litster v Forth Dry Dock and Engineering Co**. [1990] 1 A.C. 546, and more recent cases such as **Kucukdeveci v Swedex GmbH** [2010] IRLR 346, and EBR **Attridge LLP v Coleman** [2010] ICR 242 (Underhill P), that the national courts must strive to do all they can to interpret domestic statutory provisions intended as anti-discrimination measures in a way compatible with applicable EU directive, would argue powerfully for an interpretation which provides a remedy for post-termination victimisation.

105. If, contrary to our primary view that the Act renders post-termination victimisation actionable, Mr. Dutton's arguments that "employer" means the same in Section 39 for both direct discrimination and victimisation, and must (on his approach to Section 108) mean "current employer" (since the fact that Section 108 is necessary to provide for relationships which are ended indicates that, without the Section, there would be no liability) had sufficient force to cast real doubt on the correct domestic interpretation of the statute, there would nonetheless be sufficient ambiguity about the proper meaning of the statute to require resort to the "**Marleasing**" approach. We could not conclude, as **Ghaidan v Godin-Mendoza** [2004] 2 AC 557 mentions, that to interpret the act as we do would be contrary to the grain of the legislation. The whole legislation is designed to prohibit discrimination in many contexts. It regards victimisation as reprehensible. The grain of the legislation is in favour of the approach we would support.

106. We therefore have the misfortune of disagreeing with the views expressed by the Tribunal in **Rowstock Ltd v Jessemey**. One of our Members (Mr Beynon) was a party to that decision. In the light of further submissions and consideration, he has recanted from the view expressed there: the argument as eventually developed before us differed from that put before the Appeal tribunal in **Jessemey.** However, we recognise that the point is one of difficulty. We should follow the decision in **Jessemey**, unless persuaded it was wrong. For the reasons we have given, we are so persuaded.

107. This does not dispose of the appeal. The Tribunal dismissed the victimisation claim not because post-termination victimisation was not actionable, but because on the facts it was not made out. Its reasoning is contained in paragraph 134, set out above.

108. Once, submitted Mr Robottom, it is accepted that the statute prohibits victimisation after the end of the employment relationship, in compliance with European obligations, focus can centre on the Tribunal's reasons here for rejecting the claim. The Tribunal seemed to look for a sole cause of the action taken against the claimant, which had to be that she had claimed in respect of discrimination, whereas case-law (see **Owen and Briggs v James** [1982] IRLR 502, at paragraphs 21-22) is to the effect that it suffices if that is of sufficient weight in what was done. Realistically all the claims here, discriminatory and otherwise, were bound together in one claim, and it would be artificial to think that when Mr Akwiwu said the words of which complaint was made to the Claimant's sister he had in mind all the claims that Ms Onu was making *except* for the discrimination claims. The absence of mention of discrimination during the 'phone call did not mean that the 'phone calls were not motivated by the fact there had been a

discrimination claim. At most, the absence of mention would be of evidential significance, and not a condition precedent to liability as the Tribunal appeared to have assumed.

109. Mr Dutton in response suggests the matter is one of fact, and there must be a sufficient causal connection between the threat and the protected act for the one to be in response to the other.

110. A claim for victimisation is actionable as if a statutory tort. Here, applying the definition in Section 27, the Claimant did a protected act (she brought a claim which included claims for race discrimination). The statutory question is whether the victimisation (here, uttering the threat) occurred because she had done so. A realistic approach must be taken to any situation in which it is said a protected act has occurred. In a conversation threatening retaliation if an action is not withdrawn there may be no reference to the subject matter of the claim – the nature of it must be known to the parties, for there would be no other purpose in seeking its withdrawal. If the claim includes reference to allegations under the **Equality Act** then we do not see it as a precondition for the threat to be actionable that in the course of making it the perpetrator should expressly refer to that fact. In context, here, Mr Akwiwu plainly knew of an action having been brought. Although it covered more than a breach of the **Equality Act**, it covered that too. The fact he did not single out the **Equality Act** aspect for specific mention when making a threat does not mean that his action was not taken, at least in part, in response to the bringing of proceedings under that Act. Unless the suggestion that there has been an allegation by reference the Act can be discounted as being of such trivial significance, on the particular facts, as in substance to have amounted to no claim at all, then any detriment suffered from an act in response to the bringing of the claim is to be attributed to the bringing of the protected act. The allegation would have caused or contributed to the act in response. If a Tribunal is subsequently

convinced that other matters, which were not protected acts, were largely responsible for the detriment, such that absent the protected act the detriment would in any event have been suffered, then no doubt that might be reflected in any award of compensation: but it cannot in our view exclude what has happened from the scope of the victimisation proceedings. In particular, this being an anti-discrimination statute, a purposive approach should be taken.

111. We have no hesitation in rejecting the reasoning in paragraph 134. The fact that the proceedings were not solely about race discrimination matters did not have the effect that to threaten retaliation for bringing the proceedings was not an act of victimisation.

Conclusions

112. We have therefore come to the following conclusions on the appeal:

i. The Tribunal was entitled to conclude that the "family worker" exemption did not apply; the Akwiwus' appeal on that ground is dismissed.

ii. The Tribunal erred in law in concluding there was direct discrimination on the ground of race or national origin.

iii. The consequence is that unless we are satisfied that the decision to which the Tribunal came was plainly and obviously right, the conclusion of the Tribunal that there was discrimination must fall. We are not so satisfied, since this was not a "criterion" case in which migrant worker status (even if we accepted that the label discriminates directly on the ground of national origin) was more than one of the important background circumstances to the mistreatment which occurred; the case is a "reasons for" case, and there is insufficient to shift the burden of proof. The judgment is reversed.

iv. There was no possibility of the PCP which was claimed giving rise to indirect discrimination;

v. The victimisation claim was wrongly dismissed. The fact that there was no express reference to the Race Relations of Equality Acts when uttering threats in respect of proceedings taken to claim for breaches of those Acts does not defeat such a claim. We reject the argument that the Equality Act makes no provision for a Tribunal to have jurisdiction to consider such a claim since the circumstances were said to arise entirely after the relationship had ended.

vi. Accordingly, we reverse the findings of discrimination, and hold that there was here actionable victimisation. The latter claim will proceed to a remedies hearing before the Tribunal.

vii. Save for (vi), we dismiss the appeal and cross-appeal.

Permission to Appeal

Since, as a result of our conclusions, there are now two cases at EA level which differ as to the proper construction of the Equality Act, we have no hesitation in granting permission to appeal so that a definitive answer may be given. Since we are granting permission on that basis, we shall also grant it so that our conclusions in respect of direct and indirect discrimination can be argued, too: the Employment Tribunals in the present case and that of **Taiwo** came to different legal conclusions on similar facts; we are told a number of other cases await the result of this appeal and that of **Taiwo,** and we consider the points are difficult ones which merit higher consideration.

We had hoped to hand down our decision in both this appeal and that of **Taiwo** on the same day. What delayed this judgment was further argument as to victimisation. Accordingly, we extended time for appealing in **Taiwo** until 21 days after this decision was handed down. The Claimant's solicitor in that appeal is the same as in this. We consider that an appeal court would benefit from seeing the two differing first instance decisions, and therefore grant permission to appeal to the Claimant in the **Taiwo** case, too: we recommend to the supervising Court of appeal judge that the appeals (if both are pursued) be listed to be heard together.