Appeal No. UKEAT/0254/12/KN
& UKEAT/0285/12/KN

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 27th November 2012
Judgment handed down on 5th March 2013

**Before**

**THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)**

**MR B BEYNON**

**MR P GAMMON MBE**

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MS F TAIWO — APPELLANT

1) MR J OLAIGBE
2) MS S OLAIGBE — RESPONDENTS

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JUDGMENT

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## APPEARANCES

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| For the Appellant | MR C MILSOM<br>(of Counsel)<br>Instructed by:<br>Anti-Trafficking and Labour Exploitation Unit<br>Islington Law Centre<br>232 Hornsey Rd<br>London<br>N7 7LL |
| For the Respondents | No appearance or representation by or on behalf of the Respondents |

**SUMMARY**

**RACE DISCRIMINATION**
**Direct**
**Indirect**

**PRACTICE AND PROCEDURE**

A Tribunal dismissed claims by a Nigerian it found to have been mistreated when she worked for the Respondents as a domestic worker (a migrant domestic worker visa having been obtained to permit her to do so) that her mistreatment constituted either direct or indirect discrimination. On appeal, her argument that she was mistreated because she was on a migrant worker visa, and that this was indissociably linked with her race or national origin so as to be direct discrimination, was rejected: the tribunal had found that she was mistreated not because of her race but because of her vulnerability. Although being a migrant worker was part of the background to that vulnerability, it was not itself a reason for the mistreatment. There was no other basis for the claim of direct discrimination. However, the tribunal had not approached indirect discrimination correctly, since it had not identified the PCP it thought may have been applied; and the conclusion (that there was no such discrimination) was not plainly and obviously right. The PCP contended for on appeal (the practice of mistreating those on a migrant domestic worker visa) was rejected, since it assumed that which it sought to prove, or showed no comparative disadvantage; and a PCP of employing those on a migrant domestic worker visa would not suffice either. Although the Appeal Tribunal was just persuaded that the group (those who worked under a domestic migrant worker visa) arguably contained disproportionately more of those who would be disadvantaged because of their vulnerability than would those who were not working on such a visa, this was no basis for remission in this case in which no tenable PCP had been proposed or argued below.

On a second appeal, the claimant challenged a decision by the Tribunal to refuse costs on the basis that the rule required her to have incurred costs personally, whereas they had been borne

by the Law Centre, funded in part by the Legal services Commission. It had relied on **Walsall Borough Council v Sidhu** [1980] ICR 519. **Held,** allowing the appeal, that the rule had changed and as a matter of construction permitted a claim for costs where they had been incurred by another on behalf of the party claiming costs.

*Note:*

An application for permission to appeal has been made, and will be considered once judgment has been handed down in **Akwiwu v Onu,** for which purpose time to appeal to the Court of Appeal (in the event the EAT decides not to grant permission itself) has been extended.

**THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)**

1. This appeal raises a challenge by the Claimant, who when a migrant domestic worker was exploited and treated appallingly by the Respondents, to a decision by the London South Employment Tribunal of 16th January 2012 that she was not thereby unlawfully discriminated against on the grounds of her nationality or national origin.

2. The same constitution of this Tribunal has, before giving judgment, heard argument in the appeal of **Akwiwu and Akwiwu v Ms Onu** against a decision of a Tribunal at Watford which held, in very similar circumstances, that there had been such discrimination. We shall give separate judgments in each. We had intended to hand them down 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, but will not now do so since a point has arisen in the **Onu** appeal upon which it is right to give the parties an opportunity to make further submissions. 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.

3. It is a matter of particular advantage for the panel that it remained in the same constitution throughout two separate hearings in the course of one week, since this lead appeal, which might set a precedent for other cases, would otherwise have been resolved having heard developed submissions in support of one point of view only: the Respondents said in prior correspondence that they would not appear but rely on written representations. In the event, even they have not been supplied. We are grateful to Mr Milsom, who has appeared for the Appellant, for the care he has taken to be faithful to his obligation to draw the attention of this Tribunal to matters of

law and authority which might be said to assist the Respondents' case; but we acknowledge the advantage of having heard submissions developed in support of the contrary viewpoint by a professional advocate in the **Onu** appeal. The solicitor for Onu is the same as for Taiwo, so has heard the argument in each case, such that we do not in justice need to take any further steps to alert Taiwo to any points telling against her arguments.

The Facts

4. The Claimant is Nigerian, a member of the Yoruba tribe. She is married, and has two children. Her family circumstances were very difficult. Her family were reliant on what money she earned. Mr Olaigbe is also Nigerian and Yoruba, but comes from an influential and moneyed background. His wife, the second Respondent, is a Ugandan raised in Sweden. They have two children.

5. With effect from 9th February 2010 the Claimant began work as a domestic worker for the Respondents. She left their employment in January 2011. The Tribunal, faced with diametrically opposed factual accounts from the respective parties, found that the Claimant's account of systematic and callous exploitation was to be accepted. There is no appeal against that finding.

6. Though it does not do full justice to the appalling nature of the way in which the Claimant was treated, the Tribunal set out at paragraph 26.6 its acceptance that the Claimant had been treated, as she had alleged, by: -

(i) the Respondents failing to pay a salary in line with the National Minimum Wage

(ii) onerous working hours

(iii) breach of the Working Time Regulations

(iv) the Respondents subjecting the Claimant to physical/verbal abuse

(v) the Respondents restricting access to food

(vi) her working and/or living conditions

(vii) the Respondents failure to provide a written contract of employment

(viii) Constructive Dismissal.

It accepted, therefore claims under the **National Minimum Wage Act 1999**; of unlawful deduction from wages; under the **Working Time Regulations 1998** in respect of a failure to provide weekly rest; and of a failure to provide her with written particulars of employment as provided by Section 1 of the **Employment Rights Act 1996**. No point arises in respect of those decisions. It also, however, rejected a claim of race discrimination. Both direct and indirect discrimination had been alleged, the latter as a fall-back position.

7. In a subsequent decision, reasons for which were promulgated on 23rd March 2012 the Tribunal refused a claim by the Claimant for costs. A separate appeal heard together with the substantive appeal has been brought in respect of that decision.

Discrimination

8. The Tribunal had been addressed by the Claimant upon the basis that she was Nigerian. Although that inevitably meant that she claimed that she did not belong to a racial group which was non-Nigerian, she did not put forward her case upon the basis that she was non-British. In her amended statement of claim she described herself as 'of Nigerian national origin': in closing submissions made by Mr Milsom on her behalf she was said to be a person of 'Nigerian ethnic/national origin' (paragraphs 64; 65; 66; 68). There was no actual comparator. The hypothetical comparator she proposed was 'a domestic worker of British national origin'.

9. Section 13 of the Equality 2010 provides under the heading 'direct discrimination' (so far as material): -

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

Thus the evidence has to show here that the Claimant was treated less favourably than an hypothetical comparator, and that this less favourable treatment was because of (i.e. caused by) her having a protected characteristic.

10. The Tribunal said at paragraph 26.7:

> **"(1) The Tribunal had some difficulty in accepting the comparator put forward by the Claimant as being inappropriate" [presumably, 'an appropriate'] "comparator in this case. A comparator must be someone who is in a similar situation to the Claimant but who does not share the relevant protected characteristic. The relevant protected characteristic is that the Claimant is Nigerian. Her circumstances were that she was a migrant worker subject to immigration control and from a poor background which made her vulnerable. A domestic worker of British national origin would not be subject to the same immigration controls and would not be under the control of his or her employer in terms of whether their visas are was(sic) renewed or not. Therefore the Tribunal finds that the appropriate comparator would be someone who was not Nigerian but was a migrant worker whose employment and residence in the United Kingdom was governed by immigration control and by the employment relationship itself.**
>
> **(2) There was no evidence and no inference can be made that the Respondents would have treated the Claimant differently had she not been Nigerian. Whilst Mr Olaigbe says that he particularly wanted someone from the Yoruba tribe for his children to maintain his cultural heritage, this does not in the Tribunal's view mean that the treatment of the Claimant was because she was Nigerian. It was possible that the Respondents could have decided to employ a Ugandan to preserve the cultural heritage of Mrs Olaigbe. There is no reason to think that a Ugandan would have been treated more favourably than the Claimant. The Tribunal's finding is that the Claimant was not treated in the way that she was because she was Nigerian, or that this had any particular bearing on her treatment. The Tribunal's finding is that the Claimant was treated in the way that she was because she was a vulnerable migrant worker who was reliant on the Respondents for her continued employment and residence in the United Kingdom.**
>
> **(3) Consequently the Tribunal's finding is that the Claimant's (sic) has not discharged stage one of the burden of proof pursuant of the case of Igen v Wong as she has not shown a prima facie case that her treatment was because**

> **because she was Nigerian. Therefore her claim of direct race discrimination must fail.**
>
> **(4) If the Tribunal is wrong on this, the Tribunal considered what the reason was for the treatment of the Claimant in accordance with Shamoon" [Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11]. "The Tribunal's (sic) is that the reason for her treatment was that she was a vulnerable migrant worker who the Respondents were able to control. The Tribunal finds that the Respondents treatment of the Claimant was not necessarily because she was Nigerian but because she was a vulnerable migrant worker with limited resources open to her."**

Having rejected the claim for direct discrimination, the Tribunal turned to consider indirect discrimination.

11. 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."**

12. The Tribunal asked (at paragraph 26.10) "did the Respondents' treatment of the Claimant amount to a provision, criterion or practice?" It did not answer that question. Instead, it moved to the next question, posed by 26.11 as follows:

> ***"Did any such provision criterion or practice put persons of the Claimant's race ethnic or national origins (being Nigerian national origin) at a particular disadvantage when compared with other persons; that is, are persons of Nigerian origins in the UK workforce more likely to be employed on a migrant domestic worker visa, compared with persons of non-Nigerian origin in the UK workforce?***
> **i. Neither party gave any evidence as to whether persons of Nigerian origin in the UK workforce were more likely to be employed in a migrant domestic**

> **worker visa..” [presumably ‘on’ or ‘under’ were intended rather than ‘in’] “..compared with persons of non-Nigerian origin in the UK workforce. Consequently, the Tribunal was unable to consider this issue and the Claimant’s claim of indirect discrimination must fail. As a consequence the following three issues were not considered by the Tribunal…”**

The Tribunal then set out three issues the first two of which are material – did the PCP put the Claimant at a particular disadvantage when compared with persons of a non-Nigerian national origin and if so could the Respondent show that this PCP was a proportionate means of achieving a legitimate aim?

13. It is important for what follows to identify clearly what the Tribunal found in these passages was the reason for the disgraceful exploitation of the Claimant. This is clearest in 26.7 (2) and (4). In (2) it was because “…she was a vulnerable migrant worker” adding “who was reliant on the Respondents for her continued employment and residence in the United Kingdom.” In (4) it was that she was “a vulnerable migrant worker who the Respondents were able to control.” The last sentence of (4) again emphasises that the reason for the treatment was that the Claimant was vulnerable adding, this time, that she had “limited resources open to her.” This is presumably a reference to evidence which the Tribunal had earlier accepted that the Claimant spoke very limited, if any, English, and had no friends or contacts in the United Kingdom. It is linked to the finding in (1) that she was from a poor background and it was this in part which made her vulnerable.

14. The Tribunal specifically excluded the treatment as having been because she was Nigerian (sub-paragraphs (2) and (4)).

15. Those findings of fact have not been subject to any direct challenge before us save that Mr Milsom asserts that migrant worker immigration status was indissociably linked with the fact

that the Claimant was Nigerian. Thus his essential argument was that it was because the Claimant was a migrant domestic worker, and thereby subject to immigration control, that had the consequence that she was exploited. Since being subject to immigration control was indissociably linked with being non-British, and non-British inevitable if she was Nigerian, the finding that she was treated as she was because she was a vulnerable migrant worker necessarily meant that her claim should have succeeded as demonstrating, contrary to the Tribunal's conclusion, that she had indeed been directly discriminated against because she was Nigerian.

16. That synopsis of his argument does not do justice to the way in which Mr Milsom's diligent submissions expanded upon the grounds of appeal in respect of direct discrimination, to which we now turn.

The Grounds of Appeal

17. They were these:

(i) the Tribunal departed from the authority of **Mehmet v Aduma** (a decision of the Appeal Tribunal presided over by HHJ Reid QC, of 30th May 2007) without any reasoned basis for doing so;

(ii) that the possibility of similar treatment for a Ugandan migrant worker rendered the discrimination claim unsuccessful but was irrelevant;

(iii) that the Tribunal erred in determining that immigration status was dissociable from nationality/national origin;

(iv) that its interpretation of the law derogated from that demanded by international law by reference to the European Convention, the EU Charter on fundamental rights, the Council of Europe Convention on trafficking, the UN Declaration on Human Rights, and/or the UN Convention on the Elimination of Race Discrimination.

18. As to (i): 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.

19. The Appeal Tribunal's conclusion was 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.

20. 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.

21. 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.

22. In short **Mehmet v Aduma** stood for no principle which the Tribunal whose decision is appealed to us was relevantly bound to follow.

23. As to the second ground, it is a mis-reading of the Tribunal's decision to think that the conclusion it reached was because a Ugandan would not have been treated more favourably than was the Claimant. This is to take two sentences in isolation from their context, which was simply to emphasise that the specific national origin of the Claimant was not the reason for the mistreatment of her. The Tribunal cannot be blamed for focussing upon the protected characteristic as being Nigerian: that was what was submitted to it by the Claimant, even if the question posed at the start of paragraph 26.7 asks if the reason why she was treated less favourably was that she was of non-British national origin.

24. The third and fourth grounds deserve fuller consideration. Mr Milsom pointed to article 15 of the Charter of Fundamental Rights of the European Union, paragraph 3 of which provides that nationals of third countries who are authorised to work in the territories of Member States are entitled to working conditions equivalent to those of citizens of the Union. The UK Border Agency Code of Practice made under section 19 of the **Immigration Asylum and Nationality Act 2006** gives guidance to employers on how checks on prospective employees' rights to work can be carried out. It has been approved by the Secretary of State and laid before Parliament, but does not impose any legal obligations on employers. Although the code says (paragraph 2.2) that an Employment Tribunal must take account of any part of the code which might be relevant

on matters of racial discrimination in employment practices, Section 23 (4) of the 2006 Act provides only that:

> **"A breach of the code – (a) will not make a person liable to civil or criminal proceedings but (b) *may* be taken into account by a court or tribunal." (emphasis added)**

At paragraph 3.2 it gives an example of direct discrimination:

> **"where an employee with limited leave to remain in the UK is given a more degrading form of work to do in comparison with workers with unlimited leave."**

Paragraph 7.6 re-emphasises that a person who has limited leave to remain in the UK should not be treated less favourably during employment (presumably than others who do not have that characteristic).

25. Though helpful guidance, this was too general to be of assistance in the present case. The central answers required by the statute are given by identifying less favourable treatment not in general but in respect of a particular comparator (actual or hypothetical) who does not share the protected characteristic; and by answering the statutory question of causation.

26. The causation question was, in Mr Milsom's submissions answered by the self-evident nature of the link between immigration status and the Claimant's nationality or national origin. The two ran together. He relied upon **R v Governing Body of JFS and Another** ('JFS') [2010] 2 AC 728. What was in issue there was whether an oversubscribed school which gave priority to children who are recognised as Jewish according to the office of Chief Rabbi, such recognition being based on matrilineal descent or conversion in accordance with Orthodox Judaism, was thereby directly racially discriminating against an applicant whose mother had been converted according to non-orthodox Judaism. The Supreme Court by a majority held that application of

the criteria directly discriminated against the Claimant.

27. Lord Philips applied the law which had been recognised by the House of Lords in **R v Birmingham City Council ex party Equal Opportunities Commission** [1989] AC 1155 and **James v Eastleigh Borough Council** [1990] 2AC 751, to the effect that the words "on racial grounds" in the **Race Relations Act 1976**, (section 1 of which proscribed one person treating another less favourably than he treated or would treat other persons where this was 'on racial grounds') did not in this context mean the motive for the act, but rather the factual criteria applied by the discriminator in reaching his decision (see paragraph 13; and the example given by him at paragraph 21).

28. Baroness Hale said at paragraph 56:

> **"The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on ground of colour, race, nationality or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionally adverse impact upon people of a particular colour, race, or ethnic or national origins.**
>
> **57. Direct or indirect discrimination are mutually exclusive. You cannot have both at once… one can act in a discriminatory manner without meaning to do so or realising that one is. Longstanding authority at the highest level confirms this important principle."**

29. Lord Mance observed (paragraph 78) that the question why the child was refused a place at the school (an enquiry into which involved what might be described as a subjective element –'a question of fact' in Lord Nicholls' words in **Chief Constable of West Yorkshire Police v Khan** [2001] 1WLR 1947, paragraph 29) - left no room for doubt about the answer: the refusal of a place was by reason of the application of the admissions policy. The question was whether that

policy involved grounds for refusal of admission which were in their nature inherently ethnic. They were.

30. Lord Kerr likewise distinguished between the grounds for a decision (what was the basis on which it was taken) on the one hand and, on the other what motivated the decision maker to make that decision (paragraph 116).

31. Lord Clarke likewise (paragraph 141) noted that 'if, viewed objectively, the discriminator had discriminated against the Claimant on racial grounds the reason why he did so is irrelevant.' At paragraph 144 he noted that when Lord Nicholls had said in **Chief Constable of West Yorkshire Police v Khan** at paragraph 29 that the question was "why the discriminator acted as he did or, put another way, what consciously or unconsciously was his reason" he was not considering the kind of case before the Supreme Court in **JFS.** A discriminator's motivation or subjective reasoning is not relevant where the criteria adopted, or the formula used, are or is inherently discriminatory on ethnic grounds (paragraph 145).

32. The concentration on the factual basis for a decision, as opposed to the motivation for it, was apparent also in the case of **Amnesty International v Ahmed** [2009] ICR 1450. Amnesty International refused an employee promotion to the post of researcher for Sudan on the grounds that because she was from the north of the country, and had an Arab appearance, she could, due to political and ethnic tensions, be perceived to present a conflict of interests such that if she visited the region she would be exposed to an increased risk to her safety. The motive therefore, was entirely benign: protecting her. But the decision was nonetheless based squarely on her ethnicity.

33. We were told by Mr Milsom that after the oral hearing the Tribunal whose decision is appealed to us invited written submissions as to the significance of **JFS** and **Ahmed**. They were supplied. No reference was made by the Tribunal to these in its reasons. Mr Milsom relied on this in support of his suggestion that the Tribunal had ignored case law which bound it.

34. In our view, it was unnecessary for the Tribunal to make any such reference. Its decision did not rest upon the distinction between a motive and a factual basis. If – as Mr. Milsom contended – immigration status and the consequent requirement to have a visa to work as a migrant domestic worker in the UK were indissociably linked with the national origin of the Claimant, then insofar as the Claimant was treated less favourably because of her immigration status, she was less favourably treated because she was of her national origin, and direct discrimination would be shown. If, however, there was no indissociable link then the opposite would follow (Mr Milsom conceded). In either case motive would be irrelevant. We do not see **JFS** or **Ahmed** as requiring an answer one way or the other to the factual question at the centre of this case – whether there was such an indissociable link such that the Tribunal's finding of fact as to the basis of the treatment amounted inescapably to the finding that the Claimant was treated less favourably because she was of Nigerian origin (or, put conversely, because others, better treated, were not). In the latter case the legal answer to the question of liability would, of course, still depend on what precisely the Tribunal did find as to the reason for mistreatment, a matter we have dealt with above: this latter argument only therefore succeeds if we are wrong in our view of the findings of fact.

35. In support of his argument, Mr Milsom relied on **R (Morris) v Westminster City Council** [2005] 1WLR 865. A Claimant who was a British citizen but had a daughter who was a citizen of Mauritius was refused accommodation under Part VII of the Housing Act 1996 on the basis

that she was not in priority need since she could not rely on the need to accommodate her daughter as giving her a priority need for accommodation because of her daughter's immigration status. The Secretary of State and the defendant Council argued that the critical dividing line was not nationality but long-term residence in the British Isles as qualifying an applicant for housing assistance. Keith J rejected that argument:

> **"Concentrating on the first of the two categories of persons who are to be treated as ineligible for housing assistance… the fact is that that category of person encompasses exclusively persons who are subject to immigration control. It therefore applies only to those persons who are in effect not British citizens… the dividing line… is nationality, because non-British citizens are ineligible for such assistance unless they come within any of the exceptions. Very few of them will…"**

As he put it at paragraph 19 "a person who is subject to immigration control… can be equated with someone who is not a British citizen."

36. In **Patmalniece v Secretary of State for Work and Pensions** [2011] UKSC 11, the Supreme Court considered a case which arose out of the refusal of a claim made by a Latvian citizen that she should be paid state pension credit. The legislation required a Claimant to be in Great Britain: a person would not be if not habitually resident in the UK, Channel Islands, Isle of Man or Republic of Ireland, and was not to be treated as habitually resident unless she had the right to reside there. Because the Claimant lacked a right of residence the Secretary of State refused her claim. An Appeal Tribunal upheld an appeal on the grounds of nationality by regard to the requirement to have a right of residence. However, the Social Security Commissioner, whose decision was upheld by both the Court of Appeal and Supreme Court, allowed an appeal against that finding holding that the right to reside test constituted not direct but indirect discrimination. It did so upon the basis that the test looked to *actual* residence: the "*right* to reside" condition was not a sufficient condition for entitlement on its own even if it was a

necessary condition.

37. It relied upon **Bressol v Gouvernement de la Communautée française** (case C-73/08) [2010] 3 CMLR 559 in which the Grand Chamber concluded that the test of residence used to distinguish those students who might be offered places in institutions of higher education from those who might not was not directly discriminatory. In so holding, the Grand Chamber departed from the reasoning of Advocate General Sharpston to the effect that there was direct discrimination:

> **"…when the category of those receiving a certain advantage and the category of those suffering a co-relative disadvantage coincide exactly with the respective categories of person distinguished only by applying a prohibited classification"**

The Belgian Government attempted to restrict the costs incurred consequent upon increasing numbers of students enrolling for higher education programmes by defining a resident student as a person who proved that he had his principal residence in Belgium and fulfilled one of a number of conditions, the first of which was that he had the right to remain permanently in Belgium. Since all Belgian nationals automatically enjoyed the right to remain permanently in Belgium, they automatically qualified for higher education: no non-Belgians automatically had such a right, and had therefore to meet additional conditions, which they might not meet. Accordingly, Advocate-General Sharpston would have concluded that the criterion applied was directly discriminatory as automatically favouring a class defined by exclusive nationality (Belgian). The court did not advert to this reasoning. It held the discrimination to be indirect, and hence considered whether it could be justified. The legislation, it was true, created a difference in treatment between resident and non-resident students, but (paragraph 45, judgment) a condition of residence such as that required by the legislation was more easily satisfied by Belgian nationals than by nationals of other member states, thereby placing them at disadvantage.

38. Adopting the **Bressol** approach in **Patmalneice,** to what he described as a 'composite test', Lord Hope noted that the basis of entitlement to state pension credit was whether the claimant was 'in Great Britain', a test of habitual residence. The rules included a right to reside requirement – a test which no United Kingdom national could fail to meet but which, as in **Bressol**, put nationals of other member states at a disadvantage. He summed up the position (paragraph 26) in these words:

> **"Had a right to reside in the United Kingdom or elsewhere in the common travel area been the sole condition of entitlement to State Pension Credit, it would without doubt have been directly discriminatory on grounds of nationality.**
>
> **27. The effect of (the regulation as to right to reside)… must, however, be looked at in the context of section 1 (2) A of 2002 Act and Regulation 2 as a whole… while all United Kingdom nationals have a right to reside in the United Kingdom, not all of them will be able to meet the test of habitual residence… nationality alone does not enable them to meet the requirement…"**

As to **Bressol**, Lord Hope observed (paragraph 33) that the contrast between the Advocate General's reasoned approach and that of the court was so profound that her argument could not have been overlooked:

> **"One must assume that her approach which was to find that the measures were precluded because the second condition was directly discriminatory was rejected by the court as too analytical. The court looked at the conditions as a whole…:**

39. Lord Walker, upon whose judgment Mr Milsom placed particular emphasis (though it was dissenting in the result) agreed that the court must have taken that approach to the Advocate General's opinion. He observed (paragraph 69)

> **"I would like to be able to agree that her approach accords well with our domestic law, but I must say that it seems to me hard to reconcile with the**

> **approach of the Court of Appeal in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, the case of Mrs Elias who was "British enough to be interned" (in Hong Kong between 1941 and 1945) but not "British enough to be compensated" (under an official scheme introduced in 2000). In that case Mummery LJ, who gave the leading judgment, acknowledged (paras 104 -113) the strength of the submissions made on behalf of Mrs Elias by Mr Rabinder Singh QC. But he felt bound to reject them, at paras 113 and 114…"**

He concluded that the Supreme Court had to follow the judgment of the Court of Justice in **Bressol**, even if some of the members of the court did not fully understand its reasoning.

40. The case of **R (Elias) v Secretary of State for Defence** [2006] IRLR 934 to which Lord Walker made reference was one in which the Court of Appeal recognised that direct discrimination under section 1 of the **Race Relations Act 1976** as amended and recognised further in Council Directive 2000/43/EC sought to achieve formal equality of treatment between one person and another, whereas indirect discrimination, focussing on the application of apparently racially neutral criteria producing a disproportionate adverse racial impact, sought substantive equality of results. Though in that case the criteria by which eligibility for payment in respect of internment was not directly discriminatory, it excluded a greater proportion of those with non-UK national origins than those who were born in the UK and had UK national origins, and was thus indirectly so, such that an objective justification of the criteria would be required if the application of those criteria was to be justified as a matter of law.

41. Mr Milsom maintained that the immigration status to which the Tribunal referred in the course of its discussion about the reason why the Claimant had been exploited was not a composite criterion, as in **Patmalniece** and **Bressol**, requiring a rejection of the direct discrimination claim. Rather, the Claimant was in a position as if a criterion had been applied which had the clear result (as in **James v Eastleigh** and **JFS**) that the reason why she was

exploited was that she was not British.

Discussion

42. Where a Tribunal has identified a reason for treatment causing particular disadvantage, the focus of legal analysis must be on that reason. Here the Tribunal specifically found as a fact that which was *not* the reason: that the Claimant was Nigerian. The Claimant would thus have to satisfy us that this finding was plainly and obviously wrong if her appeal on this ground was to succeed.

43. The Tribunal rejected the contention that the proper comparison was with someone of British national origin, so that it is not a simple answer to this case to say that, in reality, the Tribunal should have treated her case not in the way that it was advanced (she was Nigerian) but in a way in which it might have been advanced (she was non-British).[1]

44. Mr Milsom's essential point was to the effect that in paragraph 26.7(1) the Tribunal had effectively excluded the characteristic upon which he relied for his argument (being subject to immigration control) as something which defined the Claimant. In one sense, he is correct to do so: the point can be made obvious if, for the words 'subject to immigration control' were substituted the words 'non-British'. Then it would not be sensible to say that in order for a domestic worker of British national origin to be in the similar circumstances as someone of non-

[1] The assertion that someone is of a particular national origin excludes that person being of another national origin. If those not of her group are treated advantageously by comparison with those who are of her group then there is a difference of treatment, and a difference of national origin: a point made clear in **Thompson v Bermuda Dental Board (Human Rights Commissioners intervening)** [2008] UK PC33 per Lord Neuberger MR, at paragraph 26:

> "…discriminating against someone because he or she is not Bermudian, or indeed on grounds of nationality or citizenship, is discrimination on the grounds of 'race, place of origin, colour or ethnic or national origins'",

British national origin she must be placed in the circumstance of not being of British national origin, which is how the revised paragraph 26.7 (1) would then read.

45. In order to determine whether in the light of these points, the Tribunal was in error, or whether it was attempting, if not entirely elegantly, to convey permissible reasoning, we have stood back from a detailed linguistic analysis of the words used in order to consider the overall picture painted in its judgment.

46. The exploitation consisted of treatment falling far 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 her vulnerability. Thus we can understand why the Tribunal concluded that the race of the Claimant had nothing directly to do with the treatment, and why it laid the stress upon her vulnerability. Of its nature, vulnerability is not an attribute (if it can be called that) which is particular to any racial group. It depends upon a concatenation of circumstances. In different cases, different factors may contribute to it. Here, it was the poor socio-economic background of the Claimant; her lack of English, which meant that she was effectively tied to those such as the Respondents; her absence of a support network; and also her employer having control over whether she should continue to stay in the UK (where to remain might be socio-economically advantageous if the alternative were returning to Nigeria) because they were able to control whether another visa was granted to permit her to remain in the UK; for a combination of educational and financial reasons, and because of the imbalance of power in the relationship between the Respondents and the Claimant. If therefore, she was treated as she was because of her vulnerability, 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

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and in **Orphanos v Queen Mary College** [1985] 1AC761 where it was unequivocally accepted by the House of Lords that "non-British" and "non-EEC" were racial groups. See also **R v Rogers** [2007] 2 AC 62, in which

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 person's suffering an accident in London is that they bought a train ticket for a service by which they which arrived there shortly prior to the accident. No court would conclude either that buying the ticket or being present in London was a cause of the accident in any sense relevant to any legal liability for it; no court could properly conclude that having a visa, or being present in the UK (as a result of a visa or otherwise) was a cause of the ill-treatment which occurred.

47. Vulnerability itself is not indissociably linked with migrant status. The fact that migrant status was undoubtedly one of the matters which contributed to the Claimant's vulnerability since it gave the employers another advantage over her which they could exploit, but that were other factors too, to which the tribunal drew attention, means that vulnerability represents what 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.

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"foreigners" and "non-British" were held properly to be regarded as racial groups.

48. We conclude that the factual cause of the unfavourable treatment of the claimant was not indissociably linked to immigration status (nor would it even on the test propounded by A-G Sharpston as set out at paragraph 35 above amount to direct discrimination). Mr. Milsom himself accepts that if that is our conclusion, the appeal under this head must fail. It does.

Indirect Discrimination

49. The Tribunal did not identify a "provision criterion or practice". We do not understand how, without first clearly identifying at least the PCP contended for, it could hope to be able to answer whether *that PCP* had put persons with whom the Claimant shared her national origin at a particular disadvantage when compared with persons with whom she did not share it.

50. At paragraph 26.11, the Tribunal jumped straight to the question whether there was any sufficient evidence to show relative disadvantage. In our view, this was an error of approach: relative disadvantage is not a question to be addressed at large. Who is disadvantaged, to what extent, by comparison with whom, and by what all must be answered, but by adopting a structured approach. First, the relevant PCP must be identified. It must be shown on balance to have been applied in the claimant's case. If it necessarily disadvantaged the Claimant because of (in this case) her race, it would amount to the application of a criterion such as that considered in **JFS** or **James v Eastleigh,** and no question of indirect discrimination would arise: it is where, as here, the criterion, provision or practice does not automatically do so that, secondly, it is necessary to consider the effect on the claimant as one member of a group. That group must, as such, be shown to suffer a disadvantage by comparison with another group of (in this case) those of different race or national origins. Thirdly, the disadvantage must be shown to be real (where groups are small, disadvantage may appear as a statistical artefact, and Tribunals must be wary of this). This will usually require sufficient evidence. The evidence must relate to the effect of

the specific PCP, for it is that which is being considered. Evidence that the claimant's group was disadvantaged, or for that matter advantaged, in some other way is normally irrelevant to the inquiry (though at least in cases of sex discrimination, it is recognised that where there is an inequality of treatment as between the genders, apparent to a significant degree upon a sufficient (usually statistical) inquiry, the court should not be restricted artificially by having to find a PCP, but may conclude that unless the disparity has a non-discriminatory reason there has been indirect discrimination: see **Enderby v Frenchay Health Authority** [1994] ICR 112.) Fourthly, the claimant must show that she suffered the particular disadvantage which affected the group in general: it cannot merely be assumed that what applies to the group in general applies to the claimant in particular. If those matters are established then, fifthly, it will be for the employer to show that the PCP was objectively justified,

51. It was recorded (in paragraphs 2.13 and 26.10) that one of the agreed issues in the case was whether "the Respondents' treatment of the Claimant amounts to a provision criterion or practice". No answer was given to this question in terms by the Tribunal, though it found that the treatment was as the Claimant had alleged (see paragraphs 26.6 and 26.9). It might be argued that in its paragraph 26.11 the Tribunal was considering a PCP, being the practice of employing someone who was "on a migrant domestic worker visa". If this is the PCP it considered, it would have had no basis for concluding that there was indirect discrimination, for the need for the claimant to have a migrant domestic worker visa was not linked causatively to any mistreatment of her. The possession of such a visa was so linked, on the findings of the Tribunal: but not the need to possess one. To require a person of non-UK origin to possess such a visa before working in a domestic capacity may adversely affect those who cannot obtain one, but cannot logically be said, of itself, to give rise to a greater incidence of mistreatment.

52. However, this was not the PCP for which Mr. Milsom contended on appeal[2] – that was, rather, "the mistreatment of migrant workers", which succinctly puts the issue as set out at 26.10. There were echoes of this in the **Onu** appeal, where the Claimant's case as advanced to the Tribunal was that the "treatment of the Claimant as a migrant worker" was the provision, criterion or practice which disproportionately affected her as such a migrant.

53. We cannot accept such a PCP as he 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 applies. This cannot be a proper PCP in the circumstances. 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.

54. 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. That has to be a matter for other cases before other Tribunals, rather than one for this case here or below.

[2] This is not to say it was raised for the first time on appeal: in his closing written submissions to the Tribunal Mr.Milsom argued for a PCP of "mistreating workers requiring a domestic worker visa". This formulation was not however identifiable in the reasoning of the Tribunal.

55. The reason the Tribunal actually gave for rejecting the complaint of indirect discrimination was that it did not have evidence to show that the group to which the claimant belonged was disproportionately adversely affected by the PCP which it had it in mind (though, as we have noted, did not clearly identify). Mr. Milsom contended this was an error: specific evidence was not needed to conclude that the proportion of those of Nigerian national origin employed on a migrant domestic worker visa was bound to be higher than the proportion of those of Nigerian national origin in the employed workforce as a whole, whether the pool for comparison was thought to be the workforce as a whole or just those engaged in domestic service. We accept Mr. Milsom's argument that some comparisons are so clear that they do not need evidence to establish at least a prima facie case of disparity, and this we are inclined to hold to be one of them.

56. However, for the reasons given above neither the PCP, which Mr. Milsom advanced, nor that which the Tribunal arguably may have considered (see paragraph 51 above), will logically suffice. Although we consider that the Tribunal erred in its approach, both in its failure to adopt the approach we summarise at paragraph 50 above and in rejecting the one matter it founded on (in holding there was no sufficient evidence of disproportionate disadvantage) the appeal against its finding must be rejected, for on the bases argued before it the Tribunal could not have found in favour of the claimant.

Conclusions

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

i. The Tribunal did not err in law in concluding there was no direct discrimination on the ground of race or national origin.

ii. The Tribunal did not properly approach the issue of indirect discrimination.

iii. However, neither the PCP by which the Tribunal might perhaps have been directing itself (see paragraph 51 above), nor that argued by the Claimant before us could hope to succeed for the reasons we have given. The decision was plainly and obviously right if the PCP the Tribunal was considering was the provision or criterion (or possibly practice) of employing a person with a migrant domestic worker visa; just as it was if the claimant had been advancing the PCP for which Mr. Milsom contended in his written closing submissions to the Tribunal and on this appeal.

iv. We do not rule out the possibility that in circumstances in which migrant labour is employed, where it is proved (by evidence or judicial acceptance) that such labour is disproportionately subject to non-observance of minimum standards of terms and conditions, and that the claimant who is a migrant worker is herself exploited, the employer may have applied a PCP which has had that effect upon the group as a whole and her in particular. The PCP would have to be identified with care, and evidence considered. That is not this case: the Tribunal has to deal with the arguments before it, made by a Claimant who was legally represented, and those arguments could not have succeeded. It would not be right for us to remit the case to the Tribunal with an invitation to it to hear argument about a PCP which has never before now been part of the Claimant's case.

v. Accordingly, we dismiss the appeal against the finding of indirect discrimination too.

Costs

58. Rule 38 of the Employment Tribunal Rules provides a general power to make costs orders. Rule 38 (3) provides:

> **" 'Costs' shall mean fees, charges, disbursements or expenses incurred by or on behalf of a party in relation to the proceedings."**

59. An application was made at the conclusion of the proceedings by Counsel on behalf of the Claimant for her costs under this rule.

60. Rule 40 provides when such an order may be made: "when the paying party has in bringing the proceedings, or he or his representative have in conducting them acted vexatiously, abusively or otherwise unreasonably or … the conducting of the proceedings by the paying party has been misconceived." The application of this rule was never considered, since the Tribunal took the view that a costs order could not be made in the Claimant's favour in the particular circumstances of the case. That was because the Claimant herself had not personally incurred costs. The Tribunal accepted the submission that the costs had been incurred instead by the Legal Services Commission. The LSC partly funded the North Kensington Law Centre which represented the Claimant without charge to her. As the Tribunal said at paragraph 7 of its costs judgment:

> **"The Claimant herself did not incur any costs in bringing this case, as the North Kensington Law Centre provides a free service with no charge being made to the Claimant. The North Kensington law Centre recoups some of running costs from the Legal Services Commission (sic)"**

61. The Tribunal did so because it regarded itself as bound by the case of **Walsall Borough Council v Sidhu** [1980] ICR 519. In that case, the Commission for Racial Equality had given assistance to the Claimant on terms that she would not herself incur any expense. The Respondent local authority was found to have discriminated against the Claimant. They appealed to the Appeal Tribunal, but abandoned the appeal at the 11th hour. The Claimant

applied for an order that the local authority pay her costs. The rule which applied (then Rule 21 (1) of the Employment Appeal Tribunal Rules 1976) provided:

> **"where it appears to the appeal tribunal that any proceedings were unnecessary, improper or vexatious, or that there has been unreasonable delay or other unreasonable conduct in bringing or conducting the proceedings, the tribunal may order the party at fault to pay to any other party the whole or such part as it thinks fit of the costs or expenses incurred by that other party in connection with the proceedings."**

62. The Appeal Tribunal, presided over by Slynn J, set out the wording of part of the rule and observed (at 522B-C):-

> **"As a matter of construction, the power to order costs or expenses to be paid to 'any other party' must be a party to the proceedings. That seems to us clear as a matter of construction of the rule; but in any event is put beyond doubt if one turns to paragraph 19 of Schedule 11 to the Employment Protection (Consolidation) Act 1978 which is repeating earlier legislation and which refers to the power of this Tribunal to order that costs may be paid to any other 'party to the proceedings'.**
>
> **It seems to us here that before we can make an order the local authority shall pay any monies to the Applicant we must be satisfied that she has incurred costs or expenses. The important word is "incurred". Apparently, the position in this particular case is that the Applicant has not incurred any costs or expenses."**

63. Accordingly, the Appeal Tribunal held that since the costs had been incurred by the Commission, which was not a party to the appeal, and the Claimant herself had incurred none personally, it could not award her costs under the Rule. Before parting from the issue, the Appeal Tribunal observed that those responsible for the making of the appropriate rules for the Appeal Tribunal might wish to consider changing the Rule to permit such a payment to be made.

64. Despite that plea, made in February 1980, when the Employment Appeal Tribunal Rules were re-cast in 1980 with effect from 18th December that year, the costs or expenses rule, now rule 27, contained no definition of "costs" such as that now contained in Rule 38 (3) of the

Tribunal Rules. Nor did the Industrial Tribunal Rules current in 1980. However, it appears that in 2004 the rule for the Employment (formerly "Industrial") Tribunals was altered such that Rule 38(3) accorded with Rule 34(2) of the Employment Appeal Tribunal Rules 1993, to the effect that 'costs' is not limited to fees charges, disbursements and expenses incurred *by a party*, but is enlarged to be fees etc., incurred by "*or on behalf of*" a party.

65. Mr Milsom argues that the reliance upon **Walsall v Sidhu** was misplaced, given the change in the statutory wording. He argued, more broadly, that the international obligations into which the UK had entered in respect of the Convention against Trafficking, and under Article 47 of the EU Charter of Fundamental Rights had to be considered: the latter required that everyone should have the possibility of being advised, defended and represented, and that legal aid should be made available to those who lacked sufficient resources insofar as such aid would be necessary to ensure effective access to Justice.

66. In submission to the Tribunal, he had referred also to Article 15 of the Council of Europe Convention of 2005 "Action Against Trafficking in Human Beings", highlighting the requirement that each party to the Convention was obliged to provide in its internal law the right to legal assistance and free legal aid for victims (of trafficking).

67. We do not accept that either the Convention against Trafficking or Article 47 of the Charter has anything to say to help us to resolve this appeal. The issue is not the availability of support for Ms Taiwo to bring her case. It is whether she is entitled to be recompensed for expenses incurred by others in doing so.

68. What is relevant is the wording of the Costs Rule. This is a matter of construction of the Rule. The situation where a party to litigation before the Employment Tribunal is supported by a person who incurs a fee, a charge, makes a disbursement or incurs expense on that party's behalf, in relation to the proceedings, falls squarely within the apparent meaning of the definition in Rule 38(3). Thus the fact that the North Kensington Law Centre had agreed that the Claimant would herself incur no expense, on the footing that the North Kensington Law Centre would do so on her behalf (itself gaining recourse to public funds to do so), would not upon a first blush interpretation of the Rules place an application for costs by the Claimant outside the Rule. Indeed, the Employment Appeal Tribunal Rules were changed in 1993 with the effect of accommodating the plea for change which the Tribunal presided over by Mr Justice Slynn had made in 1980 in **Sidhu**; and it appears that the Employment Tribunal Rules followed suit in 2004. This appears to be a deliberate introduction by the legislature, which could have no other effect than to enable a Claimant (or Respondent) to make a claim for costs in respect of expenses which had been incurred otherwise than by themselves personally, but in support of their claim or response. If the Rule did not provide for this, then the "indemnity" principle would apply: that a party could only be re-paid costs if that party had actually incurred them personally.

69. There is every good reason of policy why Parliament might provide in a Tribunal such as the Employment Tribunal for costs incurred by another to be recovered if the occasion were appropriate – for such Tribunals frequently hear claims brought by those who have lost their employment and are likely to be without income, who may well be in difficult social and financial circumstances as a consequence. They may need financial help if they are to access justice. It is not at all surprising that the legislature should recognise that, and make provision for reimbursement if the conduct of the other party sufficiently merits it. Similarly, where Respondents are named as employees of an institutional Respondent against whom a claim is

also brought (as, for instance, where claims of discrimination are brought against a corporation, and those of its employees whom it is said committed acts of discrimination against a Claimant) it is not uncommon for the employer to pay the costs of all in defending the claim.

There is thus no reason of policy for supposing that the Rule includes the words "on behalf of a party" as mere surplusage, and not by deliberate legislative choice. There is good reason to the contrary.

70. At paragraph 12 of its judgment the Tribunal said this:

> **"In looking at the construction of Rule 38 the Tribunal has not only looked at the words "on behalf of" but also at the context of the section as a whole. Rule 38 (3) provides that "costs" shall mean fees, charges, disbursements or expenses". The Claimant has incurred none of these. The words "on behalf of" are not sufficiently wide to cover expenses not charged to a party of the proceedings."**

71. This is not an easy paragraph to understand. Probably what the Tribunal was saying was that no expenses were "charged" to the Claimant, for those funding her claim to incur. Otherwise, the fact that the Claimant had personally incurred none of the four matters would be irrelevant in considering whether fees etc. had been incurred on her behalf.

72. If the Tribunal thought that expenses had to be "charged" specifically in respect of the proceedings, it was in error. The question is whether expenses were incurred (that is the statutory word). "Incurred" looks to effect: "charged" looks to the actions of another party and conceptually involves a process (however informal) of invoicing a payee for sums due to the payor. Expenses incurred in the course of proceedings are far more general – it is unrealistic to regard, for instance, a photocopying expense as being billed to the paying party when the

photocopier is an office machine operated by the payee; and the time taken by a lawyer at the law centre would not be an expense "charged" to the Claimant by anyone, though undoubtedly incurred on her behalf.

73. We reject the reasoning in paragraph 12 of the Tribunal decision (whatever it may mean) as any proper basis for holding as a matter of construction that the statutory wording does not cover expense incurred by the Law Centre on behalf of the Claimant.

74. The Tribunal was simply wrong to rely on the **Sidhu** case, and to reject Mr Milsom's arguments in respect of it by laconically observing "it has not been overturned". That is true: but the critical question is whether the principle is applicable. It is a principle that was expressed in respect of different statutory wording. The vital words which make the difference were not present in the Rule considered by the Appeal Tribunal in **Sidhu**. It could therefore operate only as persuasive authority, if at all. Since our conclusion on the first blush interpretation of Rule 38 is as we have stated, and derives from the words which were specifically added to the Rule at a time after **Sidhu** had been decided, it is of no such persuasive weight at all. If anything, because of the context it gives to the legislative history it supports rather than detracts from, Mr Milsom's argument. If it is regularly followed, it no longer should be.

Conclusion

75. The costs appeal is allowed. The matter must be remitted to the Tribunal to determine whether the reservations it had about the way in which the Respondents had behaved entitle it to exercise its discretion to make a costs order. In doing so it should treat any costs or expenses incurred by the North Kensington Law Centre in prosecuting the Claimant's case as being no different in principle from costs incurred by her personally.